

NO. 45298-7-II

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

IRENE NGUGI,

Appellant/Cross-Respondent,

v.

STATE INSTITUTION FOR PUBLIC POLICY; and EVERGREEN
STATE COLLEGE,

Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

ROBERT W. FERGUSON
Attorney General

CHRISTOPHER B. LANESE
WSBA# 38045, OID# 91023
Attorneys for Respondents
Assistant Attorney General
PO Box 40126
Olympia, WA 98504-0126
360-586-6300

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESTATEMENT OF THE ISSUES ON APPEAL3

III. ASSIGNMENT OF ERROR ON CROSS-APPEAL3

IV. STATEMENT OF ISSUES ON CROSS-APPEAL4

V. RESTATEMENT OF THE CASE.....4

 A. The Washington State Institute For Public Policy.....4

 B. The Institute Hired Ms. Ngugi For The Basic Education
 Finance Task Force5

 C. The State’s Worsening Fiscal Condition Resulted In The
 Institute Being Unable To Continue Employing All Of Its
 Employees.....6

 D. The Institute Undertook Efforts To Secure Alternative
 Employment For Ms. Ngugi7

 E. The Institute Arranged For Ms. Ngugi To Work With
 OSPI.....8

 F. Ms. Ngugi Began Her Work At OSPI10

 G. The Institute Responded To Ms. Ngugi’s Discrimination
 Complaint By Continuing To Work With OSPI Towards
 A Contract And Preventing A Previously Planned Pay
 Cut12

 H. The OSPI Contract Fell Through Due To Immigration
 Issues.....14

 I. Ms. Ngugi Secured Another Job Offer From OSPI.....16

J.	Ms. Lieb Again Assisted Ms. Ngugi By Extending Her Discharge Date To Accommodate Her Immigration Needs.....	16
K.	Ms. Ngugi Unexpectedly And Without Explanation Turned Down The OSPI Position	17
L.	Ms. Ngugi Twice Made Unfounded Discrimination Complaints	18
M.	Procedural History	19
VI.	ARGUMENT	19
A.	Standard Of Review.....	19
B.	The Rules Of Appellate Procedure Place Significant Limitations On The Scope Of Review In This Case.....	21
C.	Ms. Ngugi’s Discrimination And Retaliation Claims Are Subject To The <i>Hill v. BCTI</i> Burden-Shifting Analysis	22
D.	The Trial Court Properly Dismissed Ms. Ngugi’s Discrimination Claim.....	23
1.	Ms. Ngugi Failed To Establish A Prima Facie Case	23
2.	Ms. Ngugi Failed To Establish Pretext.....	26
3.	The Same Actor Inference Bars Ms. Ngugi’s Claim.....	29
4.	Ms. Ngugi Failed To Provide Evidence Of Discrimination	33
E.	The Trial Court Properly Dismissed Ms. Ngugi’s Retaliation Claim	38
1.	Ms. Ngugi Failed To Establish Direct Evidence	38
2.	Ms. Ngugi Failed To Establish A Prima Facie Case	39

a.	Ms. Ngugi Did Not Oppose Conduct She Reasonably Believed Violated RCW 49.60	39
b.	Ms. Ngugi’s Discharge—Determined Before She Complained About Alleged Discrimination—Was Not Caused By Her Complaint.....	40
3.	Ms. Ngugi Failed To Establish Pretext.....	42
4.	Ms. Ngugi Failed To Provide Evidence Of Retaliation.....	42
F.	The Trial Court Erred By Not Granting The Institute’s Motion To Strike.....	47
1.	The Testimony Of An Undisclosed Expert Witness Providing Legal Conclusions Was Inadmissible	47
2.	Much Of Ms. Ngugi’s Declaration Was Inadmissible As Hearsay Or As Lacking Sufficient Foundation.....	49
3.	The Voluminous, Uncited Deposition Transcripts Were Inadmissible	50
VII.	CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Amini v. City of Minneapolis</i> , 643 F.3d 1068 (8th Cir. 2011)	24
<i>Anderson v. Akzo Nobel Coatings, Inc.</i> , 172 Wn.2d 593, 260 P.3d 857 (2011).....	48
<i>Brown v. CSC Logic, Inc.</i> , 82 F.3d 651 (5th Cir. 1996)	31
<i>Buhrmaster v. Overnite Transp. Co.</i> , 61 F.3d 461 (6th Cir. 1995)	31
<i>Burbo v. Harley C. Douglass, Inc.</i> , 125 Wn. App. 684, 106 P.3d 258 (2005).....	20
<i>Burns v. Interparking Inc.</i> , 24 Fed. Appx. 544 (7th Cir. 2001).....	49
<i>Carmen v. San Francisco Unified Sch. Dist.</i> , 237 F.3d 1026 (9th Cir. 2001).....	50
<i>Chen v. State</i> , 86 Wn. App. 183, 937 P.2d 612 (1997).....	26, 27
<i>Clark County School District v. Breeden</i> , 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001).....	39, 40, 42
<i>Coburn v. PN II, Inc.</i> , 372 Fed. Appx. 796 (9th Cir. 2010)	28
<i>Coghlan v. American Seafoods Co.</i> , 413 F.3d 1090 (9th Cir. 2005).....	passim
<i>Cornwell v. Electra Central Credit Union</i> , 439 F.3d 1018 (9th Cir. 2006)	37

<i>Coville v. Cobarc Servs., Inc.</i> , 73 Wn. App. 433, 869 P.2d 1103 (1994).....	40
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	21
<i>Crownover v. State ex rel. Dep't of Transp.</i> , 165 Wn. App. 131, 265 P.3d 971 (2011).....	23
<i>Domingo v. Boeing Emps' Credit Union</i> , 124 Wn. App. 71, 98 P.3d 1222 (2004).....	37
<i>Fey v. State</i> , 174 Wn. App. 435, 300 P.3d 435 (2013).....	20
<i>Freedman v. MCI Telecomms. Corp.</i> , 255 F.3d 840 (D.C. Cir. 2001).....	26
<i>Godwin v. Hunt Wesson, Inc.</i> , 150 F.3d 1217 (9th Cir. 1998).....	37
<i>Graves v. Dep't of Game</i> , 76 Wn. App. 705, 887 P.2d 424 (1994).....	39, 40
<i>Griffith v. Schnitzer Steel Indus. Inc.</i> , 128 Wn. App. 438, 115 P.3d 1065 (2005).....	30, 31, 32
<i>Hervey v. County of Koochiching</i> , 527 F.3d 711 (8th Cir. 2008).....	42
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 23 P.3d 440 (2001).....	passim
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	20
<i>Hudson v. United Parcel Serv., Inc.</i> , 163 Wn. App. 254, 258 P.3d 87 (2011).....	21
<i>In re Breedlove</i> , 138 Wn.2d 298, 979 P.2d 417 (1999).....	28

<i>Jenner v. Bank of Am. Corp.</i> , 304 Fed. Appx. 857 (11th Cir. 2009).....	24
<i>Johnson v. Express Rent & Own, Inc.</i> , 113 Wn. App. 858, 56 P.3d 567 (2002).....	33, 38
<i>King v. Alabama Dep't of Public Health</i> , No. 09-503, 2010 WL 3522381 (S.D. Ala. Sept. 2, 2010)	46
<i>Kirby v. City of Tacoma</i> , 124 Wn. App. 454, 98 P.3d 827 (2004).....	passim
<i>Mackay v. Acorn Custom Cabinetry, Inc.</i> , 127 Wn.2d 302, 898 P.2d 284 (1995).....	38
<i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006).....	22
<i>Metz v. Titanium Metals Corp.</i> , 475 Fed. Appx. 33 (6th Cir. 2012).....	37
<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (2002).....	23, 42
<i>Mortenson v. Pacificorp</i> , No. 06-541, 2007 WL 405873 (D. Or. Feb. 1, 2007)	46
<i>Nationwide Mut. Ins. Co. v. Hayles, Inc.</i> , 136 Wn. App. 531, 150 P.3d 589 (2007).....	28
<i>Ngyuen v. Radiant Pharm. Corp.</i> , 946 F. Supp. 2d 1025 (C.D. Cal. 2013).....	50
<i>Oliver v. Pac. Nw. Bell Tel. Co.</i> , 106 Wn.2d 675, 724 P.2d 1003 (1986).....	24
<i>Parsons v. St. Joseph's Hosp & Health Care Ctr.</i> , 70 Wn. App. 804, 856 P.2d 702 (1993).....	27
<i>Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	48

<i>Rojas v. Florida</i> , 285 F.3d 1339 (11th Cir. 2002)	26
<i>Saltarella v. Town of Enfield</i> , 427 F. Supp. 2d 62 (D. Conn. 2006).....	49
<i>Shaffer v. Potter</i> , 499 F.3d 900 (8th Cir. 2007)	25
<i>Sheikh v. Choe</i> , 156 Wn.2d 441, 128 P.3d 574 (2006).....	20
<i>Southwick v. Seattle Police Officer John Doe</i> , 145 Wn. App. 292, 186 P.3d 1089 (2008).....	20, 48
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004).....	20
<i>State v. Olmedo</i> , 112 Wn. App. 525, 49 P.3d 960 (2002).....	48
<i>Stork v. Int’l Bazaar, Inc.</i> , 54 Wn. App. 274, 774 P.2d 22 (1989).....	38
<i>Sundberg v. Evans</i> , 78 Wn. App. 616, 897 P.2d 1285 (1995).....	28
<i>Tyndall v. Nat’l Educ. Ctrs., Inc. of California</i> , 31 F.3d 209 (4th Cir. 1994)	31
<i>Velazquez-Ortiz v. Vilsack</i> , 657 F.3d 64 (1st Cir. 2011).....	37
<i>Wiggins v. McHugh</i> , 900 F. Supp. 2d 1343 (S.D. Ga. 2012)	42
<i>Wojciechowski v. Nat’l Oilwell Varco, L.P.</i> , 763 F. Supp. 2d 832 (S.D. Tex. 2011).....	49
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	20

<i>Zuccaro v. MobileAccess Networks, Inc.</i> , No. C11-272, 2012 WL 261342 (W.D. Wash. Jan. 30, 2012).....	41
--	----

Statutes

8 U.S.C. § 1184(n)(1)	17
RCW 49.60	24, 40, 47

Other Authorities

Melissa Renee Crum, The Creation of Black Character Formulas: A Critical Examination of Stereotypical Anthropomorphic Depictions and their Role in Maintaining Whiteness (2010).....	36
---	----

Rules

CR 56(e).....	20, 28, 34, 48
ER 602	48, 49
ER 704	48
ER 801	49
ER 802	34, 49
Fed. R. App. P. 32.1.....	42
GR 14.1(b)	42
RAP 2.5(a)	21, 32
RAP 9.12.....	21, 32
RAP 10.3(c)	21

I. INTRODUCTION

The trial court properly granted summary judgment and dismissed Appellant Irene Ngugi's discriminatory and retaliatory discharge claims because the record in this case contains no evidence of discrimination or retaliation, but instead shows substantial and uncontroverted evidence of *nondiscrimination* and *nonretaliation*. The actions taken by Respondent Washington State Institute for Public Policy (the "Institute") are utterly inconsistent with Ms. Ngugi's claims. The more significant actions include: (1) hiring Ms. Ngugi, (2) twice raising her salary, (3) sponsoring her for permanent residency, (4) spending over \$20,000 on attorney fees to support her work visa and permanent residency applications, (5) actively seeking alternative employment opportunities for her after determining that the Institute could not continue employing her, (6) paying for her to attend Toastmasters to help her be more marketable and attending Toastmasters meetings with her to make her more comfortable, (7) urging the Legislature to include in its budget a proviso for a project that would allow the Institute to continue employing her, (8) paying her over \$35,000 while she worked at the Office of Superintendent of Public Instruction ("OSPI") when there was insufficient work at the Institute for her, (9) attempting to secure a contract with OSPI that would permit her to work at OSPI without jeopardizing her immigration status, and (10) extending her

termination date by a week to avoid jeopardizing her immigration status.

Further, Ms. Ngugi's theory that the Institute sabotaged her efforts to secure employment at OSPI after Ms. Ngugi complained of alleged discrimination ignores the critical fact that after Ms. Ngugi made her complaint, the Institute continued actively working with OSPI for another month to make arrangements for Ms. Ngugi to work there. Unfortunately, it was eventually determined that immigration law prohibited an employer to loan an H-1B worker to another employer. Further, the nature of the work OSPI intended Ms. Ngugi to perform was not eligible for an H-1B visa. OSPI had another position, however, that involved work that was H-1B eligible and offered it to Ms. Ngugi, but she rejected that offer at the eleventh hour without explanation. Rather than discriminate or retaliate against her, the Institute bent over backwards to help her. This Court should affirm the trial court's dismissal of those claims.

Respondents cross-appeal the trial court's failure to rule upon and grant Respondents' motion to strike certain materials Ms. Ngugi submitted in connection with her summary judgment opposition. While the trial court recognized these materials had admissibility issues—ranging from hearsay to inappropriate expert testimony—and criticized Ms. Ngugi for submitting them, the court declined to rule upon Respondents' motion to strike because it granted Respondents' summary judgment motion. This

Court should reverse that ruling and hold that the materials at issue should have been stricken because they were inadmissible.

II. RESTATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial court properly dismissed Ms. Ngugi's discrimination claim (1) where she failed to show that she was treated differently than other employees when she was let go due to budgetary constraints at the same time two other employees, both Caucasian, were also let go or retired in lieu of termination for the same reason; (2) where it was undisputed that the Institute's reason for letting Ms. Ngugi go was true; and (3) where it was undisputed that the same person who decided to let her go had also benefitted Ms. Ngugi through numerous positive employment actions.

2. Whether the trial court properly dismissed Ms. Ngugi's retaliation claim (1) where Ms. Ngugi's complaint of discrimination was not reasonable due to the abundance of positive treatment she received and the lack of evidence of discrimination; and (2) where the Institute decided to let Ms. Ngugi go before she made a discrimination complaint.

III. ASSIGNMENT OF ERROR ON CROSS-APPEAL

The trial court erred in failing to rule upon and grant the Institute's motion to strike inadmissible evidence Ms. Ngugi submitted in connection with her opposition to the Institute's motion for summary judgment.

IV. STATEMENT OF ISSUES ON CROSS-APPEAL

1. Whether the trial court should have stricken a declaration from a purported expert witness with no personal knowledge of the facts of this case, whose testimony consisted of legal conclusions, and whose identity was not revealed until the declaration was filed with Ms. Ngugi's summary judgment opposition, well after the expert disclosure deadline.

2. Whether the trial court should have stricken the inadmissible portions of Ms. Ngugi's declaration that contained hearsay or that she lacked personal knowledge regarding.

3. Whether the trial court should have stricken portions of deposition transcripts provided by Ms. Ngugi not referenced in her summary judgment opposition, where she provided the entire transcripts of six depositions, failed to include any pin cites in her summary judgment opposition, and where her attorney apologized and agreed that the unreferenced portions of those transcripts should have been stricken.

V. RESTATEMENT OF THE CASE

For the Court's convenience, a timeline of key events in this case is attached to this brief as Appendix A.

A. The Washington State Institute For Public Policy

The Institute's mission is to carry out practical, non-partisan research—at legislative direction—on issues of importance to Washington

State. Clerk's Paper (CP) at 104.¹ The Institute conducts research using its own policy analysts and economists, specialists from universities, and consultants. *Id.* The Institute's research staff is fairly small—there are currently only 12 researchers employed by the Institute. CP at 104-05.

B. The Institute Hired Ms. Ngugi For The Basic Education Finance Task Force

In late 2007, the Institute was looking to hire a new research associate to assist with its work on the Basic Education Finance Task Force. CP at 105. Roxanne Lieb, the Institute's Director, had final authority regarding hiring decisions and she interviewed and decided to hire Ms. Ngugi. *Id.* Ms. Ngugi began her work with the Institute on January 2, 2008. CP at 106. Throughout her employment with the Institute, she was an at-will employee, which was made clear in Ms. Ngugi's job offer letter. CP at 105. This meant that Ms. Lieb could discharge her at any time for any reason. *Id.*

Ms. Ngugi was not a United States citizen at the time she was hired, and the Institute had to obtain an H-1B work visa in order to employ her. CP at 106. During Ms. Ngugi's time with the Institute, the Institute spent over \$20,000 on legal fees and costs associated with her immigration status. CP at 106. The Institute successfully obtained an H-1B work visa for Ms. Ngugi. CP at 106. The Institute also decided to sponsor Ms. Ngugi's

¹ The Institute is part of Respondent, The Evergreen State College ("Evergreen"), and Evergreen provides fiscal and administrative services to the Institute. CP at 105.

permanent residency application, which was not required to continue employing her, to support its employee. CP at 106. In addition, during Ms. Ngugi's employment with the Institute, she was given two raises: first from \$6,125 to \$7,025 per month and then from \$7,025 to \$7,206 per month. CP at 106.

C. The State's Worsening Fiscal Condition Resulted In The Institute Being Unable To Continue Employing All Of Its Employees

During 2008, Ms. Ngugi worked almost exclusively on the Basic Education Finance Task Force. CP at 106. After the Task Force's work ended, the Institute turned to find other projects for Ms. Ngugi. The Institute's work is almost wholly dependent upon assignments and funding from the Legislature. CP at 107. Unfortunately, early during the 2009 legislative session, it became apparent that the Institute would have insufficient assignments and funding from the Legislature to continue employing its staff at existing levels. CP at 107. It was especially clear that the Institute would not be given any assignments or funding concerning education-related research, Ms. Ngugi's area of focus. CP at 107.

As a result of the lack of funding and assignments from the Legislature, Ms. Lieb notified Ms. Ngugi in February 2009 that her position was at risk of being eliminated. CP at 107-08. Ms. Ngugi expressed

gratitude to Ms. Lieb for this information.² Ms. Ngugi was not the only employee who received this warning—two other employees, both of whom were Caucasian, received the same warning. CP at 107-08. One of these employees opted to retire rather than deal with the uncertainty. CP at 108. The other was subsequently laid off. CP at 108.

D. The Institute Undertook Efforts To Secure Alternative Employment For Ms. Ngugi

Fortunately, the conditions the Institute was facing did not require immediate layoffs, which allowed the Institute time to try to help its at-risk employees. CP at 107. At that time, Ms. Lieb reached out to several other employers, trying to find another job for Ms. Ngugi. CP at 108, 131-39.

The Institute also tried to help Ms. Ngugi develop skills that would make her more marketable in the job market. CP at 108. Ms. Ngugi had expressed extreme reservations about public speaking and had been very reluctant to speak up at group meetings within the Institute. *Id.* As a result, in early 2009, the Institute paid for Ms. Ngugi to join Toastmasters to improve her public speaking skills. *Id.* Ms. Lieb also joined so that Ms. Ngugi would be more comfortable attending the Toastmasters meetings. *Id.* When Ms. Ngugi received an award at Toastmasters, Ms. Lieb recognized Ms. Ngugi's accomplishments by notifying the Institute's staff. CP at 108,

² CP at 127 ("It was also very kind of you to inform me about the current work situation. I really appreciate it and all other efforts you have taken on my behalf.").

141-43. Ms. Ngugi expressed gratitude to Ms. Lieb for these efforts.³

The Institute's efforts to find Ms. Ngugi alternative employment proved to be unsuccessful. CP at 109. In March 2009, however, the possibility of Ms. Ngugi working on an outside research project with Dr. Dan Goldhaber from the University of Washington arose. *Id.* Dr. Goldhaber intended to pursue outside funding for this project, but for Ms. Ngugi to work on the project the Legislature first needed to pass a budget proviso permitting such work. *Id.* Ms. Lieb spent a significant amount of time and effort communicating with the Legislature to help make this happen for Ms. Ngugi. CP at 109, 149-70. Ultimately, the proviso was part of the enacted budget. CP at 109. But before Ms. Ngugi and the Institute could begin working on the project they had to wait for Dr. Goldhaber to secure funding for the project, as the proviso did not provide funding itself. CP at 109.

E. The Institute Arranged For Ms. Ngugi To Work With OSPI

On July 16, 2009, Ms. Lieb met with Ms. Ngugi to update her on the status of her employment. CP at 109. Ms. Lieb explained to her again that the Legislature had not assigned or funded any education-related projects for the Institute. *Id.* Rather, that work had been sent to the OSPI. CP at 109-10. However, Ms. Lieb had spoken with Jennifer Priddy, an administrator at OSPI, who was interested in taking Ms. Ngugi on loan from the Institute to

³ CP at 145 (“Thank you for introducing me to Toastmasters. I think it will be very helpful to me.”).

work on education-related projects at OSPI. CP at 110. Ms. Ngugi agreed that the work at OSPI would be a more natural fit for her skills. CP at 110.

Also during this meeting, Ms. Lieb expressed to Ms. Ngugi concerns she had regarding Ms. Ngugi's work with the Institute. CP at 110. Ms. Lieb explained that, while Ms. Ngugi had good skills analyzing data, she lacked the skills necessary to function at a research associate level. CP at 110. That is, while she could mechanically manipulate data, she struggled to see the big picture and the policy implications of the data she was manipulating. CP at 110. Ms. Lieb had formed this opinion based on projects she had worked on with Ms. Ngugi directly, as well as from feedback from other employees at the Institute. CP at 56, 107, 110, 223-24. Later, Ms. Priddy at OSPI would come to the same conclusion regarding Ms. Ngugi's skills.⁴ Because it was apparent that Ms. Ngugi was having difficulty accepting this constructive criticism, Ms. Lieb sent Ms. Ngugi information regarding the Employee Assistance Program the following day. CP at 110, 176.

Despite her concerns about Ms. Ngugi's work, Ms. Lieb continued working with Ms. Ngugi to give her opportunities to succeed. CP at 111. In

⁴ CP at 591 ("Ms. Ngugi had limited skills to recognize, formulate, and defend publically the public policy implications of data or research findings. The work products required by [the Institute] required advanced skills in research and public policy formulation, which Ms. Ngugi did not have."). Ms. Ngugi's assertion that Ms. Priddy's testimony regarding Ms. Ngugi's skills "contradict[s]" Ms. Lieb's testimony regarding the same, Br. of Appellant at 8, is without any support in the record. Both Ms. Priddy and Ms. Lieb testified that, while Ms. Ngugi could technically manipulate data, she lacked the higher level public policy skills necessary to succeed at the Institute. CP at 110, 591.

mid-July 2009, she assigned Ms. Ngugi to work on a paper concerning the impact of housing assistance for former offenders. CP at 111-12. But Ms. Ngugi's first draft of the paper was wholly inadequate, reading like an advocacy piece that simply collected opinions on the subject, rather than presenting an objective analysis of the relevant research. CP at 112. After receiving this feedback, Ms. Ngugi approached Marna Miller, another employee at the Institute, to ask for her assistance on the paper. CP at 112. Ms. Miller approached Ms. Lieb about this and expressed her desire to mentor Ms. Ngugi. CP at 112. Ms. Lieb was very happy with this offer and fully supported and encouraged Ms. Miller's efforts in this regard. CP at 112. Ms. Miller subsequently spent a significant amount of time late afterhours mentoring Ms. Ngugi on the project. CP at 68-69, 76-99.

F. Ms. Ngugi Began Her Work At OSPI

The proposed loan to OSPI came to fruition in early August 2009. CP at 112. Ms. Priddy and Ms. Lieb determined that Ms. Ngugi would work at OSPI on a trial basis at first so everyone could determine whether it was a good fit. CP at 112. If it was, OSPI would execute a contract with the Institute to reimburse the Institute for Ms. Ngugi's time. CP at 112. Waiting to execute a contract also permitted the Institute to see whether the Goldhaber study would be funded, as a decision had not yet been reached at that time and, if funded, it would consume much of Ms. Ngugi's time. *Id.*

Ms. Ngugi started her work at OSPI on August 10, 2009. CP at 112.

When Ms. Ngugi went to work at OSPI, Ms. Lieb e-mailed Ms. Miller and urged her to reach out to Ms. Ngugi about OSPI in hopes that her doing so would help Ms. Ngugi be successful at OSPI. CP at 112. Ms. Lieb said in this e-mail, “I so want her to be successful there.” CP at 188.

Ms. Ngugi continued working on the housing paper with Ms. Miller. CP at 112. As their work progressed, Ms. Lieb learned from Ms. Miller that Ms. Ngugi was having an unusual amount of difficulty with the paper. CP at 73-74, 112-13. In early October 2009, after conferring with Ms. Miller about the issue, Ms. Lieb decided to have Ms. Miller finish the paper alone. CP at 113. This would allow Ms. Ngugi to focus on her work at OSPI, and it would also address the concerns Ms. Miller raised about Ms. Ngugi’s ability to successfully complete the paper. CP at 113.

In late October 2009, the Institute learned that the Goldhaber study would not be funded. CP at 113. Thus, the one last education-related study that the Institute had hoped it might work on had fallen through. *Id.* Also in late October 2009, OSPI expressed a willingness to execute a formal contract regarding Ms. Ngugi. CP at 113. Due to the fact that Ms. Ngugi’s salary at the Institute was substantially higher than that of OSPI employees engaged in comparable work, OSPI was unable to pay Ms. Ngugi more than \$6,257 per month, less than her then-current salary of \$7,206. CP at 106, 113.

Ms. Lieb spoke to Ms. Ngugi on October 28, 2009, regarding the status of her employment with the Institute. CP at 113. Ms. Lieb relayed OSPI's proposal regarding Ms. Ngugi's work and salary, and Ms. Ngugi expressed agreement with it. CP at 113. Ms. Lieb also told Ms. Ngugi that she would not be working on the Goldhaber study and that the Institute would continue to support Ms. Ngugi's immigration processes, although the Institute would revisit that issue in the event of an audit. CP at 113-14. Ms. Ngugi asked Ms. Lieb if she would be returning to work at the Institute after her time with OSPI was done, and Ms. Lieb told her "no." CP at 114. This was due to the lack of work—particularly the lack of education-related work—the Institute had, as well as due to Ms. Lieb's concerns about Ms. Ngugi's work performance. *See* CP at 56, 107, 109-10, 112-13, 223-24.

G. The Institute Responded To Ms. Ngugi's Discrimination Complaint By Continuing To Work With OSPI Towards A Contract And Preventing A Previously Planned Pay Cut

After Ms. Lieb's October 28, 2009, meeting with Ms. Ngugi, Ms. Lieb executed a Personnel Action Form to effectuate the discussed pay reduction required by the expected contract with OSPI. CP at 114, 209, 211. Ms. Lieb then sent the form to Evergreen for finalization. CP at 114. This form, once finalized, would have had no impact on the circumstances of Ms. Ngugi's employment other than to reduce her salary. CP at 114-15.

The form indicated the pay reduction would be effective November 1, 2009, through June 30, 2010. CP at 211. June 30, 2010, was the date OSPI indicated they would reconsider the circumstances of the arrangement. CP at 207. Nothing in the form, including the reference to June 30, 2010, changed the at-will nature of Ms. Ngugi's employment or otherwise promised Ms. Ngugi employment for any period of time. CP at 114-15. In fact, there is no evidence that Ms. Ngugi ever saw or relied upon this document during her employment with the Institute. Further, the form—which was solely an internal personnel document and which expressly referenced a separate contract that would be entered into between the Institute and OSPI, CP at 211—was not a contract between the Institute, OSPI, and/or Ms. Ngugi committing to any arrangement regarding Ms. Ngugi's employment.

The next day, an attorney representing Ms. Ngugi contacted Evergreen and alleged that Ms. Ngugi had been discriminated against. CP at 226, 490-91. This was the first time Ms. Ngugi had claimed the Institute had discriminated against her. Ms. Lieb learned of this development on or about the following day. CP at 114. Desiring guidance regarding how to handle the situation, Ms. Lieb contacted the Attorney General's Office. *Id.* An Assistant Attorney General advised Ms. Lieb to put the reduction in pay on hold while more details could be learned regarding Ms. Ngugi's allegations.

CP at 114. Although the reduction in pay had been set into action prior to any claims of discrimination, Ms. Lieb and the Institute's counsel wanted to ensure that there was not even the *appearance* of retaliation. CP at 114.

Pursuant to this legal advice, Ms. Lieb successfully took steps to intercept the Personnel Action Form and prevent the reduction in pay. CP at 114, 597-98. The only impact this had on Ms. Ngugi was to prevent her salary from being reduced. CP at 114, 597-98. Ms. Ngugi continued working at OSPI at her original, higher salary. Her salary was never reduced for the duration of her employment with the Institute. CP at 115.

Further, Ms. Ngugi's discrimination complaint did not deter the Institute and OSPI from continuing to work towards finalizing a contract to formalize the loan of Ms. Ngugi to OSPI. Ms. Lieb and Ms. Priddy continued actively working towards finalizing a contract for another month until late November 2009, when those efforts uncovered legal issues that precluded a contract from being executed. CP at 41-42, 115, 591-92, 598.

H. The OSPI Contract Fell Through Due To Immigration Issues

In late November 2009, as Ms. Lieb and Ms. Priddy continued working towards finalizing the contract for Ms. Ngugi's work, the immigration attorneys assisting the Institute and OSPI with this process advised them that the proposed contract would likely not comply with immigration laws. CP at 115. These laws prohibit one employer from hiring

a worker using an H-1B work visa and then loaning that worker out to a different employer. *Id.* For such an arrangement to be appropriate, the employer holding the H-1B visa needed to maintain a supervisory relationship with the worker. *Id.* Given that this would not be the case if Ms. Ngugi worked for OSPI, the proposed contract was not legal. CP at 115.

In addition, OSPI was unable to hire Ms. Ngugi directly for the position she had been working in since August 2009. This was because, to employ a worker under an H1-B visa, an employer must be able to represent to immigration officials that the worker has skills that the employer cannot otherwise find in the work force. CP at 42. Based on the nature of the work Ms. Ngugi was performing for OSPI, Ms. Priddy did not believe that OSPI could make such a representation regarding Ms. Ngugi. CP at 42.

At that point, OSPI could neither take Ms. Ngugi “on loan” from the Institute nor hire her directly for the work she was currently performing for OSPI. As a result, the Institute decided to end Ms. Ngugi’s employment with the Institute. CP at 115. Ms. Lieb notified Ms. Ngugi on December 4, 2009 that her employment with the Institute would be ending effective December 31, 2009. *Id.* While the Institute could have discharged Ms. Ngugi immediately, Ms. Lieb decided to give Ms. Ngugi roughly a month to allow her time to find alternative employment or otherwise change her immigration status so she could remain in the country. CP at 115-16.

I. Ms. Ngugi Secured Another Job Offer From OSPI

This advanced warning proved fortuitous. After learning about Ms. Ngugi's situation, another administrator at OSPI, Robin Munson, decided to offer a different position directly to Ms. Ngugi. CP at 42, 62. Ms. Munson had had difficulty filling the position at issue, and thus she could make the necessary representations regarding the need to employ Ms. Ngugi under an H1-B visa. CP at 42. The position, however, was a lower-level position than the one OSPI had originally intended Ms. Ngugi to fill, and had a correspondingly lower salary of \$50,000. CP at 65. OSPI formally offered the position to Ms. Ngugi on December 16, 2009. CP at 65.

J. Ms. Lieb Again Assisted Ms. Ngugi By Extending Her Discharge Date To Accommodate Her Immigration Needs

Although Ms. Ngugi did not immediately accept or decline this offer, OSPI immediately began spending significant amounts of time and effort working through the immigration issues associated with Ms. Ngugi's visa. CP at 62. While OSPI awaited Ms. Ngugi's decision regarding whether she would take this lower-paying job, the federal government's annual cap on the number of H1-B visas it could award was met on December 22, 2009. CP at 523-24.⁵ But, while this meant that OSPI could not immediately seek

⁵ By citing the Declaration of Bart Stroupe, Respondents do not waive their objections to this declaration, which are discussed in detail later in this brief. Rather, Respondents cite this declaration to demonstrate that, even if the Court considers it, the declaration hurts, rather than helps, Ms. Ngugi's case.

a new H1-B visa for Ms. Ngugi, they could still seek to *transfer* her *existing* visa from the Institute to OSPI, and she could work for OSPI as soon as the transfer application had been filed by OSPI.⁶ But due to this complication, OSPI could not employ Ms. Ngugi until the first week of January 2010 at the earliest, which posed a problem because Ms. Ngugi's employment with the Institute ended December 31, 2009. CP at 115-16. Any lapse in Ms. Ngugi's employment could lead to her deportation. CP at 115-16.

Fortunately for Ms. Ngugi, Ms. Lieb yet again decided to help. To prevent any lapses in Ms. Ngugi's employment that might lead to her deportation, Ms. Lieb agreed to extend the effective date of Ms. Ngugi's discharge to January 8, 2010. CP at 116.

K. Ms. Ngugi Unexpectedly And Without Explanation Turned Down The OSPI Position

Despite Ms. Lieb's efforts, and the efforts by OSPI staff to comply with immigration laws to hire Ms. Ngugi, Ms. Ngugi unexpectedly and without explanation turned down the OSPI position. CP at 62. Ms. Ngugi's employment with the Institute thus ended on January 8, 2009. Because the

⁶ 8 U.S.C. § 1184(n)(1) ("Increased portability of H-1B status[.] A nonimmigrant alien described in paragraph (2) who was previously issued a[n] [H-1B] visa . . . is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a) of this section. Employment authorization shall continue for such alien until the new petition is adjudicated."); *see also* H-1B Cap Hit for Fiscal Year 2014, *available at* <http://www.mintz.com/newsletter/2013/Advisories/2876-0413-NAT-IMM/index.html> ("Despite the quota being filled, USCIS will continue to accept and process . . . H-1B petitions which seek to . . . change H-1B employers[.]").

Institute and OSPI were never able to execute a contract regarding Ms. Ngugi's work, the Institute was never reimbursed for the more than \$35,000 in salary it paid Ms. Ngugi while she worked at OSPI. CP at 106, 598.

L. Ms. Ngugi Twice Made Unfounded Discrimination Complaints

On two separate occasions at the end of her employment with the Institute, Ms. Ngugi made discrimination complaints that were determined to be unfounded. The first, referenced above, began with a phone call to Evergreen by Ms. Ngugi's attorney on October 29, 2009, claiming that Ms. Ngugi had been discriminated against. CP at 226. Notably, this phone call occurred one day *after* the Institute notified Ms. Ngugi that she would not be working for the Institute again and *eight months* after the Institute notified Ms. Ngugi that her employment was at risk. Evergreen's Civil Rights Officer, Nicole Ack, duly investigated Ms. Ngugi's complaints and determined that they were unfounded. CP at 226, 236-64. Specifically, Ms. Ack concluded in her final report dated January 28, 2010, that, rather than discriminate against Ms. Ngugi, the Institute "seems to have extended itself to find a position for Ngugi that both matched her skills and allowed her to continue the immigration process she was involved in." CP at 236, 244.

The second instance was a complaint Ms. Ngugi later filed with the Washington State Human Rights Commission. The Human Rights Commission also found at the conclusion of its investigation in May 2010

that Ms. Ngugi had not been discriminated or retaliated against. CP at 313-15. Instead, the Institute had “advised [Ms. Ngugi] of her employment vulnerability several months prior to termination,” and “proactively assisted [Ms. Ngugi] in securing another job in another agency.” CP at 315.

M. Procedural History

Ms. Ngugi filed this lawsuit on January 12, 2012, bringing claims for race and national origin discrimination, hostile work environment, disparate treatment, retaliation, negligent infliction of emotional distress, tortious interference with business expectancy, and unpaid wages and willfully withheld wages. CP at 5-26. On August 2, 2013, the trial court dismissed all of Ms. Ngugi’s claims with prejudice on summary judgment. CP at 669-71.

Respondents also filed a motion to strike various materials Ms. Ngugi submitted with her summary judgment opposition. CP at 543-52. The trial court recognized that the materials Respondents moved to strike had “problematic admissibility issues,” and criticized Ms. Ngugi’s handling of these materials. RP 54:2-10, 58:15. Nevertheless, the court declined to rule on Respondents’ motion to strike given that it was granting Respondents’ summary judgment motion. RP 58:16-17.

VI. ARGUMENT

A. Standard Of Review

The purpose of summary judgment is to avoid unnecessary trials.⁷ If there is no genuine issue of material fact, summary judgment shall be granted.⁸ This Court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court, and may affirm on any grounds supported by the record.⁹ For this reason, while Ms. Ngugi dedicates her brief to attempting to rebut specific legal points mentioned by the trial court during its ruling on summary judgment, the trial court’s legal analysis and conclusions—while correct—are irrelevant.¹⁰

Only admissible evidence may be considered on summary judgment.¹¹ This Court reviews decisions regarding motions to strike made in conjunction with a motion for summary judgment de novo.¹²

Ms. Ngugi brought numerous claims in this lawsuit, but she only appeals the dismissal of two—discrimination and retaliation.¹³ While

⁷ *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

⁸ CR 56(e).

⁹ *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

¹⁰ *Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002) (“[B]ecause summary judgment motions are reviewed de novo, [the trial court’s] findings are superfluous and need not be considered.”).

¹¹ CR 56(e); *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 692, 106 P.3d 258 (2005).

¹² *Southwick v. Seattle Police Officer John Doe*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008).

¹³ While Ms. Ngugi asserts that she is appealing her claims for “employment discrimination and disparate treatment,” Br. of Appellant at 1, these claims are actually one and the same. *Fey v. State*, 174 Wn. App. 435, 447, 300 P.3d 435 (2013), *review denied*, ___ P.3d ___ (Mar 06, 2014) (“[E]mployees complaining of discrimination may assert several different claims: disparate treatment; disparate impact; or, in the case of disabled workers, failure to accommodate a disability.”). Here, Ms. Ngugi raised neither

Ms. Ngugi brought claims for both race and national origin discrimination, she has not differentiated between the two, and Respondents will follow suit and analyze them as a single discrimination claim.

B. The Rules Of Appellate Procedure Place Significant Limitations On The Scope Of Review In This Case

The limitations the Rules of Appellate Procedure place on the scope of review in this case are so significant that they warrant noting at the outset. When reviewing a summary judgment order, this Court only considers “evidence and issues called to the attention of the trial court.”¹⁴ Before the trial court, Ms. Ngugi presented only six pages of argument—attached to this brief as Appendix B—opposing the dismissal of her discrimination and retaliation claims. These are the only arguments properly before this Court. Issues raised by Ms. Ngugi on appeal that she did not raise before the trial court will be noted below as appropriate.

Further, issues may not be raised for the first time in a reply brief.¹⁵ In this appeal with a de novo standard of review, Ms. Ngugi’s opening brief fails to so much as reference many essential elements of her claims, and she may not do so for the first time on reply. These omissions

a disparate impact nor an accommodation claim. Thus, her “discrimination” claim is technically a “disparate treatment” claim. For convenience, Respondents will refer to this claim as Ms. Ngugi’s “discrimination” claim.

¹⁴ RAP 9.12; *see also* RAP 2.5(a).

¹⁵ *Hudson v. United Parcel Serv., Inc.*, 163 Wn. App. 254, 257 n.1, 258 P.3d 87 (2011) (“[W]e do not consider arguments raised for the first time in a reply brief. RAP 10.3(c); *see also* *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).”).

will also be noted below as appropriate.

C. Ms. Ngugi's Discrimination And Retaliation Claims Are Subject To The *Hill v. BCTI* Burden-Shifting Analysis

In employment discrimination cases, such as this one, where the plaintiff lacks direct evidence of discrimination, Washington courts employ a four-step burden-shifting analysis to rule on summary judgment motions.¹⁶ Under this analysis, first, the plaintiff bears the burden of establishing a prima facie case of discrimination, and the defendant is entitled to judgment as a matter of law if the plaintiff fails to meet this burden.¹⁷ Second, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a nondiscriminatory reason for the adverse employment action at issue.¹⁸ Third, if the defendant articulates such a reason, the burden shifts back to the plaintiff to demonstrate that the reason was pretext, and the defendant is entitled to judgment as a matter of law if the plaintiff fails to meet this burden.¹⁹ Fourth, if the plaintiff demonstrates pretext, summary judgment is denied if the record contains reasonable but competing inferences of both discrimination and nondiscrimination.²⁰ This same analysis applies to retaliation claims.²¹

¹⁶ *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 185, 23 P.3d 440 (2001), overruled on other grounds by *McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006).

¹⁷ *Hill*, 144 Wn.2d at 181.

¹⁸ *Id.*

¹⁹ *Id.* at 182.

²⁰ *Id.* at 186-90.

In this case, the trial court should be affirmed because Ms. Ngugi failed to meet any of her burdens for either of her claims.

D. The Trial Court Properly Dismissed Ms. Ngugi's Discrimination Claim

1. Ms. Ngugi Failed To Establish A Prima Facie Case

The first step in the burden-shifting analysis is the requirement that Ms. Ngugi establish a prima facie case. “To establish a prima facie disparate treatment case, and employee *must* show that (1) he or she belongs to a protected class, (2) he or she was treated less favorably in the terms or conditions of employment [(i.e., was subject to an ‘adverse employment action’)], (3) *a similarly situated employee outside the protected class received the benefit*, and (4) the employees were doing substantially the same work.”²²

The sole adverse employment action Ms. Ngugi was subject to was her discharge.²³ Thus, to establish a prima facie case, Ms. Ngugi was required to demonstrate that a “similarly situated” employee who was not

²¹ *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002) (holding that same burden shifting scheme applies to retaliation claims).

²² *Crownover v. State ex rel. Dep't of Transp.*, 165 Wn. App. 131, 147, 265 P.3d 971 (2011) (emphasis added), *review denied* 173 Wn.2d 1030 (2012); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 464-65, 98 P.3d 827 (2004).

²³ *Kirby*, 124 Wn. App. at 465 (holding that reprimands and investigations do not constitute “adverse employment actions” and stating, “Washington courts have defined ‘adverse employment action.’ According to our Supreme Court, discrimination requires an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action.” (quotation marks omitted)).

black or Kenyan was not discharged. “Similarly situated employees must have the same supervisor, be subject to the same standards, and have engaged in the same conduct.”²⁴ The circumstances of the “similarly situated” employee “must be nearly identical to the plaintiff’s . . . to prevent courts from second-guessing employers’ reasonable decisions and confusing apples with oranges.”²⁵ This standard is “a rigorous one.”²⁶

Although her opening brief does not reference the requirement that she establish a prima facie case, Ms. Ngugi did not dispute these standards before the trial court and conceded that she was required to identify a similarly situated employee to establish a prima facie case. CP at 533-34.

Ms. Ngugi failed to meet this burden because no other employee at the Institute with a similar skill level and education-focused background was not let go. In fact, during the time period at issue in this case, two other employees were notified that their positions were at risk due to funding issues, just like Ms. Ngugi’s. One of those employees opted to retire. The other was let go, just like Ms. Ngugi. Both of those employees were Caucasian. CP at 107-08.

²⁴ *Kirby*, 124 Wn. App. at 475 n.16.

²⁵ *Jenner v. Bank of Am. Corp.*, 304 Fed. Appx. 857, 859 (11th Cir. 2009). Federal authorities construing Title VII are “persuasive authority for the construction of RCW 49.60.” *Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986).

²⁶ *Amini v. City of Minneapolis*, 643 F.3d 1068, 1076 (8th Cir. 2011) (quotation marks omitted).

While Ms. Ngugi has not addressed this issue in her opening brief—and cannot do so for the first time on reply—Ms. Ngugi’s sole argument below regarding this issue was her assertion that “Annie Pennucci, a similarly situated Caucasian employee, testified that Ms. Lieb provided her valuable feedback and yearly evaluations where Ms. Ngugi was not.”²⁷ Ms. Ngugi’s attempt to compare herself to Ms. Pennucci failed for three reasons. First, Ms. Ngugi did not establish that she has personal knowledge regarding the treatment of other employees. Second, Ms. Ngugi’s factual premise—that Ms. Pennucci was given feedback and evaluations by Ms. Lieb that Ms. Ngugi did not receive—is without any factual support. The Institute did not begin giving its employees evaluations until 2010, after Ms. Ngugi left,²⁸ and thus there was no period of time when Ms. Pennucci was receiving such feedback and Ms. Ngugi was not. Third, Ms. Ngugi was required to identify a comparator with respect to an adverse employment action,²⁹ but Ms. Ngugi only seeks to

²⁷ CP at 534. Ms. Ngugi also asserted below that “Ms. Ngugi was subjected [to] abusive treatment and harsh treatment regarding her work, when other similarly situated employees were not.” CP at 534. But Ms. Ngugi never defined this conduct, has not established her personal knowledge regarding the treatment of other employees and, in any event, such alleged conduct would not go towards a discrimination claim but rather a hostile work environment claim, the dismissal of which Ms. Ngugi did not oppose below and has not appealed.

²⁸ CP at 594, 597.

²⁹ *Kirby*, 124 Wn. App. at 468; *see also Shaffer v. Potter*, 499 F.3d 900, 905 (8th Cir. 2007) (“Shaffer fails to present evidence of a similarly situated male who was not terminated for threatening to kill a co-worker.”); *Rojas v. Florida*, 285 F.3d 1339, 1344

compare herself to Ms. Pennucci with respect to a lack of evaluations and feedback, which, as a matter of law, does not constitute an adverse employment action.³⁰

Accordingly, Ms. Ngugi failed to establish a prima facie case.

2. Ms. Ngugi Failed To Establish Pretext

A second, independent basis for affirming dismissal of Ms. Ngugi's discrimination claim is Ms. Ngugi's failure to establish pretext. To prove pretext, Ms. Ngugi was required to provide evidence that "(1) the employer's reasons have no basis in fact; or (2) even if the reasons are based in fact, the employer was not motivated by the reasons; or (3) the reasons are insufficient to motivate the adverse employment decision."³¹

Neither below nor on appeal has Ms. Ngugi even attempted to establish that the reason for her discharge was pretextual. Nor could she. It is undisputed that after the 2009 legislative session the Institute lacked the funding needed to maintain staffing levels at then-current levels, that three employees (including two Caucasian) had to be let go, and that all education-related projects (i.e., the projects pertaining to Ms. Ngugi's

(11th Cir. 2002) ("Rojas can identify no man with a similar work history who was not fired.").

³⁰ *Kirby*, 124 Wn. App. at 465 (defining "adverse employment action"); *see also Freedman v. MCI Telecomms. Corp.*, 255 F.3d 840, 848 (D.C. Cir. 2001) ("Freedman's complaint that he received inadequate feedback similarly fails to rise to the level of demonstrating an adverse employment action.").

³¹ *Chen v. State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997).

background and skill set) had been assigned to OSPI rather than the Institute. While Ms. Ngugi appears to implicitly argue that Ms. Lieb's assessment of Ms. Ngugi's skill level was incorrect, Ms. Ngugi does not even attempt to demonstrate that she was more skilled than any employee who was *not* let go, and Ms. Lieb's assessment was shared by others who had worked with Ms. Ngugi.³² Further, it is well-established that Ms. Ngugi's self-assessment of her own skills falls far short of the required showing for proving pretext.³³

Instead of arguing that she has established pretext, Ms. Ngugi argues that the trial court applied the incorrect pretext standard. Namely, she claims that the trial court erred by requiring that she establish pretext by "specific and substantial evidence." Br. of Appellant at 36-42.³⁴ As an initial matter, Ms. Ngugi cannot raise this issue on appeal not only because did she not object to it below, but also because *Ms. Ngugi*, not the Institute, was the party to raise this standard and invite the trial court to rely upon it. CP at 533 ("Ms. Ngugi's evidence of pretext [is sufficient] because she has offered

³² CP at 56, 107, 110, 223-24, 591.

³³ *Chen*, 86 Wn. App. at 191 ("Chen maintains that he was doing satisfactory work and that the State's reason for dismissal, poor performance, was a pretext. To establish an inference of discrimination, Chen points to his own self-evaluations and his explanations of the State's examples of poor work performance. Chen's self-evaluations, however, are insufficient to raise genuine issues of material fact. See *Parsons v. St. Joseph's Hosp & Health Care Ctr.*, 70 Wn. App. 804, 811, 856 P.2d 702 (1993) (employee's good performance assertion did not give rise to a reasonable inference of discrimination to contradict legitimate, nondiscriminatory reason for the termination based on poor performance).").

³⁴ Ms. Ngugi actually claims that the trial court required "specific and substantial evidence" to overcome the "same actor inference," which is described below. This is incorrect, as the trial court utilized this standard at the pretext, not the "same actor," stage of the relevant inquiry. RP at 45:16-46:1.

‘specific and substantial’ evidence of discrimination.” (citing *Coburn v. PN II, Inc.*, 372 Fed. Appx. 796 (9th Cir. 2010))). Thus, even if the trial court’s reliance upon this standard were error, which it was not, it was an error Ms. Ngugi invited and cannot now challenge.³⁵

In any event, the trial court was correct in requiring “specific” and “substantial” evidence of pretext to defeat summary judgment because “specific” and “substantial” evidence is *always* required to defeat summary judgment. CR 56(e), which governs motions for summary judgment, expressly requires “specific” evidence to defeat summary judgment.³⁶ Further, it is well established that there must be “substantial” evidence to sustain a verdict in favor for a plaintiff in order to avoid dismissal as a matter of law.³⁷ Accordingly, Washington law requires “specific” and “substantial” evidence to avoid dismissal on summary judgment in *any* context.

This is consistent with the Ninth Circuit’s decision in *Coghlan v. American Seafoods Co.*, 413 F.3d 1090 (9th Cir. 2005), which the trial court in this case cited when referencing the “specific and substantial” evidence

³⁵ *In re Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999) (“[T]he doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal.” (quotation marks omitted)); *Sundberg v. Evans*, 78 Wn. App. 616, 621, 897 P.2d 1285 (1995) (applying invited error doctrine on summary judgment).

³⁶ CR 56(e) (“When a motion for summary judgment is made and supported as provided in this rule, an adverse party . . . must set forth *specific facts* showing that there is a genuine issue for trial.” (emphasis added)).

³⁷ *Nationwide Mut. Ins. Co. v. Hayles, Inc.*, 136 Wn. App. 531, 539, 150 P.3d 589 (2007) (“[S]ummary judgment is appropriate if there is no substantial evidence to sustain a verdict for [the nonmoving party].”).

standard. In that case, the Ninth Circuit stated the following:

Because direct evidence is so probative, the plaintiff need offer “very little” direct evidence to raise a genuine issue of material fact. But when the plaintiff relies on circumstantial evidence, that evidence must be “specific and substantial” to defeat the employer’s motion for summary judgment.

413 F.3d at 1095 (citations omitted). The Ninth Circuit also suggested that “specific and substantial evidence” may also be required when there is direct evidence, but declined to reach that issue given that no direct evidence was at issue in that case. *Id.* at 1095 n.7. Thus, *Coghlan* merely recognizes the potency of direct evidence, which is very uncommon in discrimination cases. It does not establish a new, different summary judgment standard for discrimination cases based on circumstantial evidence. Accordingly, the authorities Ms. Ngugi cites regarding jury instructions at trial that distinguish between direct and circumstantial evidence are inapposite.

Finally, under any standard that might apply, Ms. Ngugi has failed to establish pretext, and thus her discrimination claim was properly dismissed.

3. The Same Actor Inference Bars Ms. Ngugi’s Claim

A third, independent basis for affirming dismissal of Ms. Ngugi’s discrimination claim is the “same actor inference.” When the same person who previously took a positive action towards a employee later takes a negative action towards that same employee, to survive summary judgment the employee “must . . . answer[] an obvious question: if the

employer is so opposed to employing persons with a certain attribute, why would the employer have [given positive treatment to] such a person in the first place?”³⁸ Answering this question requires an “extraordinarily strong showing of discrimination” that plaintiffs are “rarely” able to provide.³⁹

There is no dispute that the individual who allegedly discriminated against Ms. Ngugi—Ms. Lieb—engaged in numerous positive employment actions towards Ms. Ngugi before ending her employment. These include, but are not limited to (1) hiring Ms. Ngugi, (2) twice raising her salary, (3) sponsoring her for permanent residency, (4) spending over \$20,000 on attorney fees to support her work visa and permanent residency applications, (5) actively seeking alternative employment opportunities for her after determining that the Institute could not continue employing her, (6) paying for her to attend Toastmasters to help her be more marketable, and attending Toastmasters meetings with her to make her more comfortable, (7) urging the Legislature to include in its budget a proviso for a project that would allow the Institute to continue employing her, (8) paying her over \$35,000 while she worked at the

³⁸ *Hill*, 144 Wn.2d at 188-90; see also *Griffith v. Schnitzer Steel Indus. Inc.*, 128 Wn. App. 438, 454-55, 115 P.3d 1065 (2005) (applying same actor inference when prior positive action was promotion rather than a hiring); *Coughlan*, 413 F.3d at 1093-97 (applying same actor inference when prior positive action was a favorable assignment rather than a hiring, and adverse employment action was not obtaining a different favorable assignment rather than a discharge).

³⁹ *Coughlan*, 413 F.3d at 1097.

Office of Superintendent of Public Instruction (“OSPI”) when there was insufficient work at the Institute for her, (9) attempting to secure a contract with OSPI that would permit her to work at OSPI without jeopardizing her immigration status, and (10) extending her termination date by a week to avoid jeopardizing her immigration status.

Despite all of this positive treatment, Ms. Ngugi argues that the same actor inference does not apply to this case for three reasons. Each of these arguments fails. First, she argues that the two years between Ms. Ngugi’s hiring and discharge is too long for the inference to apply. Br. of Appellant at 37-38. This argument is without merit because it fails to account for the continuous series—indeed, a *pattern*—of positive actions that Ms. Lieb directed towards Ms. Ngugi up until, and even *after*, Ms. Ngugi was notified of her discharge. Further, even if Ms. Ngugi’s hiring were the only relevant positive action in this case, this Court has approved the application of the same actor inference when *five years* had passed between the positive and negative employment actions.⁴⁰ Accordingly, the passage of time does not defeat the application of the inference here.

Second, Ms. Ngugi argues that the same actor inference does not

⁴⁰ *Griffith*, 128 Wn. App. at 454 (affirming dismissal on same actor and stating that “several of the cases cited favorably in *Hill* as applying the same actor inference involved much longer time spans. *Hill*, 144 Wn.2d at 189 n.12, 23 P.3d 440 (citing *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996) (four years); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461 (6th Cir. 1995) (at least five years); *Tyndall v. Nat’l Educ. Ctrs., Inc. of California*, 31 F.3d 209, 214-15 (4th Cir. 1994) (two years)).”).

apply because the “same actor” did not hire and discharge her—Ms. Lieb solicited the input of others when hiring Ms. Ngugi, but made the decision to discharge her alone. Br. of Appellant at 37. This argument is also contrary to Washington law. This Court has held that all that is required for the same actor inference to apply “is that one of the decisionmakers involved in the [positive action] and the [negative action] be the same.”⁴¹ That condition was met here—Ms. Lieb made all the relevant decisions, and thus the same actor inference applies.

Third, Ms. Ngugi argues that the inference does not apply because it only applies where the plaintiff has been hired through a competitive process with multiple applicants for a position, and that was not the case here. Br. of Appellant at 33-34, 38. As an initial matter, this argument should not be considered because it was not raised before the trial court.⁴² Further, this argument is based on two factual premises that are not supported by the record—it ignores the numerous positive employment actions Ms. Lieb engaged in towards Ms. Ngugi *other than* Ms. Ngugi’s hiring, and there is no evidence in the record regarding whether other candidates were considered for Ms. Ngugi’s position. More fundamentally, however, the argument is without legal support. Ms. Ngugi claims that *Johnson v. Express Rent & Own, Inc.*, 113 Wn. App.

⁴¹ *Griffith*, 128 Wn. App. at 454 (citing *Hill*, 144 Wn.2d at 189 n.12[.]).

⁴² RAP 9.12; *see also* RAP 2.5(a).

858, 56 P.3d 567 (2002), supports this argument. Br. of Appellant at 33-34. Yet the portion of *Johnson* Ms. Ngugi cites to is the court's recitation of the plaintiff's argument. *Id.* at 861. The court made no mention of this issue in its own analysis regarding its decision in that case. *Id.* at 862. Thus, there is no legal basis for this argument, and for good reason: the process through which an individual is hired in no way lessens how illogical it is to hire a person you harbor a discriminatory animus against.

Thus, Ms. Ngugi failed to overcome the same actor inference.

4. Ms. Ngugi Failed To Provide Evidence Of Discrimination

A fourth, independent basis for affirming dismissal is Ms. Ngugi's failure to provide evidence of discrimination. Even if a plaintiff satisfies each of her preliminary burdens, dismissal on summary judgment is still appropriate when, considering all of the evidence in the record, the record does not permit a reasonable inference of discrimination.⁴³ This requires consideration of evidence of both discrimination and nondiscrimination.⁴⁴

⁴³ *Hill*, 144 Wn.2d at 186 (holding that trial is required where "the record contains reasonable but competing inferences of both discrimination and nondiscrimination" (emphasis omitted)).

⁴⁴ *Hill*, 144 Wn.2d at 184-85 ("[A]n employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." (emphasis and quotation marks omitted)), 186 ("Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's

As detailed at length above, the evidence of nondiscrimination is abundant and uncontroverted in this case. Against this, Ms. Ngugi offers two, limited pieces of evidence she claims demonstrates discrimination. First, Ms. Ngugi asserts that Ms. Lieb “tried more than once to discuss whether Ms. Ngugi would be interested in dating a black male the two simply met at Toastmasters.” Br. of Appellant at 35. But Ms. Ngugi never raised this argument below. Further, the portion of the record she cites to support this allegation is an unsworn statement in an attachment to an exhibit to Nicole Ack’s declaration. CP at 258. Thus, the statement is hearsay and is not admissible in these proceedings.⁴⁵ More fundamentally, however, Ms. Ngugi cites no authority that an attempt by Ms. Lieb to help Ms. Ngugi socially is evidence of discrimination. Nor does the record indicate that this is the only time Ms. Lieb offered such assistance to Ms. Ngugi. This allegation simply is not evidence of discrimination.

Second, Ms. Ngugi claims that there are “numerous examples of how [n]on-black employees received favorable treatment in being allowed to attend meetings, receive training and receive additional assignments that Ms. Ngugi was not allowed to do.” Br. of Appellant at 39. The only

explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.” (emphasis added and quotation marks omitted)).

⁴⁵ CR 56(e) (requiring that evidence opposing summary judgment be “admissible”); ER 802 (“Hearsay is not admissible except as provided by these rules, by other court rules, or by statute”).

meetings at the Institute Ms. Ngugi claims she was not invited to occurred after July 2009, when she had begun her work at OSPI. CP at 485-86; Br. of Appellant at 4-5 (stating she wasn't invited to meetings "after July 2009"). This is corroborated by Steve Aos, who moderated such meetings, and testified that he invited Ms. Ngugi to all staff meetings *before* she began working at OSPI. CP at 220. There is no evidence indicating that any other employee who was working at a different agency was invited to such meetings. Nor is there any evidence supporting a need for employees working at other agencies to attend such meetings. Regarding Ms. Ngugi's claim that others received training and assignments she did not receive, Ms. Ngugi lacks personal knowledge regarding this issue and there is similarly nothing in the record indicating that anyone received formal training at the Institute, or that anyone was assigned education-related work assignments over Ms. Ngugi.

Finally, Ms. Ngugi also alleges that Ms. Lieb made a comment regarding Ms. Ngugi's eyes. Br. of Appellant at 35. While the parties dispute the details and context of this comment,⁴⁶ Ms. Ngugi testified that, during a conversation in which Ms. Lieb was expressing concerns about

⁴⁶ Ms. Ngugi also claims that Ms. Lieb has offered contradictory accounts of this comment. Ms. Ngugi did not allege before the trial court that Ms. Lieb's were contradictory, and cannot do so now for the first time on appeal. In any event, Respondents analyze this issue based on Ms. Ngugi's testimony, as is required on summary judgment.

Ms. Ngugi's work at the Institute, the following occurred:

Lieb [also] referred to a previous interaction with me saying that after requesting that I perform a presentation task on behalf of Lieb at the Toastmaster's meeting (which I had agreed to do on many prior occasions), all I had done was to "look at me with your big eyes!"

CP at 487. Ms. Lieb testified that her comment related to how Ms. Ngugi had appeared "surprised like a deer in headlights," and did not relate to anything about the inherent nature of Ms. Ngugi's eyes, which Ms. Lieb did not perceive to be particularly large. CP at 110-11.

This comment was not expressly raced-based. Nor is there any stereotype that black individuals have big eyes. The sole support Ms. Ngugi offers for a racial connection for this comment is the following ambiguous footnote in an unpublished master's thesis by a student at Ohio State University which appears to be notable only in the sense that one can find it through a Google search:

Thomas [Edison] introduced the pure coon in the *Wooing and Wedding of a Coon* (1905). This image developed into the most blatantly degrading of all black stereotypes (8). Edison proved to be a film pioneer in the exploitation of this typecast in *Ten Pickaninnies* (1904) (7). It was played by black child actors whose reaction to excitement was their hair standing on end and their wide eyes.⁴⁷

⁴⁷ Melissa Renee Crum, *The Creation of Black Character Formulas: A Critical Examination of Stereotypical Anthropomorphic Depictions and their Role in Maintaining Whiteness* (2010), available at [https://www.academia.edu/2377837/THE_CREATION_OF_BLACK_CHARACTER_FORMULAS_A_CRITICAL_EXAMINATION_OF_STEREOTYPICAL_ANTHROPOMORPHIC_DEPICTIONS_AND_THEIR_](https://www.academia.edu/2377837/THE_CREATION_OF_BLACK_CHARACTER_FORMULAS_A_CRITICAL_EXAMINATION_OF_STEREOTYPICAL_ANTHROPOMORPHIC_DEPICTIONS_AND_THEIR)

As an initial matter, this master's thesis was not referenced before the trial court and may not be considered now. Further, there is nothing in this unauthoritative source that states that having "big eyes" is a stereotype regarding black individuals. Finally, even if this comment were related to Ms. Ngugi's race, it is well established that a single, ambiguous, stray comment unrelated to the adverse employment action at issue is insufficient to defeat summary judgment in *any* case, much less a case with abundant evidence of nondiscrimination such as this one.⁴⁸

Finally, Ms. Ngugi cites two cases to support her assertion that she has provided sufficient evidence of discrimination to survive summary judgment. The first is *Cornwell v. Electra Central Credit Union*.⁴⁹ In that case, contrary to the facts in this case, the same actor inference did not apply, the plaintiff was replaced by someone outside the plaintiff's protected class, and the plaintiff was the only person let go. The second

⁴⁸ *Kirby*, 124 Wn. App. at 467 n.10 (holding that comments "unrelated to the decision process" were insufficient to give "rise to an inference of discriminatory intent" (quotation marks omitted)); *Domingo v. Boeing Emps' Credit Union*, 124 Wn. App. 71, 90, 98 P.3d 1222 (2004) (holding that ambiguous comments were insufficient to establish discriminatory intent); *see also Metz v. Titanium Metals Corp.*, 475 Fed. Appx. 33, 34-35 (6th Cir. 2012) (holding that "ambiguous" comments that "do not necessarily refer" to a protected class were insufficient to establish discriminatory intent); *Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 75 (1st Cir. 2011) (holding that ambiguous remark was "much too innocuous to transform routine managerial decisions into something more invidious," and affirming dismissal of discrimination claim).

⁴⁹ *Cornwell v. Electra Central Credit Union*, 439 F.3d 1018 (9th Cir. 2006). Ms. Ngugi asserts that the case she is relying upon is *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217 (9th Cir. 1998), but the facts Ms. Ngugi's brief recites are those from *Cornwell*, not *Godwin*. Br. of Appellant at 39-40.

case is *Johnson v. Express Rent & Own, Inc.*⁵⁰ In that case, contrary to the facts in this case, the plaintiff's supervisor told him that he did not fit the image of the company due to his protected class, other supervisors disputed the articulated basis for discharging the plaintiff, and the defendant offered different, inconsistent explanations for the plaintiff's discharge. *Id.* at 862. Accordingly, both cases are inapposite.

Thus, Ms. Ngugi failed to provide evidence of discrimination.

E. The Trial Court Properly Dismissed Ms. Ngugi's Retaliation Claim

1. Ms. Ngugi Failed To Establish Direct Evidence

As an initial matter, Ms. Ngugi claims that she need not prove her retaliation claim through the burden-shifting scheme described above because she has provided direct evidence of retaliation. Br. of Appellant at 42-45. Ms. Ngugi cannot raise this argument now, as she never raised it below.⁵¹ Further, there is no direct evidence of retaliation in this case. Direct evidence is evidence which, if believed, proves the fact of retaliation without inference or presumption.⁵² There is no evidence in this case that Ms. Lieb admitted that she discharged Ms. Ngugi because she complained about discrimination. As a result, Ms. Ngugi's retaliation

⁵⁰ *Johnson*, 113 Wn. App. 858.

⁵¹ *Stork v. Int'l Bazaar, Inc.*, 54 Wn. App. 274, 281-82, 774 P.2d 22 (1989) (declining to consider direct evidence theory on appeal when plaintiff had not raised theory before trial court), *overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995).

⁵² *Coghlan*, 413 F.3d at 1095.

claim is premised upon circumstantial evidence and must be analyzed under the burden-shifting analysis detailed above.⁵³

2. Ms. Ngugi Failed To Establish A Prima Facie Case

As with her discrimination claim, the first step in analyzing Ms. Ngugi's retaliation claim is the requirement that she establish a prima facie case. To establish a prima facie case of retaliation, Ms. Ngugi was required to show that "(1) [she] engaged in a statutorily protected opposition activity; (2) [she] was discharged or some other adverse employment action was taken against [her]; and (3) there is a causal connection between the opposition and the discharge."⁵⁴ Ms. Ngugi failed to establish the first and third elements of her prima facie case.

a. Ms. Ngugi Did Not Oppose Conduct She Reasonably Believed Violated RCW 49.60

Regarding the first element, to be a "statutorily protected opposition activity," an employee must *reasonably* believe that the conduct being opposed is a violation of the law.⁵⁵ The United States Supreme Court provided substantial guidance regarding this standard in *Clark County School District v. Breeden*.⁵⁶ In that case, the female plaintiff repeatedly complained after male co-workers made overtly sexual

⁵³ *Hill*, 144 Wn.2d at 185.

⁵⁴ *Graves v. Dep't of Game*, 76 Wn. App. 705, 711-12, 887 P.2d 424 (1994).

⁵⁵ *Graves*, 76 Wn. App. at 712.

⁵⁶ *Clark County School District v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001).

comments in the workplace.⁵⁷ The Supreme Court *unanimously* held that these complaints did not constitute “protected activity” because the complained-about comments, as a matter of law, did not constitute actionable employment discrimination.⁵⁸ Thus, the test for whether opposition to conduct is “protected activity” is whether a claim premised upon such conduct would fail as a matter of law—i.e., whether such a claim would survive summary judgment. Ms. Ngugi did not oppose this standard before the trial court, and instead cited cases that demonstrate that Washington law is in accord.⁵⁹

As explained above regarding her discrimination claim, Ms. Ngugi’s belief that the Institute had discriminated against her in violation of RCW 49.60 was not reasonable—i.e., a claim premised upon the conduct at issue cannot survive summary judgment. As a result, Ms. Ngugi’s complaint was not “statutorily protected opposition activity.”

b. Ms. Ngugi’s Discharge—Determined Before She Complained About Alleged Discrimination—Was Not Caused By Her Complaint

⁵⁷ *Id.* at 269-70.

⁵⁸ *Id.* at 270-71.

⁵⁹ CP at 535 (citing *Graves*, 76 Wn. App. 705, and *Coville v. Cobarc Servs., Inc.*, 73 Wn. App. 433, 869 P.2d 1103 (1994)). See *Graves*, 76 Wn. App. at 712-14 (relying on federal law to hold that complaints about supervisor not treating employee fairly were not protected because there was no evidence that such treatment was based on employee’s sex, as required to support an actionable discrimination claim); *Coville*, 73 Wn. App. at 438-40 (holding that complaints about a supervisor masturbating in a closet was not protected because there was no evidence conduct was directed at plaintiff or motivated by her gender, as required to support an actionable discrimination claim).

A second, independent basis for affirming dismissal of Ms. Ngugi's retaliation claim is her failure to establish a causal connection between her discrimination complaint and her discharge. It is undisputed that Ms. Ngugi first complained of discrimination on October 29, 2009. But the Institute had made clear in early 2009 that she would likely not remain employed by the Institute much longer, and Ms. Lieb told Ms. Ngugi on October 28, 2009 that Ms. Ngugi would not work for the Institute again after her time with OSPI ended, without regard to when that occurred. CP at 114. It is also undisputed—indeed, it is confirmed by Ms. Ngugi's own "expert," CP at 522—that work by Ms. Ngugi at OSPI under the supervision of OSPI for *any* duration was contrary to immigration law. The only circumstance that changed after Ms. Ngugi's discrimination complaint was the discovery that the work situation was inconsistent with immigration law. This event, which was out of the Institute's control and had nothing to do with Ms. Ngugi's discrimination complaint, is what caused Ms. Ngugi's employment to end earlier than anticipated.

When the decision to discharge an employee is contemplated or determined prior to any complaints about discrimination, as a matter of both logic and law, those complaints cannot have caused the discharge.⁶⁰

⁶⁰ *Zuccaro v. MobileAccess Networks, Inc.*, No. C11-272, 2012 WL 261342, at *4 (W.D. Wash. Jan. 30, 2012) (dismissing wrongful discharge claim under Washington law where employer "had considered terminating" the plaintiff before allegedly protected

Employees, such as Ms. Ngugi, cannot misuse anti-discrimination laws to insulate themselves against previously planned employment actions.⁶¹

Accordingly, Ms. Ngugi failed to establish causation.

3. Ms. Ngugi Failed To Establish Pretext

A third, independent basis for affirming dismissal of Ms. Ngugi's retaliation claim is her failure to show pretext. The standard for showing pretext for a retaliation claim is the same as showing pretext for a discrimination claim.⁶² For the same reasons stated above with respect to Ms. Ngugi's discrimination claim, she has failed to show pretext with respect to her retaliation claim.⁶³

4. Ms. Ngugi Failed To Provide Evidence Of Retaliation

A fourth, independent basis for affirming dismissal of Ms. Ngugi's retaliation claim is Ms. Ngugi's failure to provide evidence of retaliation. As indicated above with respect to Ms. Ngugi's discrimination claim, even when a plaintiff satisfies each preliminary burden, dismissal on summary

activity, although it did not actually terminate him until after); *see also Clark County Sch. Dist.*, 532 U.S. at 272 ("Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality."). Citation to unpublished federal opinions is permitted. GR 14.1(b); Fed. R. App. P. 32.1. A copy of *Zuccaro* is at CP at 355-59.

⁶¹ *Hervey v. County of Koochiching*, 527 F.3d 711, 723 (8th Cir. 2008) ("[E]mployees may not insulate themselves from discipline by announcing an intention to claim discrimination just before the employer takes action."); *Wiggins v. McHugh*, 900 F. Supp. 2d 1343, 1360 (S.D. Ga. 2012) ("[A]nti-retaliation provisions do not allow employees who are already on thin ice to insulate themselves against termination or discipline by preemptively making a discrimination complaint." (quotation marks omitted)).

⁶² *Milligan*, 110 Wn. App. at 638-39.

⁶³ *See* Section VI.D.2, *supra*.

judgment is still appropriate when, considering all of the evidence in the record, the record does not permit a reasonable inference of retaliation.⁶⁴

The evidence of nonretaliation is abundant and uncontroverted in this case. It includes, but is not limited to, the repeated, positive employment actions Ms. Lieb exhibited towards Ms. Ngugi even *after* her discrimination complaint, the undisputed budgetary issues faced by the State and the Institute when Ms. Ngugi was let go, and the extensive, contemporaneous documentation supporting the Institute's reasons for the manner in which it handled Ms. Ngugi's employment.

Against this, Ms. Ngugi makes several arguments she claims demonstrate retaliation. First, she points to the Institute's interception of the Personnel Action Form after Ms. Ngugi made her discrimination complaint and asserts that the Institute "dropped all efforts to assist [Ms.] Ngugi in her prospects with OSPI." Br. of Appellant at 45-46.⁶⁵ As discussed above, however, the only impact intercepting the form had on

⁶⁴ *See Hill*, 144 Wn.2d at 186.

⁶⁵ Ms. Ngugi appears to imply that Ms. Lieb's testimony that the Institute's counsel advised her to "put all pending personnel actions on hold," CP at 114, demonstrates that Ms. Lieb and Ms. Priddy stopped working on an agreement between the Institute and OSPI regarding Ms. Ngugi at that point. Br. of Appellant at 46. As an initial matter, this argument was not raised before the trial court and cannot be considered here. Further, the agreement with OSPI was not finalized at that point, and thus was not a pending personnel action. The only personnel action that there is evidence was put on hold is the reduction in pay.

Ms. Ngugi's employment was to prevent her salary from being reduced.⁶⁶ CP at 114-15. Further, Ms. Ngugi's assertion that the Institute stopped trying to make the OSPI arrangement happen at that point is made without any citation to the record and is false. Both Ms. Lieb and Ms. Priddy testified that they continued actively working towards finalizing such a contract until late November 2009, when those efforts uncovered legal issues that precluded execution of such a contract. CP at 41-42, 115, 591-92, 598. Thus, it is undisputed that they continued working on making the OSPI arrangement happen *for another month after Ms. Ngugi made her discrimination complaint*. This is not evidence of retaliation.

Second, Ms. Ngugi asserts that Ms. Lieb "refused to provide any further help to Ms. Ngugi with her 'green card' application process." Br. of Appellant at 46. Ms. Ngugi does not cite to the record for this proposition, but appears to be referring to Ms. Lieb's testimony that, on October 28, 2009—i.e., the day *before* Ms. Ngugi's discrimination complaint—Ms. Lieb told Ms. Ngugi that the Institute would continue to support Ms. Ngugi's immigration processes but would revisit that issue in

⁶⁶ Ms. Ngugi asserts that Ms. Lieb's testimony is contradictory regarding whether she used the word "shred" with respect to the interception of this Personnel Action Form. Br. of Appellant at 44. As an initial matter, this argument was not raised before the trial court and cannot be considered here. Further, there is no contradiction because, in her deposition, Ms. Lieb disputed using the word shred when speaking with her assistant, and did not specify in her declaration what precise language she used when instructing her assistant. Finally, Ms. Ngugi fails to identify any legal significance to this alleged contradiction, as the critical point—that Ms. Lieb instructed that the Personnel Action Form be intercepted and not put into effect—is undisputed.

the event of an audit. CP at 113-14. As this statement was made before any discrimination complaint, it is not evidence of retaliation. Further, even if this statement were made later, common sense and the law dictates that continuing to sponsor Ms. Ngugi's permanent residency application as her employer, CP at 106, after Ms. Ngugi was no longer employed by the Institute would not be possible, and thus any indication by Ms. Lieb that the Institute would no longer do so would not be evidence of retaliation.

Third, Ms. Ngugi accuses Ms. Lieb of hiding information regarding immigration issues from Ms. Ngugi in order to sabotage her employment with OSPI. Br. of Appellant at 44-47. Yet this allegation lacks any support in the record. Further, Ms. Lieb and Ms. Priddy actively worked together to make the arrangement with OSPI happen, and were unaware of any immigration issues that would preclude the arrangement, until late November 2009. CP at 41-42, 115, 591-92, 598. Once that issue came to light and Ms. Lieb learned that Ms. Ngugi could not work for OSPI while employed at the Institute, Ms. Lieb ended Ms. Ngugi's employment with the Institute. CP at 115. There is no evidence that Ms. Lieb had any knowledge that she hid from anyone, much less information that she hid from Ms. Ngugi with a retaliatory purpose.

Fourth, Ms. Ngugi points to Ms. Lieb's testimony that she was shocked by Ms. Ngugi's discrimination complaint and that she later

resented certain actions Ms. Ngugi was engaging in. Br. of Appellant at 45. As an initial matter, Ms. Ngugi did not raise this argument before the trial court and it should not be considered here. More fundamentally, however, it would be surprising if a person who did not engage in discrimination were *not* “shocked” after being accused of being a racist bigot—it is not evidence of retaliation.⁶⁷ And Ms. Lieb’s testimony regarding “resentment” pertained to Ms. Ngugi actions *after* her discharge, such as misusing an airline ticket the Institute had paid to allow Ms. Ngugi to return to Kenya, as employers discharging H-1B workers are required to do.⁶⁸ These statements are not evidence of retaliation.

Finally, it should be noted that most of Ms. Ngugi’s alleged evidence of retaliation relates to alleged interference between Ms. Ngugi and OSPI. Yet such arguments do not relate to employment actions the Institute engaged in vis-à-vis Ms. Ngugi as an employee, which is what

⁶⁷ *King v. Alabama Dep’t of Public Health*, No. 09-503, 2010 WL 3522381, at *12 n.26 (S.D. Ala. Sept. 2, 2010) (“If a plaintiff could satisfy her *McDonnell Douglas* pretext burden merely by showing that the supervisor accused of unlawful discrimination was unhappy at being called a racist, sexist, or so on, then summary judgment in Title VII retaliation cases could never succeed. Human nature being what it is, it is difficult to envision any supervisor not being hurt or upset when a subordinate levels allegations of unlawful discrimination against her. What matters is not whether the alleged discriminator had an emotional response to the accusation, but whether there are genuine issues of fact as to whether that person acted on those emotions in a retaliatory manner.”); *Mortenson v. Pacificorp*, No. 06-541, 2007 WL 405873, at **14-15 (D. Or. Feb. 1, 2007) (dismissing retaliation claim despite testimony that supervisor was “surprised,” “shock[ed],” and “hurt” by discrimination complaint). Copies of these cases are attached to this brief as Appendices C and D.

⁶⁸ The precise timing of these events are not noted in the record because Ms. Ngugi did not raise this issue before the trial court, depriving the Institute of notice that such clarity was required.

RCW 49.60 is concerned with. Rather, such arguments would go towards a claim for tortious interference with business expectancy—a claim that Ms. Ngugi dedicated only a single sentence to in her summary judgment opposition, CP at 537, and has not appealed the dismissal of.

Accordingly, Ms. Ngugi failed to provide evidence of retaliation.

F. The Trial Court Erred By Not Granting The Institute’s Motion To Strike

1. The Testimony Of An Undisclosed Expert Witness Providing Legal Conclusions Was Inadmissible

The trial court erred in not striking the Declaration of Bart Stroupe, CP at 520-24, for two reasons. First, Ms. Ngugi failed to disclose Mr. Stroupe’s identity in her witness disclosures and discovery responses. The deadline to disclose fact witnesses in this matter was March 11, 2013, the deadline to disclose expert witnesses was April 10, 2013, and the deadline to disclose rebuttal witnesses was June 10, 2013. CP at 556. Further, Defendants’ discovery requests asked Ms. Ngugi to disclose the identity of individuals with knowledge relevant to this case, as well as expert witnesses. CP at 558-62. But Ms. Ngugi did not so much as mention Mr. Stroupe in any of these required disclosures, CP at 565-89, and identified him for the first time in her summary judgment opposition materials filed July 23, 2013, CP at 520. Given Ms. Ngugi’s failure to comply with her obligation to disclose Mr. Stroupe’s identity, his declaration was

inadmissible and should have been stricken.⁶⁹

Second, Mr. Stoupe's testimony was inadmissible because he lacked personal knowledge regarding this case. ER 602. To the extent Ms. Ngugi sought to present Mr. Stoupe as an expert, it is well established that experts may not give testimony regarding legal conclusions.⁷⁰ Yet Mr. Stoupe's declaration consists almost entirely of such testimony, and he fails to even cite the sources of law his testimony concerns. Further, Mr. Stoupe's declaration (a) would not be helpful to the jury, who could simply be instructed on the law,⁷¹ and (b) lacks sufficient factual foundation for the opinions it offers because it relies solely on Ms. Ngugi's declaration, which does not provide sufficient information regarding the positions at OSPI for Mr. Stoupe to provide an opinion regarding them.⁷² The trial court erred in not striking this declaration.

⁶⁹ CR 56(e); *Southwick*, 145 Wn. App. at 301-02 (affirming striking of expert declaration submitted in connection with summary judgment motion because expert had not been disclosed as required by case scheduling order and "CR 56(e) requires that a declaration be limited to matters that would be admissible in evidence").

⁷⁰ *State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) ("Under ER 704, a witness may testify as to matters of law, but may not give legal conclusions. . . . [E]xperts may not offer opinions of law in the guise of expert testimony.").

⁷¹ *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606, 260 P.3d 857 (2011) (holding that expert testimony must be helpful to be admissible).

⁷² *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 104, 882 P.2d 703 (1994) (holding that expert must have adequate factual foundation for testimony to be admissible).

2. Much Of Ms. Ngugi's Declaration Was Inadmissible As Hearsay Or As Lacking Sufficient Foundation

The trial court erred in not striking the inadmissible portions of Ms. Ngugi's declaration. Her declaration contains several statements allegedly made by individuals at OSPI (or by OSPI's attorneys),⁷³ but OSPI is not a party to this lawsuit and thus the party-opponent exception does not apply. ER 801 & 802. Further, Exhibit A to her declaration, CP at 498, is an e-mail that she was neither a sender nor a recipient of. As a result, not only does she lack personal knowledge regarding the e-mail, but it is also inadmissible hearsay. ER 602, 801, 802. Finally, Ms. Ngugi's declaration contains numerous assertions that she failed to establish that she had personal knowledge regarding—mostly concerning the treatment of other employees.⁷⁴ ER 602. This is a common issue in employment cases, and courts routinely strike such testimony as a result.⁷⁵ The trial court erred in not striking this testimony.

⁷³ See CP at 489:18-19, 491:22-492:2, 492:4-10, 493:10-11, 493:13-18, 494:1-13.

⁷⁴ See CP at 482:18-19, 484:10-12, 484:12-15, 484:19-485:2, 485:3-4, 485:8-11, 486:6-8, 490:2-3, 490:17-19, 491:1-2, 491:3-8, 491:10-11.

⁷⁵ See, e.g., *Burns v. Interparking Inc.*, 24 Fed. Appx. 544, 548 (7th Cir. 2001) (declining to consider plaintiff's testimony regarding treatment of other employees that was "not within [plaintiff's] personal knowledge"); *Wojciechowski v. Nat'l Oilwell Varco, L.P.*, 763 F. Supp. 2d 832, 846 (S.D. Tex. 2011) (striking plaintiff's testimony regarding treatment of other employees because plaintiff had "not demonstrated she has personal knowledge" of that treatment); *Saltarella v. Town of Enfield*, 427 F. Supp. 2d 62, 71 (D. Conn. 2006) (striking plaintiff's testimony regarding treatment of other employees "because he has shown no basis for his personal knowledge about" that treatment).

3. The Voluminous, Uncited Deposition Transcripts Were Inadmissible

With her summary judgment opposition, Ms. Ngugi filed the *entire* transcripts of *six* depositions, including the associated exhibits. Together, these totaled over 200 pages and 22 exhibits. CP at 384-480. Yet, in her opposition brief, Ms. Ngugi failed to provide *any* pincites to these voluminous materials. Nonetheless, Defendants undertook to identify which specific portions of these materials had been referenced in Ms. Ngugi's brief—which equated to only 14 pages of transcripts and one deposition exhibit. CP at 550 (identifying referenced portions of record). Given that the remaining materials were not relied upon by Ms. Ngugi, they were literally irrelevant under ER 401 and were also inadmissible under ER 403 due to the burden and prejudice associated with, amongst other things, their volume.⁷⁶ Ms. Ngugi agreed that these materials should be stricken, CP at 619, and the trial court erred in not doing so.

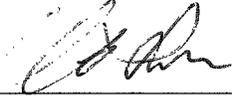
VII. CONCLUSION

For the reasons detailed above, this Court should affirm the dismissal of Ms. Ngugi's claims and reverse the trial court's failure to grant Respondents' motion to strike.

⁷⁶ See also *Ngyuen v. Radiant Pharm. Corp.*, 946 F. Supp. 2d 1025, 1034 (C.D. Cal. 2013) (Courts "need not 'comb the record' looking for other evidence; it is only required to consider evidence set forth in the moving and opposing papers and the portions of the record cited therein." (citing *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001))).

RESPECTFULLY SUBMITTED this 31st day of March, 2014.

ROBERT W. FERGUSON
Attorney General



CHRISTOPHER LANESE, WSBA #38045
OID# 91023
Assistant Attorney General
PO Box 40126
Olympia, WA 98504-0126
360-586-6300

CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid via Consolidated Mail Service

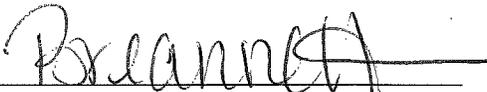
ABC/Legal Messenger

State Campus Delivery

Hand delivered by _____

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

DATED this 31 day of March, 2014, at Tumwater, Washington.



Breanne Higginbotham, Legal Assistant

Appendix A

Timeline of Key Events

January 2, 2008	The Institute hires Ms. Ngugi. (CP at 106)
Throughout 2008	The Institute spends over \$20,000 on fees and costs associated with Ms. Ngugi's H-1B visa and permanent residency application. Ms. Ngugi receives two raises. (CP at 106)
February 2009	Ms. Lieb advises Ms. Ngugi and two Caucasian American employees their positions were at risk of being eliminated due to budget. The other employees either retire in lieu of termination or are let go. (CP at 107-08)
February 2009	Ms. Lieb seeks alternative employment for Ms. Ngugi. (CP at 108)
February 2009	The Institute pays for Ms. Ngugi to attend Toastmasters to become more marketable due to her reservations about public speaking, and Ms. Lieb attends with Ms. Ngugi to make her more comfortable. (CP at 108)
March 2009 – April 2009	Ms. Lieb successfully works with Legislature on budget proviso that would permit the Institute to continue employing Ms. Ngugi, contingent on outside funding for the research project. (CP at 109)
July 2009	Ms. Lieb successfully arranges for Ms. Ngugi to work on loan to the Office of Superintendent of Public Instruction ("OSPI"). (CP at 110)
August 2009	Ms. Ngugi begins working at OSPI. (CP at 112)
Late October 2009	Funding for project related to budget proviso is denied. (CP at 113)
October 28, 2009	Ms. Lieb tells Ms. Ngugi that OSPI is willing to do a contract regarding Ms. Ngugi's work for them, but at a reduced salary, and that she will not be returning to work at the Institute after her time with OSPI is done. Ms. Ngugi agrees with the proposal. (CP at 113-14)
October 29, 2009	An attorney representing Ms. Ngugi contacts Evergreen and alleges Ms. Ngugi has been discriminated against; this is the first allegation of discrimination by Ms. Ngugi. (CP at 226)
October 30, 2009	On advice of counsel, Ms. Lieb prevents the previously planned salary reduction for Ms. Ngugi from going into effect. (CP at 114)
Late October 2009 – Late November 2009	Ms. Lieb continues to actively work with OSPI to finalize the contract regarding Ms. Ngugi's work for OSPI. (CP at 41-42, 115, 591-92, 598)
Late November 2009	Ms. Lieb and OSPI discover contract would violate the law. (CP at 115)
December 4, 2009	The Institute discharges Ms. Ngugi effective December 31, 2009. (CP at 115)
December 16, 2009	OSPI directly offers Ms. Ngugi a different position. (CP at 42, 65)
Late December 2009	Federal government's annual H-1B visa cap is met, requiring OSPI to seek authority to employ Ms. Ngugi through alternative means. OSPI is unable to employ Ms. Ngugi until first week of January 2010 as a result. The Institute extends the effective date of Ms. Ngugi's discharge to January 8, 2010, to prevent her deportation. (CP 115-16, 523-24)
December 31, 2009	Ms. Ngugi turns down the OSPI position without explanation. (CP at 62)
January 8, 2010	Ms. Ngugi's employment with the Institute ends. (CP at 116)
January 28, 2010	Evergreen's investigation concludes Ms. Ngugi was not discriminated against. (CP at 243)
May 19, 2010	The Washington State Human Rights Commission's investigation concludes that Ms. Ngugi had been neither discriminated nor retaliated against. (CP at 315)

Appendix B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

2. The Same Actor Inference Does Apply to Retaliation Claims and Should not be Applied the Ngugi's Discrimination Claims.

In the State of Washington the "Same Actor Inference" does not apply to retaliation claims. Washington's Appellate Court reiterated that no Washington case has applied the same actor inference to retaliations case and they declined to adopt this inference with respect to retaliation claims. *Lodis v. Corbis Holdings, Inc.*, 292 P.3d 779 (Wn. App. 2013).

Furthermore, the same actor inference only applies if someone was hired and fired by the same actor "within a relatively short period of time." *Hill v. BCTI Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001). However, almost two years separates Ms. Ngugi's hiring and firing. This significant amount of time calls into doubt whether the inference should apply at all. *See Coburn v. PN II, Inc.* 372 Fed.Appx. 796 (Nev. 2010) (holding the same actor inference was inapplicable when "almost two years" had elapsed).

Additionally, there is a dispute as to whether the same actor was responsible for Ms. Ngugi's hiring and termination. It undisputed that Ms. Ngugi was hired by committee, but her termination came solely at the hands of Ms. Lieb, the Director of the Institute recommendation of the a committee. *See Deposition of Lieb*, however; her termination came at the hands of Ms. Lieb. Given these facts, it is not clear who the "actor" is, much less is it sufficiently clear to determine as a matter of law that the same actor rule applies. *Coburn v. PN II, Inc.*, at 799; see also *Russell v. Mountain Park Health Center*, 403 Fed. Appx. 195 (Ariz. 2010) (holding that fact question as to whether the individuals responsible for the plaintiff's termination were the actually responsible for the hiring or mere participants in the process). Given these factual

1 disputes regarding the application of the same actor inference, this issue must be submitted to a
2 trier of fact to resolve, and rule should not apply.

3 Even assuming the same actor inference applies; Ms. Ngugi's evidence of pretext
4 overcomes it because she has offered "specific and substantial" circumstantial evidence of
5 discrimination. Her evidence is sufficient to overcome the inference and create several disputes
6 of material fact requiring denial of defendants' motion. The specific and substantial
7 circumstantial evidence needed to rebut the inference can be largely the same evidence used to
8 establish the prima facie case. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3de 440
9 (2001); *see also Coburn v. PN II, Inc.*, 372 Fed.Appx. 796 (Nev. 2010).

10 **B. MATERIAL FACTS EXIST TO PRECLUDE SUMMARY JUDGMENT**

11 1. Material Facts Exist Regarding Ms. Ngugi's Discrimination Treatment Claim

12 Disparate treatment is intentional discrimination. It occurs when "(t) he employer
13 simply treats people less favorably than others because of their race, color, religion, sex...
14 national origin" or some other protected characteristic. *Shannon v. Pay'N Save*, 104 Wn.2d
15 722, 726-7, 709 P.2d 799, 803 (1985). To establish a prima facie claim for racial
16 discrimination based on disparate treatment, Ms. Ngugi must show (1) the employee belongs to
17 a protected class; (2) WSIPP treated Ms. Ngugi less favorably in the terms or conditions of
18 employment; (3) than a similarly situated, non-protected employee; (4) who does substantially
19 the same work. *Washington v. Boeing Co.*, 105 Wn.App. 1, 13, 19 P.3d 1041 (2000).

20 The undisputed evidence in this matter clearly establishes prong one and prong four
21 (that the similarly situated non-protected employees were performing substantially the same
22 work -- research and analysis). However, as to the third and fourth prongs, there is a material
23

1 dispute as to whether or Ms. Ngugi was treated less favorably in the terms and condition of her
2 employment than non-protected employee(s). In fact, Ms. Annie Pennucci, a similarly situated
3 Caucasian employee, testified that Ms. Lieb provided her valuable feedback and yearly
4 evaluations where Ms. Ngugi was not. *See Deposition of Pennucci*. Furthermore, Ms. Ngugi
5 was subjected abusive treatment and harsh treatment regarding her work, when other similarly
6 situated employees were not. *See Deposition of Pennucci and Ngugi Decl.*

7 Accordingly, there is evidence that shows at the very least that there is an issue of
8 material fact with respect to whether WSIPP treated Ms. Ngugi less favorable in the terms or
9 conditions of employment than those outside her protected class; and the court should deny
10 WSIPP Motion for Summary Judgment regarding disparate treatment.

11
12 2. Materials Facts Exist Regarding Ms. Ngugi's Retaliation Claim

13 Ms. Ngugi can establish all the elements of a prima facie retaliation claim. In order to
14 establish a retaliation claim, a plaintiff must make a prima facie McDonnell Douglas showing
15 by evidence of (1) a protected activity by the employee, (2) an adverse actions by the
16 employer, and (3) a causal connection between the protected activity and the adverse actions.
17 *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 482, 205 P.3d 145 (Div. 1 2009); *Davis v. West*
18 *One Automotive Group*, 140 Wn. App. 449, 460, 166 P.3d 807 (Div. 3 2007).

19 i. Ms. Ngugi Engaged in a Statutorily Protected Activity

20 Ms. Ngugi engaged in a statutorily protected activity on October 29, 2009. Her
21 attorney at that time, Martha Schmidt contacted The Office of the President of Evergreen State
22
23

1 College to inform the college that Ms. Ngugi was a victim of Racial discrimination.¹ To
2 satisfy this element, an employee does not need to show that he complained about behavior
3 that actually violated the law. *Kahn v. Salerno*, 90 Wn. App. 100, 951 P.2d 321 (1998).
4 Instead, an employee need only reasonably believe that the conduct was in opposition to
5 actions that are arguably a violation of the law. *Id.*; *see also Graves v. Dept. of Game*, 76 Wn.
6 App. 705, 887 P.2d 424 (1994). To make this determination, the court must balance the setting
7 in which the activity arose and the interests and motives of the employer and employee. *Coville*
8 *v. Cobarc Servs.*, 73 Wn. App. 433, 869 P.2d 1103 (1994).

9 The Washington Supreme Court has noted that the eradication of discrimination in the
10 workplace a public policy of the "highest priority", *Hill v. BCTI Fund-I*, 144 Wn.2d 172, 23
11 P.3d 440 (2001). Contrary to defendants' assertion that that Ms. Ngugi's discrimination
12 complaints were "unfounded," the test is whether not they are arguably a violation of the law.
13 There is no dispute that Ms. Ngugi's claims of disparate treatment and retaliation are
14 reasonably against the law.

15 Additionally, similar to the plaintiff in *Kahn*, whose protected activity was not any
16 formal process but rather was simply complaining to management about personal safety
17 concerns, Ms. Ngugi effectively communicated her complaints of discrimination to Evergreen
18 College and this information was forwarded to Ms. Lieb on October 29, 2009.

19 ii. Ms. Ngugi was Subjected to Adverse Employment Action

20 Once Ms. Lieb learned of Ms. Ngugi's discriminatory complaint on October 29, 2009,
21 Ms. Lieb retaliated against Ms. Ngugi in the following manner. She immediately, on or about

22 ¹ A formal letter setting out of the allegations was later delivered on November 12, 2009 to Ms. Nicole
23 Ack, the Civil Rights Officer for The Evergreen State College.

1 October 30, 2009 directed her assistant to terminate Ms. Ngugi's recent job assignment at
2 OSPI. Lieb directed her assistant (Janie Maki) to "Shred" the Performance Action Form (PAF)
3 that memorialized Ms. Ngugi's new employment duties with OSPI. This form was just signed
4 by Ms. Lieb on October 28, 2009. Although, Defendant's claim the reason for this action was
5 because of a sudden immigration concern, the evidence clearly proves otherwise. An email sent
6 from Jani Maki on October 29, 2009 indicates that there are no concerns with the arrangement.
7 Secondly, Ms. Lieb continued to keep Ms. Ngugi in the dark about her true intent – to fire her
8 before she had an opportunity to change her visa status. *See Stroupe Decl.* If Ms. Lieb
9 informed Ms. Ngugi sooner, Ngugi could have taken steps to secure her employment and visa
10 status with OSPI. *Id.* However, Lieb concealed the immigration concerns from Ms. Ngugi and
11 terminated her on December 4th, 2009. This concealment precluded Ngugi and OSPI (or other
12 employers) from securing a H-1B visa. As of December 20th, 2009, no H-1B visas remained.
13 *Id.*

14 iii. Disputes of Material Fact Surround the Connection Between Ms. Ngugi's
15 Protected Activity and Her Termination

16 To establish the necessary causal connection, an employee must show that retaliation
17 was a substantial factor motivating the adverse employment decision. Burchfiel, at 152, citing
18 to Allison v. Hous. Auth. Of City of Seattle, 118 Wn.2d 79, 96, 821 P.2d 34 (1991). An
19 employee need not, however, prove that the employer's sole motivation was retaliation.
20 Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 70, 821 P.2d 18 (1991).
21 Furthermore, an employee can make the showing using circumstantial evidence. *Francom*
22 *v. Costco Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182 (2000).

1 Contrary to defendants' assertions, circumstantial evidence does exist that raises the
2 inference that Ngugi was retaliated against. Prior to Ms. Ngugi discrimination complaint, she
3 was performing satisfactorily in job duties. She received two raises for her performance and
4 had been sponsored for permanent status – attesting to her talent and worth. She was also
5 praised again for her talents by Jennifer Priddy of OSPI. However, just a day after she
6 complained of discriminatory treatment, Ms. Lieb instructed her assistant Janie Maki to “shred
7 the PAF.” Ms. Lieb testified that she received a call about Ms. Ngugi claim from the
8 president's office. *See Lieb Deposition*. Furthermore, Mr. Trotter from The Evergreen College
9 testified that he would have signed the PAF because there were no financial issues precluding
10 the arrangement. *See Trotter Deposition*. The close correlation in time between Ms. Ngugi's
11 protected activity and Ms. Lieb's termination of her employment opportunity with OSPI,
12 concealment of the possible immigration issues from OSPI and Ngugi, and Ngugi's December
13 4th 2009 termination indicate that Ms. Lieb retaliated against Ngugi. *Vasquez v. D.S.H.S.*, 94
14 Wn. App. 976 985, 974 P.2d 348 (1999).² These material factual disputes can only be resolved
15 by a fact finder and preclude granting summary judgment.

16 3. Tortious Interference With Business Expectancy

17 Based upon the previous arguments, Ngugi has set out material facts that are in dispute
18 sufficient to defeat summary judgment.
19
20
21

22 ² See also *Kahn v. Salerno*, 90 Wn. App. 100, 951 P.2d 321 (1998)(holding that proximity in time of a month or so
23 between the protected activity and the adverse action raises an inference of retaliatory intent).

Appendix C

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

H

Only the Westlaw citation is currently available.

United States District Court,
S.D. Alabama,
Southern Division.
Debra K. KING, Plaintiff,
v.
ALABAMA DEPARTMENT OF PUBLIC
HEALTH, Defendant.

Civil Action No. 09-0503-WS-C.
Sept. 2, 2010.

West KeySummaryCivil Rights 78 ↪1251

78 Civil Rights

78II Employment Practices

78k1241 Retaliation for Exercise of Rights

78k1251 k. Motive or Intent; Pretext.

Most Cited Cases

States 360 ↪53

360 States

360II Government and Officers

360k53 k. Appointment or Employment and
Tenure of Agents and Employees in General. Most
Cited Cases

Former employee of state public health department failed to demonstrate that former employer's reasons for terminating her employment were pretextual, and thus, was unable to sustain her Title VII retaliation claim against former employer. Former employer alleged that it terminated employee because she violated agency policy by double-counting program participants, altering records when a supervisor discovered the double-counting, and failing to follow up when former employer attempted to investigate. Former employee, on the other hand, argued that employer singled her out for punishment because a supervisor informed staff at another clinic that the double-counting she engaged in was okay. However, the supervisor was not aware of her protected activity

and reported her activities as a violation. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Ronnie L. Williams, Mobile, AL, for Plaintiff.

Carol Robin Gerard, Montgomery, AL, for Defendant.

ORDER

WILLIAM H. STEELE, Chief Judge.

*1 This matter comes before the Court on defendant's Motion for Summary Judgment (doc. 43). The Motion has been briefed and is ripe for disposition.^{FN1}

FN1. Several related motions are also ripe. In particular, defendant has filed a pair of Motions to Strike (docs. 55 & 56) taking issue with literally dozens of factual representations in plaintiff's brief and supporting affidavits. Rather than becoming mired in ancillary evidentiary objections at the outset, the Court will consider those Motions to Strike on an ongoing basis herein, and only to the extent necessary to resolve the pending Motion for Summary Judgment. Also, contemporaneously with its Motion for Summary Judgment, defendant filed a Motion to Exceed Page Limit (doc. 42). In this Court's experience, the 30-page cap on principal briefs imposed by Local Rule 7.1(a) is sufficient in all but the most complex or extraordinary cases. After careful review of the parties' filings (including defendant's 43-page principal brief and plaintiff's combined 70-page principal brief spread across two documents (docs. 53 & 54) without leave of court), the Court is hard-pressed to understand why briefing could not have been completed within the spatial

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

constraints of Local Rule 7.1(a). What we have here is essentially a single-issue Title VII case that is unremarkable in factual or legal sophistication relative to other Title VII actions routinely litigated in this District Court within the Local Rule 7.1(a) parameters. Nonetheless, in its discretion, and to spare the parties the expense and delay of resubmitting their briefs, the Court **grants** defendant's Motion to Exceed Page Limit (doc. 42) and will also consider plaintiff's submission as filed, notwithstanding her noncompliance with the Local Rules and her attempted circumvention of applicable page limitations by splitting the fact and law sections of her brief into two different documents.

I. Nature of the Case.

Plaintiff, Debra K. King, is a black female who filed a Complaint (doc. 1) against her former employer, the Alabama Department of Public Health ("ADPH"), in this District Court on August 5, 2009. The straightforward Complaint alleged causes of action against ADPH for race discrimination and retaliation, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The gravamen of the Complaint is King's contention that ADPH engaged in "file papering" activities to fabricate disciplinary infractions against her and singled her out for adverse treatment after she accused her supervisors of plotting to eliminate all black employees from her workplace. According to the Complaint, ADPH relied on bogus violations to terminate King's employment because of her race and in retaliation for her protected activity.

II. Background Facts.^{FN2}

FN2. The Court is mindful of its obligation under Rule 56 to construe the record, including all evidence and factual inferences, in the light most favorable to the nonmoving party. *See Skop v. City of*

Atlanta, GA, 485 F.3d 1130, 1136 (11th Cir.2007). Thus, plaintiff's evidence is taken as true and all justifiable inferences are drawn in her favor.

A. Plaintiff's Employment History at ADPH.

King is a Registered Nurse who began working for ADPH at the Conecuh County Health Department in 1992. (King Decl., at 1.)^{FN3} During all times relevant to this lawsuit, her job title was Nurse Coordinator. (*Id.* at 1–2.) In that capacity, King's duties included supervising the administration of clinic services, ensuring staff compliance with prescribed standards and state policies, and providing direct nursing care. (Doc. 54, ¶ 9.) The Conecuh clinic to which King was assigned was a small clinic, staffed at all relevant times by a full-time Nurse Coordinator (King), a Social Worker, a Nurse Practitioner who visited the clinic from time to time, and a pair of Administrative Support Assistants. (*Id.*, ¶ 8.) Until February 2008, King's employment at the Conecuh clinic was mostly uneventful, as she consistently received favorable performance evaluations and maintained a clean disciplinary record. (King Decl., at 4.)

FN3. Plaintiff's primary summary judgment exhibit is the 26-page Declaration of Plaintiff Debra King (doc. 53–1). Unfortunately, plaintiff neglected to number the paragraphs (or even the pages, for that matter) of her Declaration. This form of declaration needlessly complicates the Court's efforts to review and cite to that document. To make matters worse, plaintiff omitted pinpoint citations to that Declaration in her briefing, instead offering a generic assertion that, "[u]nless stated otherwise, all facts are from the declaration of King." (Doc. 53, at 3 n. 1.) It is improper for a litigant to shift to the Court the time-consuming burden of sifting through a lengthy, lawyer-drafted exhibit in search of a page, paragraph or

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

sentence that supports that litigant's position on each of myriad factual issues, yet that is precisely what plaintiff has done. The Court expects counsel to adhere to Local Rule 7.2(b) (requiring a party opposing a Rule 56 motion to "point out the disputed facts appropriately referenced to the supporting document or documents filed in the action") in future practice in this District Court. It is not the Court's responsibility to scour the record in search of evidence that supports a litigant's position; rather, it is the litigant's responsibility to apprise the Court of precisely where in the record such evidence might be located.

B. The March 28 Meeting and Plaintiff's Race Discrimination Complaint.

Our story begins in earnest on March 28, 2008, when Debbie Thomasson (King's immediate supervisor) and Ricky Elliott (King's reviewing supervisor) conducted a meeting with King concerning Conecuh clinic operations. (Thomasson Aff., ¶ 6.) King admits that, at that meeting, she was told that she was "in charge" of the clinic and that "some changes needed to be made because it was not being ran [*sic*] as it should." (Defendant's Exh. 13, at 1.) ^{FN4} Among the numerous operational and performance issues that Thomasson and Elliott addressed with King at that meeting were the following: (i) the need for King to make sure the reception area was kept organized; (ii) a complaint that King had refused to see patients after they arrived (albeit late) for appointments that had previously been rescheduled three times, even though she was in the building; (iii) issues concerning King's attendance and multiple reports that she was not at work during normal business hours; (iv) at least two other patient complaints involving specific acts and omissions by King; (v) the front door being locked and no employees being present on certain mornings during scheduled business hours; (vi) the supervisors' assessment that "for the past year things have not been going well"

at the clinic and that King's "evaluations would reflect [her] responsibilities in Clinic" going forward; and (vii) interpersonal issues and disagreements between King and other employees. (*Id.* at 1–3.) From the breadth and scope of the issues raised, it was evident that ADPH viewed King as being on shaky ground as of March 28, notwithstanding her history of favorable performance evaluations.

FN4. This exhibit is a lengthy (and alternately defensive and combative) e-mail message authored by King, dated March 31, 2008, and transmitted to various ADPH supervisors, including both Thomasson and Elliott. The exhibit purports to be, in the words of plaintiff's counsel, an "e-mail confirming what had occurred during the meeting of March 28." (Doc. 54, at 20.) As such, this e-mail reflects the events of that meeting in the light most favorable to King because it is her own version of what transpired. The Court will not credit King's subsequent declaration or briefing to the extent they conflict with, disregard, or attempt to rewrite her March 31 summary of that meeting in a manner more favorable to King's present litigation status. A plaintiff cannot toggle back and forth between multiple inconsistent stories of her own creation to evade summary judgment by stitching together a hybrid version that picks and chooses the details from her own various narratives that are most advantageous to her. *See generally Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir.2005) ("when conflicts arise between the facts evidenced by the parties, we credit the nonmoving party's *version*. Our duty to read the record in the nonmovant's favor stops short of not crediting the nonmovant's testimony in whole or part: the courts owe a nonmovant no duty to disbelieve his sworn testimony which he

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

chooses to submit for use in the case to be decided.”). The March 31 e-mail reflects King’s account—in her own words—of the March 28 meeting; therefore, she must live with it on summary judgment.

*2 On March 31, 2008, three days after the meeting, King sent an e-mail message to Thomasson, Elliott, and Ruth Underwood (highest ranking administrator for the Conecuh County Health Department) concerning the March 28 meeting. At the conclusion of that e-mail, King pointedly accused her ADPH supervisors of race discrimination. She indicated that she had heard complaints that “those White folks are going to get rid of you all” and “were going to pick yall [*sic*] off.” (*Id.* at 4.) King further wrote: “I know what is going on here. You do plan to harrass [*sic*] us out of here one by one. It was ok for us to work in the decrepit building down the hill but, we Black folks don’t need to be in this new building[.] ... A copy of this letter and other letters from Black workers in Area 7 and 9 will be forwarded to the EEOC for review.” (*Id.*)^{FN5} King’s missive referenced no specific facts or circumstances to buttress her accusation that ADPH officials were eliminating all black employees from the Conecuh clinic.

FN5. The reference to the “new building” alludes to the relocation of the Conecuh County Health Department to a newly completed structure in December 2007. (Doc. 54, at 10.)

Upon receipt of King’s e-mail, Thomasson called her immediately. (Thomasson Dep., at 58–59.) Thomasson admits that she was “upset,” (*Id.* at 55–56.)^{FN6} At that time, Thomasson asked King if she really felt that way. When King answered affirmatively, Thomasson responded, “okay, if that’s the way you feel about it.” (King Decl., at 15.) During that same conversation, Thomasson notified King of her right to file a grievance with ADPH on the matter. (Thomasson Dep., at 59–60.)^{FN7} Underwood also contacted King shortly after receiving the March 31 e-mail,

and made arrangements to meet with her to discuss it; however, because of various conflicts, they were unable to schedule such a meeting until more than a month later, on May 8, 2008. (Underwood Aff., ¶ 18; King Decl., at 15.) As discussed below, the May 8 meeting occurred as planned, but its agenda was altered considerably by certain intervening developments.

FN6. This emotional reaction is hardly surprising, given that Thomasson construed King’s e-mail as accusing her of being a racist. Of course, the mere fact that Thomasson was not pleased by King’s inflammatory accusations does not necessarily imply that Thomasson retaliated against her for articulating those concerns.

FN7. When plaintiff’s counsel asked her why she had done that, Thomasson explained that “as a supervisor, my job is to apprise the employee of their rights if they have a grievance.” (*Id.* at 60.)

C. Performance Issues in April and May 2008.

In the wake of the March 28 meeting, ADPH officials identified a series of additional performance-related issues with the Conecuh clinic generally, and with King specifically.^{FN8} The three most significant concerns that arose were (a) information that King had falsified clinic records; (b) information that King had allowed the clinic’s drug inventory control book to go missing, failed to report its absence, and obtained assistance from a housekeeper or janitor to reconstruct it; and (c) other information that King had engaged in dishonest or otherwise improper conduct in performing her Nurse Coordinator duties. There is record evidence as to each of these issues.

FN8. Plaintiff suggests that ADPH engaged in a pretextual fishing expedition after the March 31 e-mail to identify shortcomings with her performance. In support of this claim, King states in her

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

declaration that, when she was on sick leave, somebody called somebody else and said that Underwood and Thomasson “were at the clinic pulling records and being very ‘hush hush’ about it,” after which the second person called King to relay that information. (King Decl., at 15.) Defendant has properly objected to this evidence as hearsay on top of hearsay. (Doc. 56, at 3.) “The general rule in this Circuit is that parties’ exhibits may be considered for purposes of pretrial rulings so long as they can be reduced to admissible form at trial.” *Longcrier v. HL-A Co.*, 595 F.Supp.2d 1218, 1223 (S.D.Ala.2008) (citations omitted). But King has made no showing that her double-hearsay testimony about what someone told her that someone else had said about Underwood and Thomasson’s activities could be reduced to admissible form at trial; therefore, this evidence will not be considered on summary judgment. Defendants’ Motions to Strike (docs.55, 56) are **granted** insofar as they seek exclusion of these materials from the record.

1. Falsification of WIC Records.

Among the programs that ADPH administers is the federal Women, Infants, Children Supplemental Food Program (the “WIC Program”). (Underwood Aff., ¶¶ 8–9.) The WIC Program provides supplemental foods and other benefits to eligible participants (pregnant and postpartum women, infants and young children), subject to a requirement that participants must receive nutrition education. (*Id.*, ¶ 9.) This nutrition education is provided in two phases, the first being when the participant is accepted into the program and the second (so-called secondary nutrition education (“SNE”)) in follow-up visits. (*Id.*) At the Conecuh clinic, King was the WIC Coordinator and was the only employee authorized to conduct SNE. (Doc. 54, ¶ 32.)

*3 On April 22, 2008, Nancy Johnson (the ADPH’s Area Nutrition Director with oversight responsibility for the Conecuh clinic) visited the Conecuh clinic to perform duties concerning the WIC Program. (Johnson Aff., ¶ 3.) At that time, Johnson noticed clinic records stating that on April 16, 2008 King had completed 12 SNE individual visits, as well as an SNE class with 10 participants. These records concerned Johnson for two reasons. (*Id.*) First, Johnson knew for a fact that King had been out of the office on April 16, because King had attended a WIC Coordinators’ meeting in Monroeville, Alabama with Johnson that day. (*Id.*, ¶ 2.) Second, all 10 names of the SNE class participants were also included in the 12 names of people for whom King had purportedly completed individual visits on the same day. (*Id.*, ¶ 3.) So the Conecuh clinic’s official records showed that King had provided duplicate SNE services for the same ten people twice on April 16, a day on which she had not even been present at the clinic. Johnson became alarmed that such conduct amounted to duplication of services, falsification of records, and violation of federal WIC Program guidelines that ADPH was bound to follow as a condition of its participation. (*Id.*)

Johnson promptly questioned King about these discrepancies. (*Id.*, ¶ 4; King Decl., at 16–17.) Plaintiff’s evidence is that, in response, King admitted that she had been in Monroeville on the day these SNE individual visits and class meeting purportedly occurred, and explained that she had just had clerks give the participants pamphlets for SNE credit. (King Decl., at 16–17.)^{FN9} King further informed Johnson that all she (King) had to do was sign and backdate the WIC “green cards” (index cards for each participant tracking appointments, food vouchers, and SNE participation) for that day, which she had not yet done. (*Id.* at 17.) When Johnson indicated that this was improper, King was unrepentant, replying that “it had been done this way for years and that Johnson knew it.” (*Id.*) According to King, she had been completing WIC green cards for

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
 (Cite as: 2010 WL 3522381 (S.D.Ala.))

approximately the last four years to certify that she had conducted SNE contacts that had never actually happened, even though “[n]obody had told [her] it was okay to proceed in that fashion.” (King Dep., at 85–86; Johnson Aff., ¶ 8.)^{FN9} In fact, King admits that Johnson told her in April 2008 that King’s practice concerning WIC green cards and SNE certification was “fraud.” (King Dep., at 101.)

FN9. It is undisputed that applicable written policy provides that “[t]he use of publications ... without the other elements of nutrition education is not considered to be effective and will not be counted as a nutrition education contact.” (Thames Peoples Dep., at 11; King Dep., at 97 & Exh. 21, at 2.) Thus, ADPH workers could not simply hand WIC participants a pamphlet and record that contact as an SNE. Yet that is precisely what King did.

FN10. Plaintiff offers no evidence that double-counting the act of handing a pamphlet to a WIC participant as both an SNE class and an individual SNE visit was ever an acceptable ADPH practice. However, to justify her practice of handing out literature in lieu of a required face-to-face or computer-based SNE session, King submits testimony of Idell Thames Peoples, a former employee at ADPH’s office in Atmore, Alabama, that Johnson had told her “years ago” to hand out pamphlets as an SNE when the nutritionist is not present. (Peoples Dep., at 7.) This evidence is properly submitted and considered on summary judgment.

King also states in her declaration that a person named Yolanda Gantt told King something similar about practices in the ADPH’s Brewton office. (King Decl., at 17–18.) Defendant objects to King’s hearsay statements about what Gantt may have told her. (Doc. 55, at 8.) The Court agrees that plaintiff has not shown

that this evidence may be reduced to admissible form at trial, particularly given that the plaintiff-submitted affidavit from Gantt (doc. 54–2) omits the SNE testimony that King’s declaration attributes to her. The Court therefore will not consider the portion of pages 17 and 18 of King’s declaration purporting to recite hearsay statements of Gantt that plaintiff has not shown can be reduced to admissible form at trial. The same goes for King’s unvarnished speculation about what she thinks Johnson knew about SNE practices at the Conecuh clinic and elsewhere, to which defendant has objected, where King’s declaration identifies no viable evidentiary foundation for such conjecture. Defendants’ Motions to Strike (docs.55, 56) are **granted** as to these items.

The day after Johnson’s inquiry, however, King went back into ADPH’s computer system and altered the SNE records for April 16 to delete the double-counting of SNE individual and class sessions for 9 of the 10 participants listed for the April 16 class that had never happened, and to change the records for the April 16 appointments that had never happened to “pickup” instead. (Johnson Aff., ¶ 5 & att. 2.) In other words, despite her insistence that she had done nothing wrong, the next day after Johnson confronted her, King took affirmative steps to erase the discrepancies in ADPH records of SNE sessions on April 16.

*4 Johnson sent a follow-up e-mail to King on April 24 seeking further investigation and clarification about the April 16 SNEs and how this policy violation could have happened and whether it had occurred on other occasions; however, King never responded. (Johnson Aff., ¶ 5 & att. 1.) On that basis, and given that King had covered her tracks in the computer on April 23, Johnson conducted further investigation as to whether there

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

was a pattern of documenting SNEs for WIC participants when King was not present at the clinic. (Johnson Aff., ¶ 6.) Johnson discovered that during the week of January 7–11, 2008, when King was attending a team academy in Montgomery, there were 24 documented SNE encounters at the Conecuh clinic, with all such SNEs having been initialed and dated by King on the participants' respective green cards, even though King was not there and could not possibly have administered such education. (*Id.*, ¶ 7 & att. 3.) Johnson documented her findings and submitted them to Underwood via written memo dated April 25, 2008. (*Id.*)

2. The Drug Inventory Control Book.

The Conecuh clinic maintains a Drug Inventory Control Book to track the stock of prescription drugs on hand and connect those inventories to the patients to whom they are prescribed. (Thomasson Dep., at 108.)^{FN11} Simply put, “the drug book is the record.... It is the record of your stock. It has your tracing information for all the drugs that we receive.... The major concept is that it should never be away.” (*Id.* at 111.)^{FN12} Thomasson views the “continuity and the accountability of maintaining that stock ... [as] a huge role of what a nurse coordinator does.” (*Id.* at 108.) To Thomasson, “the coordinator has the all time accountability, always for the drug book.” (*Id.* at 94.) For her part, King admits that she was responsible for maintaining possession of the drug inventory control book at the Conecuh clinic. (King Dep., at 107.) The drug book “is missing if it's not with the drugs ... [a]nd whoever has it needs to get it back to the drugs.” (Thomasson Dep., at 109.) Without the drug book, it is impossible to ascertain whether any drugs in the clinic's stock are missing. (*Id.* at 112.) If for any reason the drug book were to be misplaced, a nurse who discovered its absence was expected to report that fact, recreate the drug inventory on the proper form, and complete an incident report. (*Id.*)

FN11. King concedes that the drug book “is used primarily to keep track of various

drugs we dispense to clients of the clinic, such as antibiotics, tuberculosis meds, STD meds, and birth control meds.” (King Decl., at 5–6.) However, she insinuates that the drug book is no big deal because it “has no value to anyone outside the clinic” and because the clinic does not dispense “any kind of controlled substances typically sold illegally on the streets.” (*Id.* at 6.) King also reasons that “[i]t would not have done me any good to have the Drug inventory book and no meds.” (*Id.* at 20–21.) These rationalizations are undercut to a large extent by King's admissions that “this book is to be kept in a secure place” and “[i]t's common practice that you should know where the book is, yes.” (King Dep., at 115–16.)

FN12. John Hankins, the State Nursing Director, explains the utility of the book in the following terms: “An accurate Drug Inventory Control Book ensures that the nurse is aware of the amount of medication in the health department at all times and is able to ensure that diversion or theft does not occur.” (Hankins Aff., ¶ 9.) Hankins further states that in order to comply with applicable federal guidelines, “Medications must be accounted for as they enter the system and are dispensed to the patient.... The importance of nursing protocol and the inventory procedures related to medication are elevated due to the level of independence under which public health nurses operate.” (*Id.*) If these records are not properly maintained by ADPH clinics, the consequences could be an adverse audit and potential loss of funding for federal programs in which those clinics participate. (Thrash Aff., ¶ 7.)

On May 13, 2008, Thomasson went to the Conecuh clinic for the specific purpose of evaluating another employee (not King). While she

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

was there, Thomasson went to the drug room to get a medication for a patient, but was unable to sign that medication out of the Drug Inventory Control Book because the book was not there. (Thomasson Aff., ¶ 8.) Thomasson immediately confronted King about the whereabouts of the book. King responded that she knew the book had been missing for about three weeks,^{FN13} and that King had simply assumed that Thomasson or some other ADPH official had taken the book. (King Decl., at 5, 20; Thomasson Dep., at 108.)^{FN14} King never reported the book as missing. (King Dep., at 131.) In Thomasson's view, King's knowledge of the book's absence for a period of weeks, and her failure to report that fact to anyone, constituted "a major breach of practice" and "a major wrongdoing for a nurse." (Thomasson Dep., at 108.) In her deposition, Thomasson steadfastly rejected plaintiff's counsel's premise that it was okay for King not to report that the drug book was missing because King assumed her supervisors had it. On that point, Thomasson stressed, "She should have reported it to me." (*Id.* at 109.) Moreover, Thomasson's testimony was unequivocal that King's oversights in this regard amounted to "major nursing infractions." (*Id.* at 112.)

FN13. Actually, it appears that King knew the book was missing for longer than that. In her deposition, King testified that the last time she saw the drug inventory book was in March 2008, and that she believes the book may have been taken then. (King Dep., at 110–12.) Thus, by King's own testimony, she had known the book was missing for as long as two months before Thomasson brought the matter to her attention.

FN14. There is no evidence that King took any action to investigate or confirm her assumption about the whereabouts of the book, or that she had any factual basis for believing that her supervisors had removed it from the premises for a prolonged period

of time without telling King, the person charged with maintaining that book on site.

*5 To this day, the missing drug book has never been found, despite ADPH officials having performed an extensive search of the building. (Thomasson Dep., at 105.) Moreover, ADPH officials concluded that King compounded her error in not reporting the book's absence by not properly creating a new inventory list. Rather than printing off the readily available correct form^{FN15} and recording drug quantities, dates, expirations and other information needed for an official ADPH drug inventory, King presented Thomasson with an undated handwritten document that Thomasson characterized as a "scribbled list, like you might make to go to the grocery store," and deemed "totally inadequate." (*Id.* at 113–14.)^{FN16} By King's own admission, when she discovered that the inventory book was missing, she enlisted the aid of the clinic's "housekeeper" to help King with the inventory by writing down drug names as King called them out. (King Dep., at 119–20.) Again, King did all of this without consulting her supervisors, notifying them that the drug book was missing, or inquiring of them as to the proper steps for recreating a drug inventory. In Thomasson's view, these omissions constituted "major nursing infractions," so much so that Thomasson no longer entrusted King with drug responsibilities after that time. (Thomasson Dep., at 112–13.) Thomasson reported these developments to Underwood. (Thomasson Aff., ¶ 8.)

FN15. ADPH utilizes a form entitled the "ADPH Medication Requisition/Inventory Form" recording detailed information for each drug on hand. (Thrash Aff., at att. 2.) The Drug Inventory Control Book is nothing more than a collection of these forms. (*Id.*, ¶ 2.) By simply printing out and completing these forms, King could have substantially recreated the missing drug book and mitigated the harm caused by its disappearance. Yet she failed to do

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
 (Cite as: 2010 WL 3522381 (S.D.Ala.))

so.

FN16. This new drug record consisted of four pages of scrawled handwritten listings of drugs, with quantity notations of varying degrees of helpfulness, all under the heading "Pharmacist List." (King Dep., at Exh. 22.) The list lacked information regarding drug concentrations and expiration dates, any indication as to the date the list was prepared, and notations about what drugs were signed out, when, and by whom. King misleadingly states that her new list gave "the lot numbers and other information that would have been noted on the DI sheets" (King Decl., at 22); however, a side-by-side comparison of the proper forms and King's recreated "Pharmacist List" reveals that King's document contained only a small fraction of the information that belonged on the inventory forms (and, for that matter, did not even contain lot numbers for many items). On summary judgment, King insists that she "was going to transfer the information to the drug inventory sheets and start a new book" (King Decl., at 22), but the fact is that she never did. (Besides, her suggestion that she intended to go through the effort of recreating detailed records contained in a drug book that she "assumed" her supervisors were reviewing, without ever inquiring of those supervisors as to the veracity of her assumption, borders on the nonsensical. Why would King do that much work in a resource-strapped health clinic to recreate records that she "assumed" her supervisors were reviewing, without first checking to see if they had those records and, if so, whether and when they might return them?) Thus, King allowed the Conecuh clinic to operate for a period of weeks with a missing drug book, without preparing proper inventory records for a new drug book (even though

she knew this step needed to be taken), and without breathing a word of these troublesome matters to her supervisors.

3. Other Improper Conduct.

Although the WIC records and drug book problems were ADPH's paramount concerns, other facts contributed to defendant's decision to take serious personnel action against King.

For example, ADPH officials believed that King was dishonest to them at a meeting held on May 8, 2010. At that time, Underwood confronted King about a situation on March 18, when King had failed to meet with young patients who had appeared for an immunization appointment that had previously been rescheduled three times. King said that she had been unable to see the children that day because she was teaching a breast feeding class at the Extension Office. Upon being pressed by Underwood, however, King admitted that there had in fact been no breast feeding class scheduled on March 18 at the Extension Office. (Underwood Aff., ¶ 24.)

Furthermore, after the Drug Inventory Control Book issue came to light, Thomasson and Underwood requested that the State Nursing Director, John Hankins, conduct an audit of the Conecuh clinic's operations. (Thomasson Aff., ¶ 9; Underwood Aff., ¶ 27; Hankins Aff., ¶ 5; Thomasson Dep., at 107.)^{FN17} Hankins (who often audits ADPH clinics) performed an audit in late May 2008 by pulling a small, random sample of medical records of patients who had visited the clinic during the previous six months. (Hankins Aff., ¶¶ 6-7.) During the course of that audit, Hankins identified "numerous concerns as it relates to proper nursing practice in the medical records," including organizational problems, documentation problems, lack of referrals to nurse practitioners or physicians when protocol required them, and so on. (*Id.*, ¶ 7.) Hankins discovered "a large number of errors" with King's work, and also found that she was practicing medicine without a license by dispensing contraceptives to patients whose

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

physical exams she was deferring. (*Id.*, ¶ 8.) For her part, King does not dispute most of these errors; however, she attributes Hankins' audit to a "mere fishing expedition looking for justification for termination" and indicates that none of the mistakes Hankins found "had caused any injury, damage or harm," such that they amounted to "nitpicking" and "piling on" by ADPH. (King Decl., at 22–25.) Thus, King espouses a "no harm, no foul" philosophy as to her nursing errors. ADPH did not share that view.

FN17. Thomasson testified that the missing drug book issue was the "compelling thing" and the motivating force for her request that an audit of the Conecuh clinic be performed. (Thomasson Dep., at 108.) Recall that in ADPH's view, King had lied, falsified records and used poor judgment, and that King was supposed to be running the clinic. Based on these revelations, ADPH's confidence and trust in the performance of King and the Conecuh clinic had been shaken to the point where defendant believed that further investigation was necessary.

D. Termination of Plaintiff's Employment.

*6 In approximately mid-May 2008, Thomasson made a recommendation to the ADPH that King's employment be terminated. (Thomasson Dep., at 83.) Thomasson's reason for making that recommendation was her assessment that King had engaged in "major breaches in practice," including the drug book issues, the fraudulent WIC documentation, and issues of concern in patients' medical records about treatment. (*Id.* at 86.)^{FN18} This recommendation was echoed by Elliott and Underwood.

FN18. Plaintiff presents allegations by King that Thomasson "was the one who wanted me gone and Underwood and Elliott went along with it by bringing in Hankens [*sic*] and his team to review all of my files until they felt that they had

enough to justify the termination.... If Thomasson could have had it her way, she would have fired me the same day she read my e-mail complaint." (King Decl., at 26.) Similarly, King hypothesizes that when she was placed on administrative leave on May 19, "[t]he purpose of the leave was to remove me from the clinic while about five or six nurse educators and supervisors comb through my files looking for evidence of mistakes so as to justify the termination recommendation." (*Id.* at 13.) As plaintiff's counsel well knows, this kind of self-serving speculation about the mental processes of other persons is untethered to any record facts, is obviously improper for a summary judgment declaration, and is devoid of any evidentiary value. Accordingly, defendants' Motion to Strike (doc. 55) is **granted** as to these portions of the King Declaration.

ADPH placed King on mandatory administrative leave effective May 19, 2008. (Underwood Aff., ¶ 29; King Decl., at 26.) The stated purpose of this leave was "to finalize the investigation and give the employee her pre-termination conference." (Defendant's Exh. 26.) The leave period was extended on June 13, 2008, to allow for completion of the audit "that identified serious patient care issues" and to obtain "further information to ensure the correct decision is made." (*Id.*)

On June 19, 2008, the ADPH notified King in writing that her employment was being terminated, effective immediately, based on (a) the recommendation of Thomasson, Elliott, and Underwood, (b) the results of a pre-termination conference which yielded a recommendation that King's termination be upheld, and (c) the state health officer's acceptance of that recommendation. (Defendant's Exh. 3.)

III. Summary Judgment Standard.

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

Summary judgment should be granted only if “there is no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law.” Rule 56(c), Fed.R.Civ.P. The party seeking summary judgment bears “the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial.” *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991). Once the moving party has satisfied its responsibility, the burden shifts to the nonmovant to show the existence of a genuine issue of material fact. *Id.* “If the nonmoving party fails to make ‘a sufficient showing on an essential element of her case with respect to which she has the burden of proof,’ the moving party is entitled to summary judgment.” *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)) (footnote omitted). “In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determinations of the truth of the matter. Instead, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994, 999 (11th Cir.1992) (internal citations and quotations omitted). “Summary judgment is justified only for those cases devoid of any need for factual determinations.” *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013, 1016 (11th Cir.1987) (citation omitted).

The Eleventh Circuit has expressly rejected the notion that summary judgment should seldom be used in employment discrimination cases because they involve issues of motivation and intent. *See Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079 (11th Cir.2004). Rather, “the summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on either side of the scale.” *Id.* at 1086 (citation omitted).

IV. Analysis.

A. *McDonnell Douglas Framework.*

*7 The parties' respective summary judgment arguments on King's discrimination and retaliation claims are properly evaluated under the time-honored *McDonnell Douglas* standard. Absent direct evidence of discrimination or retaliation (which has not been presented here), King must make a showing of circumstantial evidence that satisfies the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this familiar burden-shifting analysis, plaintiff is required to make out a *prima facie* case of race discrimination and/or retaliation.^{FN19} If she does so, that showing “creates a rebuttable presumption that the employer acted illegally.” *Underwood v. Perry County Com'n*, 431 F.3d 788, 794 (11th Cir.2005).

FN19. King's burden of establishing a *prima facie* case is not heavy. *See Crapp v. City of Miami Beach*, 242 F.3d 1017, 1020 (11th Cir.2001) (“the *prima facie* requirement is not an onerous one”).

At that point, “the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action.... If the employer does this, the burden shifts back to the plaintiff to show that the employer's stated reason was a pretext for discrimination.” *Crawford v. Carroll*, 529 F.3d 961, 976 (11th Cir.2008) (citations and internal quotation marks omitted); *see also Holifield v. Reno*, 115 F.3d 1555, 1566 (11th Cir.1997) (outlining similar procedure for Title VII retaliation claims). A plaintiff may establish pretext “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.” *Brooks v. County Com'n of Jefferson County, Ala.*, 446 F.3d 1160, 1163 (11th Cir.2006) (quotation omitted). Either way, “[i]f the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it.... Quarreling with

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

that reason is not sufficient.” *Wilson*, 376 F.3d at 1088; *see also Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1278 (11th Cir.2008) (“It is the plaintiff’s burden not merely to raise a suspicion regarding an improper motive, but rather to demonstrate there is a genuine issue of material fact that the employer’s proffered reason ... was pretextual.”). “The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Springer v. Convergys Customer Management Group Inc.*, 509 F.3d 1344, 1347 (11th Cir.2007). Thus, “[i]f the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer’s articulated reasons is pretextual, the employer is entitled to summary judgment.” *Chapman v. AI Transport*, 229 F.3d 1012, 1024–25 (11th Cir.2000) (*en banc*).

B. Retaliation Cause of Action.^{FN20}

FN20. The Complaint asserts Title VII causes of action for both race discrimination and retaliation; however, the focal point of the parties’ briefing (and the only claim as to which King has opposed entry of summary judgment) is the retaliation count. For that reason, the Court’s analysis will begin with that claim.

In her Title VII retaliation claim, King alleges that ADPH’s actions in terminating her employment after she complained of race discrimination in the workplace violate the anti-retaliation provisions of Title VII. That statute renders it unlawful for an employer “to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter.” 42 U.S.C. § 2000e–3(a).

1. Prima Facie Case and Legitimate Nonretaliatory Reason.

*8 To establish a *prima facie* case of retaliation under Title VII, King must show that “(1) [s]he engaged in a statutorily protected activity; (2)[s]he

suffered an adverse employment action; and (3)[s]he established a causal link between the protected activity and the adverse action.” *Bryant v. Jones*, 575 F.3d 1281, 1307–08 (11th Cir.2009); *see also Butler v. Alabama Dep’t of Transp.*, 536 F.3d 1209, 1212–13 (11th Cir.2008) (“To establish a claim of retaliation under Title VII or section 1981, a plaintiff must prove that he engaged in statutorily protected activity, he suffered a materially adverse action, and there was some causal relation between the two events.”) (citation omitted). In its principal brief, ADPH eschews any contention that King cannot make a *prima facie* showing. That decision was prudent, inasmuch as the record plainly establishes that each of these elements is satisfied.

FN21

FN21. As to the first prong, it is well settled that a good-faith (even if not meritorious) internal complaint of race discrimination of the sort articulated by King constitutes protected activity under Title VII. *See, e.g., Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1268 (11th Cir.2010) (deeming plaintiff’s letter to company official complaining of discrimination based on Cuban origin to be statutorily protected activity); *DeLeon v. ST Mobile Aerospace Engineering, Inc.*, 684 F.Supp.2d 1301, 1324 (S.D.Ala.2010) (“Statutorily protected expression includes complaining to superiors about harassment in the work place, lodging complaints with the EEOC and participating in discrimination-based lawsuits.”). As to the second, the termination of King’s employment is obviously a materially adverse action. *See generally Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 978 n. 52 (11th Cir.2008) (to qualify as adverse action for Title VII retaliation purposes, “[t]he challenged action must be materially adverse from the standpoint of a reasonable employee”); *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 587 (11th

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

Cir.2000) (in Title VII retaliation context, adverse employment actions include ultimate employment decisions such as discharge or failure to hire). And temporal proximity of roughly six weeks between King's protected activity and her forced administrative leave (which culminated in termination of her employment) is sufficiently close in time to satisfy the "causal link" requirement. *See, e.g., McCann v. Tillman*, 526 F.3d 1370, 1376 (11th Cir.2008) ("close temporal proximity may be sufficient to show that the protected activity and the adverse action were not wholly unrelated"); *Burroughs v. Smurfit Stone Container Corp.*, 506 F.Supp.2d 1002, 1018 (S.D.Ala.2007) (causation element satisfied where plaintiff was terminated approximately six weeks after protected activity, and supervisor was aware of that protected activity upon recommending the adverse action). Based on the foregoing principles, and ADPH's failure to contest plaintiff's ability to establish a *prima facie* case of retaliation, the Court agrees that King has made a *prima facie* showing, and will move on to the next step in the *McDonnell Douglas* analysis.

Moreover, there can be no dispute that ADPH has met its modest burden "to rebut the resulting presumption of discrimination by producing evidence that it acted for a legitimate, nondiscriminatory reason." *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1265 (11th Cir.2010); *see also Vessels v. Atlanta Independent School System*, 408 F.3d 763, 769–70 (11th Cir.2005) (employer's burden of production is "exceedingly light" and requires only that employer articulate "a clear and reasonably specific non-discriminatory basis for its actions") (citation omitted). After all, ADPH's evidence is that it terminated King because of an array of performance issues that undermined its confidence

in her judgment, her ability to run the clinic, and her dealings with patients.

2. Pretext.

In light of the foregoing, ADPH's Motion for Summary Judgment as to the retaliation cause of action rises or falls with the pretext analysis. Defendant recognizes as much, arguing that "King's retaliation claim fails for lack of substantial evidence of pretext." (Doc. 44, at 42.) Simply put, it is incumbent on King to show that ADPH's stated reasons for her discharge are a pretext for retaliation. *See Brown v. Alabama Dep't of Transp.*, 597 F.3d 1160, 1174 (11th Cir.2010) (once employer articulates reason, "the presumption of discrimination is rebutted, and the burden of production shifts to the plaintiff to offer evidence that the alleged reason ... is a pretext for illegal discrimination") (citation omitted). To demonstrate pretext, the plaintiff's evidence "must reveal such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." *Vessels*, 408 F.3d at 771 (quotation omitted).^{FN22} Significantly, King does not satisfy her burden unless she "proffer [s] sufficient evidence to create a genuine issue of material fact regarding whether *each of the defendant employer's articulated reasons* is pretextual." *Chapman*, 229 F.3d at 1024–25 (emphasis added).

^{FN23}

^{FN22}. *See also Rioux*, 520 F.3d at 1278 ("The plaintiff must demonstrate weaknesses or implausibilities in the employer's proffered legitimate reasons for its action sufficient for a reasonable factfinder to disbelieve the reasons."); *Jackson v. State of Alabama State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir.2005) (to demonstrate pretext, a plaintiff must show that the employer's offered reason was not the true reason for its decision, "either directly by persuading

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence”).

FN23. In this Circuit, there is a “well-established rule that a plaintiff must show pretext as to each proffered reason.” *Chapman*, 229 F.3d at 1037 n. 30; *see also Crawford v. City of Fairburn, Ga.*, 482 F.3d 1305, 1309 (11th Cir.2007) (“By failing to rebut each of the legitimate, nondiscriminatory reasons of the City, Crawford has failed to raise a genuine issue of material fact about whether those reasons were pretext for discrimination.”); *Bojd v. Golder Associates, Inc.*, 2006 WL 3780645, *1 (11th Cir. Dec.26, 2006) (“Where multiple reasons are advanced, the plaintiff must show that each reason was a pretext.”).

*9 As described in detail *supra*, defendant's evidence is that it terminated King's employment because of her falsification of WIC Program records, her acts and omissions with respect to the missing drug book, and other performance and patient care issues. Plaintiff's efforts to demonstrate pretext fall short in each of these areas.

With respect to the WIC Program, ADPH's evidence is that it fired King for falsifying SNE documentation. This falsification had at least three components, to-wit: (a) King certified that she had provided SNE to program participants on occasions when she had not even been on-site, such that participants had simply been handed pamphlets for SNE credit, in contravention of written ADPH policies; (b) King recorded (or caused to be recorded) the same people as receiving SNEs multiple times on the same day, effectively double-counting them by listing them as both individual visits and classes; and (c) when confronted about these discrepancies, King surreptitiously altered ADPH records after the fact to delete most of those individuals from the class. Plaintiff contends that

this proffered justification is pretextual because ADPH singled out King for punishment when “the same rules applied to all staff” and plaintiff's evidence was that Johnson (the Area Nutrition Director) had informed staff at another clinic (albeit not the Conecuh clinic) that it was okay to hand out pamphlets and count that activity as an SNE. (Doc. 53, at 10–11.)

Plaintiff's pretext argument is unavailing. As a threshold matter, it is uncontroverted that Johnson discovered the WIC problems at the Conecuh clinic and reported them to ADPH as violations of policy. Inherent in King's pretext argument is the notion that Johnson herself must have been retaliating against King by reporting her violations to ADPH officials (whereas she was not reporting other clinics or other people for similar transgressions). But the record is devoid of evidence that Johnson was aware of King's protected activity. It goes without saying that Johnson could not have been retaliating against King for engaging in protected activity that Johnson never knew had occurred. *See generally Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1278 (11th Cir.2008) (to prevail on retaliation claim, “the plaintiff must generally show that the decision maker was aware of the protected conduct at the time of the adverse employment action.”) (citations omitted). Furthermore, even accepting as true plaintiff's evidence that staff at a different ADPH clinic had been told years ago that it was acceptable to record SNE credit where only a pamphlet was handed out, that statement does not exonerate King because (i) her testimony was clear that no one had ever told her it was acceptable to proceed in that fashion, (ii) ADPH's written policies were to the contrary, and (iii) such evidence would in no way explain or excuse King's acts of double-counting SNE credit for the same participants on the same day by listing them as both individual visits and classes, of altering clinic computer records after she was questioned about it, or of ignoring Johnson's follow-up inquiries. Nor has King ever disputed that she in fact did these things, or that as WIC Coordinator she (and not other staff)

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

was the employee responsible for administering the program properly at the Conecuh clinic.

*10 King's pretext argument hinges on the notion that ADPH's decision to terminate her for violating agency policy, misrepresenting SNE credits, double-counting attendees, altering records when a supervisor discovered the double-counting, and failing to follow up when ADPH sought to investigate further were pretextual because someone (not King) at another clinic (not the Conecuh clinic) had ostensibly been informed years earlier that it was okay to hand out literature in lieu of proper SNE training. This does not constitute the sort of implausibility or inconsistency that is required for King to sustain her burden of showing pretext. Simply put, King's argument glosses over several facets of the problem (*i.e.*, the double-counting, alteration of records, and failure to follow up) and there is absolutely no indication that the ADPH supervisor who spotted and reported King's WIC Program violations had any idea that she had engaged in protected activity.

With respect to the Drug Control Inventory Book, King does not dispute that (a) she was responsible for the book's custody and control at all times; (b) the book went missing; (c) King was aware that the book was missing, but failed to report it or to make any inquiries as to its whereabouts for a period of weeks; and (d) rather than preparing a proper recreation of the book using readily available log forms, King enlisted the aid of a janitor or housekeeper to scrawl the names and quantities of drugs on hand. Defendant presents evidence that it fired King because this course of conduct demonstrates lack of responsibility and poor judgment on her part as to a critically important clinic record. According to defendant's evidence, drug stock records must be properly kept because failure to track and account for pharmaceuticals could violate federal guidelines, trigger adverse audit findings, and jeopardize funding for federal programs in which ADPH participates.

In an effort to undercut this nonretaliatory justification for her dismissal, King suggests that it was not her fault that the book was lost, that the book was not important because the drugs stored at the clinic are not the sort of pharmaceuticals that are typically traded illegally, and that she was merely being resourceful and restoring order to the clinic by preparing the replacement list. This kind of quibbling and second-guessing is manifestly inadequate to constitute pretext. *See, e.g., Rioux*, 520 F.3d at 1278 (“It is the plaintiff's burden not merely to raise a suspicion regarding an improper motive, but rather to demonstrate there is a genuine issue of material fact that the employer's proffered reason ... was pretextual.”); *Wilson*, 376 F.3d at 1088 (“If the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it.... Quarreling with that reason is not sufficient.”). Whether King actually lost the book, whether she thought the book was important, or whether the drugs in question are commonly abused on the streets is beside the point. It is undisputed that the ADPH viewed the drug book as vitally important from both an internal protocol and external guidelines standpoint, that King bore sole responsibility for the safekeeping of the book at the Conecuh clinic, that King knew it was lost but did not tell anyone for at least several weeks thereafter, and that King went about replacing the missing tome in a manner that ADPH viewed as grossly inadequate. On this record, a reasonable factfinder could not conclude that defendant's drug book explanation for King's termination was unworthy of credence; therefore, plaintiff has failed to show pretext as to it.

*11 As to the other performance issues identified as a basis for her termination, it is undisputed that ADPH performed an audit of the Conecuh clinic in May 2008 in which “a large number of errors” were discovered with King's work, including multiple circumstances in which she was effectively practicing medicine without a license. King's pretext argument is apparently that

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

no clinic is perfect, that her nursing mistakes were fairly minor because they did not injure or kill any patient, and that there was no criticism of her nursing and administrative performance prior to the March 31 e-mail. In so arguing, however, King ignores her own correspondence wherein she admitted that ADPH officials had discussed a litany of performance and operational concerns with her on March 28, 2008, three days before she complained of discrimination. King admitted that at the March 28 meeting, her supervisors counseled her for lack of organization of the reception area, a complaint that King had refused to see patients for an immunization appointment a few days earlier, problems with King's attendance and whereabouts during normal business hours, at least two other specific patient complaints about King, the front door of the clinic being locked during business hours, and the supervisors' assessment that things had not been going well at the clinic for a year. Those issues were under investigation before King's protected activity ever happened. Because it is undisputed that ADPH presented all of these concerns to King before she engaged in protected activity, her pretext argument rests on a counterfactual premise that she enjoyed a spotless record with nary a critical word from ADPH prior to the March 31 e-mail. The fact of the matter is that ADPH officials raised serious concerns about King's performance before her protected activity, and the subsequent investigation and disciplinary action had a sturdy factual foundation in pre-March 31 events.^{FN24}

FN24. Of course, an employee cannot manipulate Title VII to shield herself from forthcoming adverse action by voicing a complaint of discrimination. *See Alvarez*, 610 F.3d at 1270 (“We emphasize that Title VII's anti-retaliation provisions do not allow employees who are already on thin ice to insulate themselves against termination or discipline by preemptively making a discrimination complaint.”).

Also, although King lambasts the May 2008 audit as a fishing expedition, defendant's evidence shows that King's course of conduct (*i.e.*, the poor performance of the Conecuh clinic, her attendance and organizational issues, her patient service issues, the WIC Program problems as to SNE requirements, the loss of the drug book and King's reaction to same, her perceived lying to ADPH officials about skipping a patient appointment to teach a breastfeeding class that never happened, etc.) had so badly eroded ADPH's confidence in her that her supervisors felt it necessary to expand their investigation. Despite casting aspersions on defendant's motivations and belittling the severity and significance of her transgressions, King has failed to come forward with evidence that might create a genuine issue of material fact as to whether ADPH's stated concerns about her performance as a Nurse Coordinator were a pretext for unlawful retaliation. For the most part, she does not deny that she engaged in that conduct, but instead quibbles with ADPH's assessment that it warranted dismissal. She identifies no comparators or written policies casting doubt on the veracity of ADPH's explanation, but instead second-guesses its business judgment. In the context of a *McDonnell Douglas* pretext analysis, that is not enough. *See Alvarez*, 610 F.3d at 1266 (“it is not our role to second-guess the wisdom of an employer's business decisions—indeed the wisdom of them is irrelevant—as long as those decisions were not made with a discriminatory motive”). Simply put, there is no reason to think that ADPH did not actually believe that King's performance was unacceptable and that her termination was warranted on that basis. *See id.* (“The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs, and to be blunt about it, not on reality as it exists outside of the decision maker's head.... The question is whether her employers were dissatisfied with her for these or other non-discriminatory reasons, even if mistakenly or unfairly so, or instead merely used those complaints ... as cover for discriminating against her....”).

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

*12 A pair of other pretext arguments by King warrant brief treatment here. ^{FN25} First, King suggests that an inference of pretext is raised by Thomasson's admission that she was "upset" by King's March 31 e-mail and called her immediately to confirm what King was alleging. This is far too slender a reed to support plaintiff's burden of establishing pretext. There is a vast inferential leap between evidence that Thomasson was "upset" that plaintiff had accused her of plotting methodically to eradicate all black personnel from the Conecuh clinic, on the one hand, and a conclusion that Thomasson retaliated against King for making that accusation, on the other. Plaintiff offers nothing other than her own speculation and innuendo to bridge that gaping chasm. ^{FN26} Second, King indicates that Dianna Tanton and Katina Findley are similarly situated ADPH nurses who were not disciplined or fired for their conduct. But the undisputed evidence shows that Tanton and Findley's errors were vastly different in character from King's, that they were separated temporally from King's performance problems by nearly a decade, and that they were not subject to the same decisionmaker as King.^{FN27} As such, ADPH's treatment of Tanton and Findley does not raise any inference of pretext here because they are not similarly situated to King in a meaningful way.

FN25. Defendant's principal brief addresses an anticipated argument by King that a post-discharge increase in staffing at the Conecuh clinic is evidence of pretext. However, review of King's summary judgment brief reveals that she has not advanced such an argument. (Doc. 53, at 10-15.) Plaintiff having invoked no staffing-related pretext argument, the Court will not *sua sponte* investigate it here. That said, any suggestion that ADPH's alleged increase in staffing at the Conecuh clinic following King's dismissal is probative of pretext would fail. There is no indication, and no reason to believe, that ADPH altered staffing levels at the

Conecuh clinic in any way following King's March 31 protected activity. Because staffing levels were identical at the clinic both before and after the protected activity, it is difficult to conceive of how post-termination changes in staffing (even if they occurred) could logically be deemed to demonstrate pretext. In any event, King has not advanced any such argument on summary judgment.

FN26. If a plaintiff could satisfy her *McDonnell Douglas* pretext burden merely by showing that the supervisor accused of unlawful discrimination was unhappy at being called a racist, sexist, or so on, then summary judgment motions in Title VII retaliation cases could never succeed. Human nature being what it is, it is difficult to envision any supervisor not being hurt or upset when a subordinate levels allegations of unlawful discrimination against her. What matters is not whether the alleged discriminator had an emotional response to the accusation, but whether there are genuine issues of fact as to whether that person acted on those emotions in a retaliatory manner. There is no evidence of the latter here.

FN27. Specifically, the record shows that Tanton and Findley were nurse coordinators who failed to follow up on abnormal lab results for multiple patients in 1999. (Underwood Second Supp. Aff., ¶¶ 2-3.) Both were reprimanded. (*Id.*) Neither was supervised by Thomasson. (*Id.*) And ADPH did not regard Tanton and Findley's errors as approaching the frequency, breadth, and severity of King's infractions, as documented *supra*. (*Id.*) As such, plaintiff's references to Tanton and Findley are ineffectual in bolstering her pretext argument.

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

In sum, viewing the record in the light most favorable to plaintiff, the Court finds that she has failed to meet her burden of showing genuine issues of fact as to whether ADPH's stated reasons for firing King were true, and whether retaliation as the real reason. King was in charge of day-to-day operations at the Conecuh clinic. The record unequivocally shows that ADPH confronted King for operational, administrative and performance failings at the clinic before her protected activity, and that King later falsified federal program records, failed to take proper action when a drug inventory control book entrusted to her went missing, misstated her whereabouts to her supervisors, and otherwise irreparably damaged their trust and confidence in her ability to serve as Nurse Coordinator for the Conecuh clinic. Plaintiff having failed to show pretext for any of these reasons (much less all of them), defendant is entitled to summary judgment on King's retaliation claim.

C. Race Discrimination Cause of Action.

As noted *supra*, the Complaint expressly alleges that ADPH "has engaged in unlawful racial discrimination in employment." (Doc. 1, at 4.) Defendant has also moved for summary judgment on the race discrimination claim on a variety of grounds. King's extensive briefing in response to that motion neither addresses those arguments nor even alludes to the presence of a race discrimination cause of action in this litigation. Plaintiff has been completely silent as to ADPH's request for summary judgment on the race discrimination claim.

ADPH asserts that King's omission of any discussion of her race discrimination claim on summary judgment constitutes abandonment. However, it is well-settled that summary judgment is not automatically granted by virtue of a nonmovant's silence. See *U.S. v. One Piece of Real Property Located at 5800 SW 74th Ave., Miami, Fla.*, 363 F.3d 1099, 1101 (11th Cir.2004) ("[T]he district court cannot base the entry of summary

judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion ... [and] ensure that the motion itself is supported by evidentiary materials."^{FN28} Nonetheless, a court is not obligated to read minds or to construct arguments or theories of relief that counsel have failed to raise and that are not reasonably presented on the face of the pleadings. See *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.1995) ("There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment."^{FN29} Clearly, "the onus is upon the parties to formulate arguments." *Id.* Accordingly, King's decision not to proffer argument, evidence or authority in response to the race discrimination component of the Motion is at her peril.

FN28. See also, *Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 246 (2nd Cir.2004) ("Although the failure to respond may allow the district court to accept the movant's factual assertions as true ..., the moving party must still establish that the undisputed facts entitle him to a judgment as a matter of law"); *Custer v. Pan American Life Ins. Co.*, 12 F.3d 410, 416 (4th Cir.1993) ("the court, in considering a motion for summary judgment, must review the motion, even if unopposed, and determine from what it has before it whether the moving party is entitled to summary judgment").

FN29. See also *Gleason v. Norwest Mortgage, Inc.*, 243 F.3d 130, 142 (3rd Cir.2001) ("The ruling on a motion for summary judgment is to be made on the record the parties have actually presented, not on one potentially possible."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 260 (1st Cir.1999) (declaring that a "party who aspires to oppose a summary judgment motion must spell out

Not Reported in F.Supp.2d, 2010 WL 3522381 (S.D.Ala.)
(Cite as: 2010 WL 3522381 (S.D.Ala.))

his arguments squarely and distinctly, or else forever hold his peace,” as district court may ignore arguments not adequately developed by nonmovant).

*13 As required by the Eleventh Circuit, the undersigned has “review[ed] all of the evidentiary materials submitted in support of the motion for summary judgment” as to the race discrimination claim. *One Piece of Real Property*, 363 F.3d at 1101–02. Based on that review, the Court agrees with ADPH that King has failed to establish a *prima facie* case of race discrimination. “*McDonnell Douglas* requires the plaintiff to establish a *prima facie* case which includes identifying an individual who replaced him or was treated better than he was who was not a member of his protected class.” *Morris v. Emory Clinic, Inc.*, 402 F.3d 1076, 1082 (11th Cir.2005). The applicable legal standard for this element is as follows: “Where the racial discrimination is alleged in the application of work rules to discipline an employee, and where there is no claim that the employee did not violate the work rules, as here, then plaintiff must show that he engaged in misconduct similar to that of a person outside the protected class, and ... the disciplinary measures enforced against him were more severe than those enforced against the other persons who engaged in similar misconduct.” *Rioux*, 520 F.3d at 1276 (internal quotes omitted). To satisfy this threshold, “[t]he quantity and quality of the comparator’s misconduct [must] be nearly identical” to that of the plaintiff. *Id.* at 280 (internal quotes omitted); see also *Brown v. Alabama Dep’t of Transp.*, 597 F.3d 1160, 1174 (11th Cir.2010) (to satisfy *prima facie* case, “[t]he comparators for the fourth prong must be similarly situated in all relevant respects”) (citation omitted). Plaintiff has identified no facts which might satisfy the comparator element of her *prima facie* case. Even if she had, her race discrimination claim would fail for lack of proof of pretext, for the same reasons previously discussed with respect to the retaliation claim.

Accordingly, after reviewing defendant’s Rule 56 motion on the merits, the Court is of the opinion that ADPH is entitled to entry of summary judgment in its favor on plaintiff’s race discrimination cause of action.

V. Conclusion.

For all of the foregoing reasons, it is hereby **ordered** as follows:

1. Defendant’s Motion to Exceed Page Limit (doc. 42) is **granted**;
2. Defendant’s Motions to Strike (docs. 55 & 56) are **granted in part**, as set forth in footnotes 8, 10 and 18, but are otherwise **moot** because the objected-to matters addressed therein are not necessary to full adjudication of the summary judgment motion;
3. Defendant’s Motion for Summary Judgment (doc. 43) is **granted**, and this action is **dismissed with prejudice**; and
4. A separate judgment will enter.

S.D.Ala.,2010.
King v. Alabama Dept. of Public Health
Not Reported in F.Supp.2d, 2010 WL 3522381
(S.D.Ala.)

END OF DOCUMENT

Appendix D

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

H

United States District Court,
D. Oregon.
Lori MORTENSEN, Plaintiff,
v.

PACIFICORP, an Oregon corporation, Defendant.

No. CV06-541 HU.
Feb. 1, 2007.

Matthew B. Duckworth, Busse & Hunt, Portland,
OR, for plaintiff.

Calvin L. Keith, Cody M. Weston, Perkins Coie,
Portland, OR, for defendant.

OPINION AND ORDER

HUBEL, Magistrate Judge.

*1 This is an action for employment discrimination and retaliation based on disability, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12110 *et seq.* (ADA),^{FN1} and Oregon law; interference with plaintiff's rights under the federal Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.* (FMLA) and the Oregon Family Leave Act, Or.Rev.Stat. § 659A.100 *et seq.* (OFLA); and wrongful discharge. Plaintiff alleges that she is disabled by sleep apnea and chronic obstructive pulmonary disease (COPD), and that she was denied leave and ultimately terminated after she requested accommodations for this disability. Defendant asserts that plaintiff was terminated for job performance issues.

FN1. Plaintiff has dismissed disability claims based on hostile work environment and on being "perceived as" disabled.

Defendant moves for summary judgment on all claims.

Factual Background

Plaintiff Lori Mortensen began working for defendant Pacificorp in March 2001 and was

terminated in August 2005. For most of her tenure, she worked as an administrative assistant to Blaine Andreasen, a Wyoming-based managing director supervising approximately 600 employees across a six-state service area. She performed administrative and clerical tasks for Andreasen and other members of the metering group. In 2005, Mortensen worked briefly for Jim Wagner, a director of the metering group, who reported to Andreasen.

During the first two years of Mortensen's employment, Andreasen was satisfied with her performance, and gave her positive performance evaluations.^{FN2} He characterized her as "very helpful" and "very loyal." Weston Declaration, Exhibit B, Andreasen deposition, 25:2-15 (hereinafter Andreasen dep.) Nevertheless, Andreasen has testified that during those first two years, "there were people on my staff that were frustrated with Lori," and who complained to him about her. Andreasen dep. 30:8-13. Andreasen testified that he disregarded these complaints because at that time he had his "hands full with 600 employees, and a lot of changes to be made," and he did not want to "spend a lot of time trying to address an issue with my assistant who was doing fine for me personally." Andreasen dep. 30:14-20.

FN2. Andreasen gave Mortensen a "4" overall rating on her midyear performance rating in October 2003, a "3" overall rating on her year end performance rating in April 2004, and a "3" in November 2004. On Pacificorp's 5-point performance evaluation rating scale, a "4" equals "highly effective," Weston Exhibit L, p. 14, and a "3" means fully effective. *Id.* A "2" means "needs improvement." *Id.*

Mortensen has testified that during her third year of employment, between January and July 2004, she was falling asleep at work several times a day. Duckworth Declaration, Exhibit A, Mortensen deposition 53:21-54:19 (hereinafter Mortensen

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

dep.) She says she told Andreasen about falling asleep at work immediately after she began experiencing the symptoms, Mortensen dep. 48:25-49:18, but Andreasen has testified that Mortensen told him about her sleep apnea during the last year of her employment. See Andreasen dep. 49:25-50:11.

Mortensen was diagnosed with sleep apnea in July 2004. Mortensen dep. 57:17-22. She provided a doctor's note dated July 30, 2004, to Heidi Kucera-Taylor, Disability Services Administrator for Pacifcorp; the note stated that Mortensen would suffer "excessive sleepiness until further evaluation and treatment." Duckworth Declaration, Exhibit FF. Mortensen testified that she believes the sleep apnea was "creeping up" on her between 2001 and 2004, and caused her to make more errors at work, made her grumpy, and affected her memory. Mortensen dep. 59:18-60:15. In addition, extended staff meetings were "very difficult" for her because she was so sleepy. Mortensen dep. 60:19-23.

*2 In October 2004, Mortensen began using a CPAP machine to help her sleep. Mortensen dep. 59:8-17. Mortensen testified that "after about a year of using it," the machine enabled her to get a decent night's sleep. Mortensen dep. 59:8-17.

Mortensen was diagnosed with COPD in January 2005; she has testified that the COPD caused her to tire easily and have coughing fits during meetings. Mortensen dep. 62:1-10; 66:8-12; 70:6-9; 64:21-23, 65:6-25.^{FN3} The evidence indicates that Andreasen was aware of these coughing fits, but had not commented on them because he knew Mortensen smoked. Weston Declaration, Exhibit Q.

FN3. Mortensen's testimony is somewhat inconsistent on this point, as she has also testified that she had the cough "at least five years" before being diagnosed with COPD and that she was coughing at meetings during that time. Mortensen dep. 64:7-23. She has also said she had a "bad

smoker's cough," but didn't have "fits of coughing" until about 2004. *Id.* 65:6-25.

In January 2005, Mortensen told Andreasen she had COPD. Mortensen claims she made an oral request to Andreasen that she be excused from monthly extended staff meetings or meetings that required travel because of her coughing and the possibility of falling asleep. Mortensen dep. 60:19-24; 66:13-15; 93:14-94:17; 95:10-24; 97:20-25. Mortensen's attendance at the extended staff meetings was required every other month. Mortensen dep. 94:16-17, 97:18-19. Mortensen has testified that Andreasen agreed that she could be excused from extended staff meetings because he "had enough coverage" from two other people, Kelly Cook and Hillary Klumpe-McGowan. Mortensen dep. 94:10-16.

Andreasen has testified that he did not recall Mortensen asking to be excused from staff meetings because of her COPD. Andreasen dep. 82:13-15. Andreasen testified that Mortensen had never liked to attend staff meetings, and over the past four years, "if she could avoid them she did." Andreasen 82:5-12. Andreasen testified that for a year he had asked someone else to attend staff meetings, so "it wasn't really an issue I spent a lot of time concerned with anymore, whether she attended the meetings or not." Andreasen dep. 82:18-21; 83:1-7.

The factual record is unclear on when Mortensen asked to be excused from meetings; whether she asked to be excused from all meetings or only the all-day extended staff meetings that occurred every other month; whether she asked to be excused from meetings because of sleepiness, coughing, or both; and whether Andreasen excused her from any attendance at meetings or got others to attend and take minutes in Mortensen's stead.

According to Andreasen, Mortensen's performance began to worsen during 2004 and 2005, to the "point where as an assistant I was finding I was using her less and less on a continual

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

basis, and spending more and more time solving issues and problems.” Andreasen dep. 30:21-31:1. In Andreasen's opinion, many of the problems were due to Mortensen's inability to get along with others. Andreasen dep. 32:11-15. According to Andreasen, Mortensen made simple administrative mistakes, then failed to acknowledge them and became defensive when confronted. Andreasen dep. 32:16-33:9.

In March 2005, Mortensen sent Kucera-Taylor an e-mail as follows:

I've been telling my supervisor for some time now about my health situation, and I don't think he believes me. He didn't require documentation from my docs and that was his choice. I have kept him in the loop the entire time; but I still feel it's appropriate to make some aspects official now because of the way he's acting. I'm scared I'm going to lose my job because I literally have not been physically able to take minutes at the all day meetings for the past couple months. Although, I am hoping to improve with the treatments they are giving me. When they added oxygen a couple weeks ago, that helped my sleep patterns a lot.

*3 Duckworth Declaration Exhibit BB. Ms. Kucera-Taylor responded,

Thanks for the note. I have copied Jen [Crosby]^{FN4} on this as well so we can be sure to keep her up to date too. From our conversation last week you indicated to me that you are not missing time from work or that you expect to at this time [sic]. I also understand that you are not requesting anything with regard to your daily job duties and a potential health condition. If either of these things should change, please be sure to let me and Jen Crosby know so we can discuss further.

FN4. Crosby, now Crosby-Meurisse, was the HR person for the metering group. Crosby dep. 6:8-11.

Id. Heidi Kucera-Taylor had talked to Mortensen about FMLA, which Mortensen had never used. Mortensen dep. 102:19-24.

On April 15, 2005, Andreasen gave Mortensen a performance evaluation in which her ratings came down in nearly every area. The assessment states, among other things, that Mortensen “often shows lack of follow through, which often leads to accuracy problems with her work and generally an inconsistent performance.” Weston Declaration, Exhibit L, p. 6. Andreasen also noted that Mortensen's “performance this last six months has been sporadic; the progress she made the first six months has actually declined.” *Id.* at 6-7.

Andreasen also wrote,

Other members of the Metering Management Team are also concerned with her accuracy and the confusion it often creates, i.e., meeting schedules, instructions she authors, and in general her interaction with others on the team. Lori has the ability to do a fine job and does exhibit this ability on projects she enjoys. Lori tends to find ways to avoid work she either doesn't like or involves a public meeting or setting.... Her ability to get along with people often hampers her ability to complete a task, or makes that task more difficult. She is reluctant to take minutes and action items for staff meetings and Safety meetings, these tasks have typically fallen on others to complete. When others have stepped up to fill these voids she is critical and uncooperative. Her performance is unacceptable based on her performance these past few months.

Id. at 7. Andreasen noted in the evaluation that Mortensen had made errors with his expense accounts and scheduling, saying, “My schedule is hectic and difficult but too often errors are made that require rescheduling. Meeting notifications and scheduling are often done more than once because of errors, others consistently complain to me about confusion with meetings Lori sets up.” *Id.* at 10.

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

On April 15, 2005, Mortensen received a documented verbal warning about her poor performance and a written plan for improvement. Andreassen dep. 52:19-23; Weston Declaration, Exhibit M. The warning stated that Mortensen's accuracy, "related to all aspects of job performance" had been "unacceptable," including Andreassen's expenses, meeting notices, and calendar management. Weston Declaration, Exhibit M. She was criticized for tasks done inaccurately, including expense accounts, meeting notices, and scheduling. *Id.* Andreassen also noted that Mortensen's demeanor in the workplace was "unacceptable," and that she was "difficult to communicate with, won't listen when given direction, advice, or counsel." *Id.* Also noted was that when mistakes were made, "considerable time is spent convincing you of the fact," and that considerable time was spent resolving conflicts with other employees. *Id.* She was also faulted for being inconsistent in her availability during regular work hours and being unwilling to attend meetings. *Id.*

*4 Mortensen disputed many of these findings. *Id.* She contacted HR to say she felt she was being discriminated against for a medical condition. Mortensen dep. 100:8-11. On April 20, 2005, Mortensen wrote a letter to Andreassen, with a copy to Jennifer Crosby, asking him to rescind the verbal warning and performance improvement plan. Weston Declaration, Exhibit N. Mortensen accused Andreassen of "making a calculated effort to discipline me because of my medical condition." *Id.* Mortensen said she loved her job, but Andreassen was "making my work experience intolerable." Mortensen said she thought it would be in her best interest if she had a different supervisor, because "I deserve a workplace that is free of harassment, discrimination and retaliation." *Id.*

Mortensen stated that in the letter that, as she had informed Andreassen a year earlier, she suffered from several disabilities, including sleep apnea, COPD, emphysema, arthritis and "herniating discs

in my back," as well as an anxiety disorder. *Id.* Mortensen claimed that the anxiety disorder was the result of "the poor treatment I am receiving from you at work." *Id.* The letter continued for several pages describing COPD and sleep apnea, and charging Andreassen with initially granting her the accommodation of not attending meetings, then renegeing on that agreement, and with insisting that she carry 30 boxes weighing up to 40 pounds when her job location was changed. *Id.*

Mortensen also stated that she was "having huge technical problems with Outlook 2003 as far as scheduling," because there were bugs in the program that were not being resolved by IT; she disputed Andreassen's opinion that she did not display a positive work attitude. *Id.* Mortensen wrote, "I have lots of people at work who like me and like working with me. You do not like me." *Id.*

On April 29, 2005, Andreassen sent a letter to Jennifer Crosby disagreeing with many of the assertions made in Mortensen's April 20 letter. Andreassen denied that he was faulting Mortensen because of health problems, saying, "Lori does have a major problem with meeting acceptable levels of performance. Primarily in the areas of accuracy, attitude, accepting advise [sic], and a willingness to take on assignments she does not like." Weston Declaration, Exhibit Q. Andreassen explained the issue of attendance at extended staff meetings as follows:

It is true I recently excused her from taking minutes of staff meetings, however Lori has had a problem with doing this for sometime. I have been remise [sic] in not requiring her to fulfill this task, too much effort. In fact Lori has told me on more than one occasion she does not like admin. work and wants to be an analyst.... I eventually told her the analyst option would not be there, but she could continue to be my assistant. She told me she was not made to be an admin. and didn't like minutes or the day to day requirements of this type of work....

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

* * *

*5 During this period she relayed the many personal challenges she has with her family; her mother, father, son and grandson all live with her. Feeling compassion for her I chose to not require minutes, not due to health reasons, but to the fact she said she just hated doing them. So eventually I compromised with action items only.

* * *

Hillary and Kellie have covered for Lori on many occasions, but Lori would at least attend the meetings. Recently she has not even done that. She has also been hostile to Hillary and Kellie at times to the point Hillary does not even want to interact with her....

Weston Declaration, Exhibit Q. Andreasen denied that he had made Mortensen carry her own boxes when her office was moved. *Id.* According to Andreasen, he did "not insist she move or pack herself, to the contrary I arranged to have it done for her.... I would never require her to jeopardize her back to move herself. This is ridiculous." *Id.*

Andreasen stated that he had spent hours with Mortensen trying to explain that she was operating Outlook 2003 incorrectly, and "she argued with me the entire time." According to Andreasen, Mortensen had been sending out duplicate schedules for over two years that "cause my entire staff nothing but confusion and headaches," and that this was the result of Mortensen's unwillingness to accept advice and "fight[ing] everyone including me even when she is wrong ." *Id.* Andreasen said there were no technical problems with Outlook 2003, and that no one else in the metering group was having difficulty with it. *Id.*

On May 9, 2005, Mortensen said in an email to Kucera-Taylor saying that although she had asked Andreasen in January 2005 to excuse her from taking notes at long meetings because of "my

choking fits which are regarded by some as unseemly, my back pain, and the fatigue I experience because of my Sleep Apnea," Duckworth Declaration, Exhibit H, Andreasen had sent her an e-mail in March 2005 insinuating that it was her own choice not to attend meetings rather than the result of her medical conditions. *Id.* See also Mortensen dep. 101:6-18. Mortensen also complained to Kucera-Taylor that in the April 15, 2005 evaluation, Andreasen "disciplined me for not attending extended meetings, which is something he specifically excused me from doing. This is retaliation." Duckworth Declaration, Exhibit H. However, at her deposition, Mortensen acknowledged that Andreasen did not discipline her for not attending extended meetings, and that the April 2005 performance review did not contain any negative comment about Mortensen's failure to attend staff meetings except for the statement, "She is reluctant to take minutes and action items." Mortensen dep. 104:3-105:22.

Jennifer Crosby investigated Mortensen's complaint of discrimination by Andreasen and found the allegations meritless. Duckworth Declaration, Exhibit D, Crosby deposition 43:24-48:16 (hereinafter Crosby dep.) Crosby's investigation and conclusions were reviewed and approved by her supervisor, Jeremy Courval, and Courval's supervisor, Andrea Gansen. *Id.* 5:20-22; Duckworth Declaration, Exhibit C, Courval deposition (hereinafter Courval dep.) 24:4-26:7; Duckworth Declaration, Exhibit E, Gansen deposition (hereinafter Gansen dep.) 13:6-15:7.

*6 In May 2005, Mortensen applied for intermittent FMLA leave. Mortensen dep. 105:25-106:2; Duckworth Declaration, Exhibits DD and EE. On May 4, 2005, Pacificorp notified Mortensen that she had been approved for intermittent FMLA leave. Duckworth Declaration, Exhibits U, V. Mortensen took 45.25 hours of medical leave on 10 different days between May 16 and July 20. *Id.* at Exhibit W.

On June 1, 2005, a final written warning was

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

placed in Mortensen's personnel file. *Id.* at Exhibit O. The warning charged Mortensen with, among other things, submitting the April payroll a day late because she had been on personal time and maintained that it was too cumbersome to enable another employee to enter payroll in her absence; scheduling Andreasen on a flight that arrived at noon, even though his meeting began at noon; failing to place a director on a meeting schedule until his third request; and displaying a poor attitude. *Id.*; see also Exhibit M.

Mortensen responded to these criticisms on June 9, 2005. Duckworth Exhibit J. She reiterated that the calendaring problems were the result of bugs in the Outlook 2003 program. *Id.* Mortensen admitted to "messing up the timesheets," saying "I simply forgot to do them on the appropriate day." *Id.* She explained, "There's no excuse, really, I was visiting with my son and granddaughter and time slipped right past me." *Id.*

She denied fault in scheduling Andreasen for the noon flight, saying that Andreasen knew his flight arrived at the same time the meeting started, and that arrangements could have been made for the meeting to be postponed for 10 minutes until Andreasen could get there. *Id.* She denied that she had failed to get the director invited to the meeting, characterizing the problem as a "miscommunication between the two of us." *Id.* Mortensen characterized her work performance as follows:

I took all the notes for all the meetings when Kellie was out for 2 periods of STD, along with my regularly scheduled rotation before that. My midyear [evaluation] reflects my efforts to run the ship for everyone while she was gone, which I gladly did....

I also took on the Safety Peer Reviews on my own volition by making a suggestion and then designing the database ... and also tracking them and even discussing needed changes.... I also efficiently tracked and followed through on the safety action items for Risk Assessment. I also

sent you an example of an email where Matt Golson said how much better my system is than his and Jim Bennett's, and for that matter, PD Safety. Now my database is married with Safety's database, making all sorts of data splendor. I can't help it if that's what I do best, and most people enjoy what they do best.

Id.

Crosby recommended that Mortensen be transferred to another supervisor, Jim Wagner, who reported to Andreasen, but worked in Portland. Crosby testified that she made the recommendation because she believed Mortensen was in need of supervision at her job site, and Andreasen, who was in Wyoming, was unable to oversee her day-to-day work. Crosby dep. 23:9-24:5. Crosby felt that the relationship between Andreasen and Mortensen had deteriorated to the point where it was not productive. *Id.* Wagner was receptive to the idea, and "had very nice things to say about Lori." *Id.* at 24:1-3. Wagner had worked in proximity to Mortensen, and felt that he could supervise her and give her work she could do well. *Id.* at 24:3-5.

*7 Wagner went over the performance improvement plan with Mortensen. Wagner dep. 31:24-33:22. In keeping with his regular practice with employees, Wagner gave Mortensen a letter outlining his expectations of her. *Id.* at 34:1-16. Mortensen gave Wagner a letter from her doctor describing her sleep apnea problems, which Wagner read and questioned her about. *Id.* at 36:8-19. Wagner testified that Mortensen did not ask for specific work adjustments to accommodate her sleep apnea. *Id.* at 36:20-24.

Wagner was aware that Mortensen had made discrimination complaints against Andreasen, because Crosby had showed Wagner a copy of the letter in which Mortensen complained that Andreasen was discriminating against her. Andreasen dep. 107:15-108:14; Wagner dep. 42:6-43:6.

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

On June 20, 2005, Mortensen obtained a doctor's note saying she had COPD and requesting that she not attend meetings lasting more than several hours because her coughing would be disruptive to others. Duckworth Declaration, Exhibit T.

Wagner testified that after Mortensen transferred to his supervision, she failed to improve her job performance in compliance with the performance plan. Wagner dep. 46:9-47:1. He said he had discussed with all the other directors of the metering group the problem Mortensen had with sending out meeting notices, and that all of them "thought she was inept in her ability to schedule meetings." Wagner dep. 20:-1-17. According to Wagner, the directors would get three or four notices at a time through e-mail, and then, if the meeting date was changed, there would be "three or four cancellations and then three or four new ones. So it was this huge string of e-mails every time." *Id.* at 20:17-25.

The decision to terminate Mortensen was made by Wagner, Andreasen and three levels of Pacificorp HR personnel-Crosby, Courval, and Gansen. According to Crosby, no one person had the power to make the decision; there had to be consensus. Crosby dep. 5:14-12:2; 72:21-73:3. Gansen testified that the decision to terminate Mortensen was made on the basis of a recommendation by Wagner and Andreasen that was supported by Crosby, with final approval by herself and Andreasen. Gansen dep. 18:1-20.

On August 9, 2005, at a meeting with Wagner and Crosby, Mortensen was terminated. Wagner dep. 59:18-25. The termination letter cited examples of poor work performance while she was working under Wagner's supervision, including entering her own time after being explicitly instructed not to do so; changing her work hours without authorization; cancelling a flight for Andreasen without notice or communication, requiring the rebooking of the flight; and creating a Power Point presentation that had to be reorganized

and rewritten. Duckworth Declaration, Exhibit P.

Standards

Summary judgment 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(c). Summary judgment is not proper if material factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), *cert. denied*, 116 S.Ct. 1261 (1996). On a motion for summary judgment, the court must view the evidence in the light most favorable to the non-movant and must draw all reasonable inferences in the non-movant's favor. *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir.2001).

*8 The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. Assuming that there has been sufficient time for discovery, summary judgment should be entered 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." *Id.* at 322.

Discussion

A. *The disability discrimination claim*

In an ADA Title I case, the plaintiff must show that he or she is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996). To establish a prima facie case, therefore, the plaintiff must show that 1) he or she is a disabled person within the meaning of the ADA; 2) he or she

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

is able to perform the essential functions of the job with or without reasonable accommodation; and 3) he or she suffered an adverse employment decision because of his or her disability. §§ 12112(b)(5)(A) & 12111(8); see also *Kennedy*, 90 F.3d at 1481. The same standard applies to cases brought under Oregon disability discrimination law. *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080, 1087-88 (9th Cir.2001).

Pacificorp contends that it is entitled to summary judgment on the disability discrimination claim because 1) Mortensen cannot establish that she is disabled and 2) Mortensen cannot show that she suffered an adverse employment action because of a disability.

1. Does Mortensen have a disability?

To bring a claim under the ADA a plaintiff has the burden of showing that he or she is a “qualified individual with a disability.” *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir.2000)(en banc), *vacated on other grounds*, 535 U.S. 391 (2002).

In determining what constitutes a disability under the ADA or under Oregon law, the court looks to the statutory definition:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment.
FN5

FN5. Mortensen's claims are based on allegations that she is disabled and that she has a record of a disability.

42 U.S.C. § 12102(2). Oregon law is similar. See Or.Rev.Stat. § 659.400(1).

Under the implementing regulations, an impairment is substantially limiting if it

“significantly restricts as to the condition, manner or duration under which an individual 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.” 29 C.F.R. § 1630.2(j)(1)(ii) (1993). Major life activities include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” *Id.* at 1630.2(i).

*9 In addition, the regulations enumerate the following factors that should be considered in determining whether an individual is substantially limited in a major life activity: 1) the nature and severity of the impairment; 2) the duration or expected duration of the impairment; and 3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. *Id.* at § 1630.2(j)(2).

Mortensen stated at oral argument that the only major life activity in which she is limited is that of sleeping. Sleeping is a “major life activity” for purposes of the ADA. *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir.1999), *amended*, 201 F.3d 1211 (9th Cir.2000); *Head v. Glacier Northwest*, 413 F.3d 1053, 1060 (9th Cir.2005).^{FN6}

FN6. Neither of these cases involves a plaintiff with sleep apnea or COPD. In *McAlindin*, plaintiff suffered from anxiety disorders, panic disorders, and somatoform disorders, and alleged that he was limited in the ability to engage in sexual relations, sleep, and interact with others. Plaintiff testified that despite the use of medication, he continued to experience severe insomnia. *Id.*

In *Head*, plaintiff was diagnosed with depression or bipolar disorder. Plaintiff alleged that he was substantially impaired in his ability to sleep, interact with others, think, and read. The court

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

held that each of these was a major life activity. 413 F.3d at 1059. The court held that plaintiff had established a substantial impairment in the ability to sleep by means of his testimony that even after getting on medication, he “periodically had serious problems,” including passing out for a while immediately after getting home from work, having great difficulty getting to sleep, waking up during the night, sleeping only five to six hours a night even with the medication, and, on some nights, even with the medication, not getting to sleep for hours or even at all. *Id.* at 1060.

Establishing a disability requires more than a showing that one is limited in a major life activity. The limitation must be severe or substantial when compared to the ability of “the average person in the general population,” *McAlindin*, 192 F.3d at 1235, citing 29 C.F.R. §§ 1630.2(j)(1)(i) and 1630.2(j)(2)(i), and its impact must be permanent or long term. *Toyota Motor Mfg. Kentucky Inc. v. Williams*, 534 U.S. 184, 198 (2002).

Under this test for proving disability, it is insufficient for Mortensen merely to submit evidence of a medical diagnosis. *Toyota Motor*, 534 U.S. at 198. Instead, the ADA requires her to offer evidence that the extent of the limitation caused by the impairment, in terms of her own life experience, is substantial. *Id.* The question of whether an impairment constitutes a disability is not to be answered only by analyzing the effect of the impairment in the workplace. *Id.* at 201. Occupation-specific tasks may have only limited relevance. *Id.*

Mortensen asserts that she has offered evidence from which a jury could find that her sleep apnea and COPD substantially limited the major life activity of sleeping. This evidence is 1) her testimony that she fell asleep at work several times a day for approximately six months; 2) that she had

probably been experiencing symptoms of sleep apnea as early as 2001; 3) that lack of sleep affected her memory; 4) that lack of sleep caused her to make more errors at work; and 5) that lack of sleep and made her grumpy.

Mortensen's testimony alone may suffice to establish a genuine issue of material fact. *Head v. Glacier Northwest Inc.*, 413 F.3d 1053, 1058 (9th Cir.2005). But Mortensen's testimony about each of the areas in which she was limited by sleeplessness is directly contradicted by her other testimony and by statements she made to Pacificorp. In other words, she herself has contradicted each of her allegations of substantial limitation.

On the one hand, Mortensen claims that sleeplessness caused her to make more errors at work, and that while the diagnosis was made in July 2004, the symptoms began as early as 2001 and continued through October 2005. On the other hand, she has denied Andreasen's testimony that her work performance deteriorated during her third and fourth years of employment (2004 and 2005). She has also denied every one of the mistakes with which she was charged by Andreasen. She has insisted that the difficulties she had with meeting notices and calendar management were attributable solely to technical problems with the computer program she was using. Mortensen dep. 107:5-24; Weston Declaration, Exhibit N. She has denied that she made any significant errors with Andreasen's expense accounts, testifying that in the three and a half years before her termination, she had only three expense account charges rejected by a supervisor, and two of them were the result of Andreasen's request that she split a \$400 charge to avoid raising an accounting “red flag.” Mortensen dep. 7:20.

*10 On the one hand, Mortensen claims that sleeplessness made her grumpy. But on the other, she denied Andreasen's criticism that she had difficulty getting along with others, stating that most of the management team thought she was wonderful. Mortensen dep. 111:15-112:21.

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

Mortensen characterized as untrue Andreasen's statements that she did not display a positive workplace attitude. Duckworth Declaration, Exhibit H.

Mortensen claims that she was falling asleep several times a day at work for a period of six months. But she denied Andreasen's criticism that she was unavailable during work hours, saying she got to work every day at 6:05 and left at 4:40 p.m., Mortensen dep. 112:25-113:11, and that she worked a 40-hour work week throughout her four years at Pacificorp. Mortensen dep. 11:24-13:6; 31:14-20. Mortensen acknowledges that except for the request to be excused from extended staff meetings, she asked for no adjustments to her schedule or her work duties. Mortensen dep. 60:16-24.

Further contradicting her claims of falling asleep during the day, errors at work and memory problems, Mortensen emphasized in the May 2005 memorandum to Jennifer Crosby, "the fine work I continue to do as a valued member of the Safety Committee," where she spent the majority of her work time. About the Safety Committee, Mortensen said, "I am so proud of the work I have done for the Committee ... and things seem to continue to improve and grow more challenging daily." Duckworth Declaration, Exhibit H. She also pointed out, "[D]ue to covering for Kellie's time off, I have been involved in a few presentations for Blaine, and he was very pleased with them at the time." *Id.* Mortensen insisted that she had performed her work duties "faithfully and accurately for four years now, and I would have ... no problem continuing them." *Id.*

In further contradiction of her claims of falling asleep at work, workplace errors, and memory problems, Mortensen pointed out to Crosby that she had actually taken on extra duties during the time she claims she was suffering from sleep apnea, saying, "My midyear [evaluation] reflects my efforts to run the ship for everyone while [Kellie] was gone." Mortensen specifically noted that during this time she had also designed a database,

"efficiently tracked and followed through" on safety action items, and done a good job at analysis. Duckworth Declaration, Exhibit J.

In the June 2005 letter to Jennifer Crosby, Mortensen acknowledged that one occasion she had forgotten to do timesheets, but she did not attribute this to sleeplessness. Instead, she said there was "no excuse," and that she had been visiting with family and the "time slipped right past me."

Mortensen's testimony about her activities outside work also contradicts her claims that sleeplessness made her drowsy during the day and affected her memory. She testified that her daily activities outside work included cooking for herself, her 80-year-old father, and her 27-year-old son, all of whom live with her. Mortensen dep. 10:9-18; 11:21-12:6; 12:11-18. She helped her father "get through the day," taking him to appointments and, "because he has a very bad memory," helping him in general. *Id.* at 12:11-19. She also performed household maintenance, *id.* at 12:25-13:4, cleaned the house, except for "anything that might hurt my back," *id.* at 12:25-13:4, gardened, 70:6-18, and assisted in the care of her family's 11 dogs, parrot and cat. *Id.* 18:2-14.

*11 If the factual context makes the nonmoving party's claim of the existence of a material issue of fact implausible, that party must come forward with more persuasive evidence to support her claim than would otherwise be necessary. *In re Agricultural Research and Tech. Group*, 916 F.2d 528, 534 (9th Cir.1990). In the context of all the evidence, Mortensen has not demonstrated the existence of a material issue of fact on her claim that she is substantially limited in the major life activity of sleeping, because, through her own statements and testimony, she has denied her claims that she was unable to stay awake during the day, and that sleeplessness affected her memory, caused her to make more errors at work, and made her grumpy. In essence she has eliminated any material question of fact on whether she has an impairment that substantially limits a major life activity. I conclude

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

that Mortensen has not established that she was disabled.

2. Does Mortensen have a record of a disability?

Mortensen argues that she has also adduced evidence of a record of disability. A record of a disability means that the employee has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. 29 C.F.R. § 1630.2(k). Pacificorp argues that Mortensen's complaint alleges no facts supporting a "record of" disability claim, and that discovery has revealed no facts supporting the claim. Pacificorp cites *Walz v. Marquis Corp.*, 2005 WL 758253 at *6 (D.Or.2005), rejecting a "record of" disability claim because "[a]lthough [the employee's] records reveal that [employee] suffers from type II insulin-dependent diabetes, they fail to reveal a level of impairment that substantially limits one or more major life activities."

In *Coons v. Secretary of U.S. Dept. of the Treasury*, 383 F.3d 879, 886 (9th Cir.2004) the court held that the record must be of an impairment that substantially limits a major life activity. In *Coons*, plaintiff's only evidence was a letter from his doctor stating that he suffered from various physical and mental impairments, and that he received treatment for some of these impairments. There was nothing in the letter saying that any of the treated impairments substantially limited any major life activity. The court held that because the plaintiff "presents no evidence of having a history of an impairment that substantially limits a major life activity," he was not a disabled person under this ADA test. *Id.*

In this case, as in *Coons* and *Walz*, the historical record shows only that Mortensen has been diagnosed with, and is being treated for, sleep apnea and COPD.^{FN7} As discussed above, the evidence, on this record does not establish a history of an impairment that substantially limits a major life activity.

FN7. Although the record indicates that Mortensen took FMLA leave, there is no evidence about whether this leave was related to her sleep apnea or COPD. Compare *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080, 1089 (9th Cir.2001)(paid and unpaid disability leave can establish evidence of a record of being impaired).

Because Mortensen has failed to establish that she is a disabled person, Pacificorp is entitled to summary judgment on the disability discrimination claims.

B. The retaliation claims

*12 Pacificorp contends that it is entitled to summary judgment on the retaliation claim because Mortensen cannot show a causal link between any protected activity and her termination.

Title V of the ADA prohibits retaliation against or interference with a person who has asserted rights under the ADA. See 42 U.S.C. §§ 12203(a) & (b). In *Barnett*, 228 F.3d at 1121, the court adopted for ADA retaliation claims the framework used to analyze retaliation claims under Title VII of the Civil Rights Act. Thus, in order to establish a prima facie case of retaliation under the ADA, Mortensen must show 1) she engaged in a protected activity; 2) she suffered an adverse employment decision; and 3) there was a causal link between the protected activity and the adverse decision. *Brown v. City of Tucson*, 336 F.3d 1181, 1187 (9th Cir.2003).

To establish causation, plaintiff must show, by a preponderance of the evidence, that engaging in the protected activity was one of the reasons for her firing, and that but for such activity, she would not have been fired. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064-65 (9th Cir.2002).

An action for retaliation under the ADA follows the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

Barnett, 228 F.3d at 1121; *Brown*, 336 F.3d at 1186. Thus, if the plaintiff makes out a prima facie case of retaliation, the employer has the burden of producing a legitimate nondiscriminatory reason for the adverse employment decision. The plaintiff must then prove that the employer's proffered reason is mere pretext and that the decision was made as retaliation for the protected activity.

Pacificorp argues that Mortensen cannot establish a prima facie case of retaliation because she cannot show a causal connection between her request that she be excused from extended meetings and/or her complaint about Andreasen and her termination and, even if she could, Pacificorp terminated her for the legitimate nondiscriminatory reason of poor performance.

a. *Prima facie case*

Mortensen relies on the temporal proximity of her March 2005 complaint that Andreasen was discriminating against her and the subsequent disciplinary steps taken against her. She also argues that after requesting that she not be required to take minutes in long meetings, Andreasen followed up over the next four months with a quick succession of adverse employment actions, including a negative performance review and placing Mortensen on a performance improvement plan.

In some cases, causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity, see, e.g., *Villiarimo*, 281 F.3d at 1065; *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir.2000), particularly when the adverse action occurs "fairly soon after the employee's protected expression." *Villiarimo*, 281 F.3d at 1065. See also *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001)(cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence uniformly hold that the temporal proximity must be very close).

*13 Under the *McDonnell Douglas* framework, the requisite degree of proof necessary to establish a prima facie case on summary judgment is "minimal and does not even need to rise to the level of a preponderance of the evidence." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir.1994); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir.1998). The time interval between Mortensen's complaints about discrimination by Andreasen and the disciplinary actions taken against her is sufficient for a prima facie showing of causation.

b. *Legitimate, nondiscriminatory reason*

If the plaintiff makes out a prima facie case, the employer can rebut it by producing evidence of a legitimate, nondiscriminatory explanation for its actions. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993)(if plaintiff establishes prima facie case, burden of production shifts to employer to articulate a nondiscriminatory reason for adverse employment action, causing the presumption created by the prima facie case to fall away.) See also *Wallis*, 26 F.3d at 892. The employer must produce evidence, not merely express an argument. *Rodriguez v. GMC*, 904 F.2d 531, 533 (9th Cir.1990). Pacificorp has met its burden of producing evidence that Mortensen was terminated for poor work performance.

c. *Pretext*

Mortensen can establish pretext in two ways:

- (1) indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or
- (2) directly, by showing that unlawful discrimination more likely motivated the employer.

Chuang, 225 F.3d at 1127. To survive summary judgment, Mortensen is not required to provide direct evidence of discriminatory intent as long as a reasonable factfinder could conclude, based on her prima facie case and the factfinder's disbelief of defendant's reasons for discharge, that

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

discrimination was the real reason for defendant's actions. *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 n. 2 (9th Cir.1997). Mortensen can survive summary judgment without producing any evidence of discrimination beyond that constituting her prima facie case, but only if her prima facie evidence raises a genuine issue of material fact on the truth of Pacificorp's asserted reasons for terminating her. *Chuang*, 225 F.3d at 1127.

A plaintiff is required to produce "very little" direct evidence of an employer's discriminatory intent to move past summary judgment. *Id.* at 1128. Direct evidence of discrimination is "evidence, which, if believed, proves the fact of discriminatory animus without inference or presumption." *Godwin*, 150 F.3d at 1221; *Bergene v. Salt River Project Agricultural Improvement and Power District*, 272 F.3d 1136, 1141 (9th Cir.2001).

Alternatively, the plaintiff may come forward with circumstantial evidence that the employer's proffered reasons were pretextual, but such circumstantial evidence must be "specific" and "substantial" to create a triable issue of fact as to whether the employer intended to discriminate. *Godwin*, 150 F.3d at 1222.^{FN8} A plaintiff can make a case that an employer is biased by showing the employer's proffered explanation for the adverse action is "unworthy of credence." *Coghlan v. American Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir.2005)(quoting *Burdine*, 450 U.S. at 256). As the Supreme Court explained in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000), "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."

FN8. But see *Cornwell v. Electra Cent. Credit Un.*, 439 F.3d 1018, 1030-31 (9th Cir.2006) (discussing whether post-*Godwin* cases may have overturned the *Godwin* requirement that a plaintiff's circumstantial evidence of pretext must be

"specific and "substantial," but not finally deciding the issue because the evidence presented by the plaintiff was sufficient to create a genuine issue of fact regarding the defendant's motive for its actions under the *Godwin* specific and substantial standard in any event).

*14 In deciding whether judgment as a matter of law is appropriate, the court looks at "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation if false, and any other evidence that supports the employer's case." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148-49 (2000).

Mortensen argues that she has raised a genuine factual issue on whether Pacificorp's articulated reasons for her termination were pretextual. She points to deposition testimony from Andreassen that he was surprised and hurt by Mortensen's discrimination complaint:

Q: What do you recall about the letter that you saw that accused you of discrimination? ...

A: ... I just remember my surprise and awe at it.

Q: Surprise and awe?

A: Yeah.-

Q: Any other reactions?

A: Yeah. There was a bit of shock associated with that. I did not anticipate-I did not anticipate that, and that's probably it.

Q: Were you angry about it?

A: To be honest, no. I wasn't angry as much as I was hurt.

Q: Why were you hurt?

A: Just I-you know, I think I've stated it several times here that I really did appreciate the job that Lori did. Specifically the first couple two and a

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

half, three years. I think she was-I think she was helpful to the department. I think she was well meaning towards me, and I towards her. So essentially this had come to that, and yeah, I was hurt.

Andreasen dep. 92:8-93:5.

Mortensen also relies on her own testimony that after she complained about Andreasen, the management team treated her coldly and "all my duties were pulled immediately after my complaint." Mortensen dep. 31:2-13; 162:14-23; 165:1-22. Mortensen has not proffered any evidence about who treated her coldly, or what this treatment consisted of. Mortensen's own words contradict any inference that she was treated coldly by Jim Wagner, her successor supervisor. By June 2005, after Mortensen had been reassigned to Wagner, she characterized him in her June 9, 2005 letter to Crosby as follows:

I believe in my heart that Jim Wagner is a good and honest man. I believe that if perceives [sic] my performance is good, he will tell you that.... I bring value to this Company, I think it is the best place I've ever worked, and now I'm working for the best man I've ever worked for. That is my belief.

Duckworth Declaration, Exhibit J.

Mortensen has not explained what is meant by her testimony that "all my duties were pulled" immediately after complaining about Andreasen. There is no indication of what, if any, duties were taken away from her. Mortensen complained about Andreasen in April 2005 and was terminated in August 2005; the evidence is that she continued to work 40 hours a week during that interval. The only explanation offered is by Pacificorp, which is that Mortensen may have been referring to her lighter workload once Wagner became her supervisor, based on Wagner's testimony that when Mortensen worked for him he was out of the office more than usual and not requiring as much assistance from

Mortensen. Wagner dep. 52:5-56:2.

*15 Mortensen also relies on her assertion that Andreasen reneged on his promise to excuse her from taking minutes at extended meetings by disciplining her in the April 15, 2005 performance evaluation for not attending them.

The April 15 warning is based on deficiencies in accuracy in "all aspects of job performance," including expense accounts, meeting notices, calendar management, and work product; workplace demeanor and approachability, including accepting advice and counsel and working positively with others; work availability between the hours of 7:00 a.m. and 4:00 p.m.; and lack of availability or willingness to attend meetings to take action items and minutes. In the April 15 performance evaluation, Andreasen made references to Mortensen's "reluctance" to attend staff meetings, along with numerous other specific complaints of poor performance, to justify his low performance rating.

The record is unclear on whether the meetings referenced in the April 15 documents are the same extended meetings from which Mortensen asked to be excused. But drawing every reasonable inference in Mortensen's favor, I will assume that Andreasen's criticism of Mortensen for not attending staff meetings was groundless.

The net result is that Mortensen challenges two of the deficiencies named in the April 15 evaluation: meeting attendance and work availability.

In assessing Mortensen's showing of pretext, I must balance the strength of Mortensen's prima facie case, the probative value of her proof that Pacificorp's explanation of her termination is false, and any other evidence that supports the employer's case. *Reeves*, 530 U.S. at 148-49.

The causation element of Mortensen's prima facie case rests entirely on the timing of her

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

termination. The probative value of her proof the Pacificorp's explanation is false rests on the challenges to Andreasen's criticisms about meeting attendance and work availability. Other evidence that supports Pacificorp's case includes the evidence that in April 2005, Mortensen requested a different supervisor, and that Pacificorp complied with this request by putting her under the supervision of Wagner, a man she clearly liked and who liked her, and who was in a position to work more closely with her in order to provide her the opportunity to improve her work performance. This suggests a good faith effort on the part of Pacificorp to give Mortensen the opportunity to bring her performance into compliance with the improvement plan.

After consideration of all this evidence, I conclude that Mortensen's evidence is not specific or substantial enough to establish that Pacificorp's proffered reasons for terminating her were a pretext for retaliation. I conclude that Mortensen has not raised a material issue of fact tending to establish that Pacificorp's asserted reason for terminating her was pretextual. Pacificorp is entitled to summary judgment on the retaliation claims.

3. The FMLA claim

Pacificorp contends that Mortensen's FMLA claim fails as a matter of law because she cannot demonstrate that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her.

*16 A claim alleging that an employee was terminated in violation of FMLA is not analyzed under the "discrimination" or "retaliation" provisions of the FMLA. *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112 (9th Cir.2001). A claim that an employer visited negative consequences on an employee because she has used FMLA leave is covered under the FMLA provision governing "interference," 29 U.S.C. § 2615(a)(1). *Bachelder*, 259 F.3d at 1124. Under this provision, it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to

exercise, any right provided by this subchapter." The *McDonnell Douglas* burden-shifting framework for employment discrimination and retaliation claims is inapplicable to claims under § 2615(a)(1). *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1135(9th Cir.2003).

When an employee alleges that her FMLA leave was impermissibly considered in the decision to terminate her, courts in this jurisdiction apply the standard set forth by the Department of Labor in 29 C.F.R. § 825.220(c). *Xin Liu*, 347 F.3d at 1135. Accordingly, a triable issue of material fact requires a showing by the plaintiff that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her. *Bachelder*, 259 F.3d at 1125.

Mortensen testified that she knew nothing of FMLA leave until someone from Pacificorp's HR department told her about it. Mortensen requested, and received, intermittent FMLA leave in May 2005. The record indicates that by May 2005, the negative performance evaluations, the investigation of her discrimination complaint against Andreasen, and, possibly (the record is unclear) the transfer to Wagner's supervision, had all taken place. There is no evidence in the record before me that Mortensen's taking of FMLA-protected leave constituted a negative factor in the decision to terminate her. Because she cannot establish a causal connection between her invocation of FMLA leave and her termination, Pacificorp is entitled to summary judgment on this claim.

4. The OFLA claim

Pacificorp contends that Mortensen's OFLA claim fails because there is no cause of action under OFLA for retaliatory discharge. Pacificorp is correct. *Stewart v. Sears, Roebuck and Co.*, CV 04-428-HU (April 15, 2005); *Loumena v. Les Schwab Tire Centers of Portland, Inc.*, CV01-856-KI (October 2, 2003); *Denny v. Union Pacific Railroad*, CV 00-1301-HU (F & R October 31, 2002, adopted by Jones, J., January 30, 2003).^{FN9} Pacificorp is entitled to summary judgment on

Not Reported in F.Supp.2d, 2007 WL 405873 (D.Or.), 34 NDLR P 66
(Cite as: 2007 WL 405873 (D.Or.))

this claim.

FN9. In *Denny v. Union Pacific Railroad Co.*, 173 Fed. Appx. 549, 551 (9th Cir.2006), an unpublished opinion, the Ninth Circuit reversed the holding in *Denny* that there is no claim for retaliation, relying on *Yeager v. Providence Health Sys. Or.*, 195 Or.App. 134 (2005). The Ninth Circuit nonetheless affirmed, since the error was deemed harmless in light of the factual findings at trial. This unpublished opinion is dicta in that the error, if any, was harmless. In addition, the *Yeager* opinion does not address the reasons the *Denny* trial court found there was no OFLA retaliation claim, and it is not a decision of the Supreme Court of Oregon.

Not Reported in F.Supp.2d, 2007 WL 405873
(D.Or.), 34 NDLR P 66

END OF DOCUMENT

5. *Wrongful discharge claim based on FMLA and OFLA*

Pacificorp is entitled to summary judgment on this aspect of the wrongful discharge claim because, as discussed, Mortensen has not shown a causal connection between her invocation of FMLA/OFLA protected rights and her termination.

6. *Wrongful discharge claim based on disability discrimination*

Pacificorp has argued that this claim is preempted by Oregon's disability discrimination and retaliation laws, citing *Galenbeck v. Newman & Newman*, CV 02-6278-HO, 2004 WL 1088289 (D.Or. May 14, 2004). Mortensen has not addressed this argument. Pacificorp is entitled to summary judgment on this claim.

Conclusion

*17 Defendant Pacificorp's motion for summary judgment (doc. # 17) is GRANTED.

IT IS SO ORDERED.

D.Or.,2007.
Mortensen v. Pacificorp

WASHINGTON STATE ATTORNEY GENERAL

March 31, 2014 - 3:33 PM

Transmittal Letter

Document Uploaded: 452987-Respondents Cross-Appellants' Brief.pdf

Case Name: Irene Ngugi v. State Institution for Public Policy; and Evergreen State College

Court of Appeals Case Number: 45298-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondents Cross-Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Cathy E Washington - Email: cathyw@atg.wa.gov

A copy of this document has been emailed to the following addresses:

ChristopherL@atg.wa.gov
torolyef@atg.wa.gov
Breanneh@atg.wa.gov
MelissaK@atg.wa.gov
cwbawn@justwashington.com