# UNITED STATES COURT OF APPEALS

# FOR THE NINTH CIRCUIT

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**ALISON N. TERRY**

*Plaintiff and Appellant,*

v.

**CITY OF SAN DIEGO,**

*Defendant and Appellee.*

**CASE NO. 09-55579**

**D.C. No. 3:06-cv-01459-MMA-CAB**
**Southern District of California, San Diego**

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
THE HONORABLE MICHAEL M. ANELLO, PRESIDING

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# APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

The primary issue in this appeal is whether there is substantial evidence to support a judgment for Alison Terry ("Terry"). It is not whether there is substantial evidence to support a judgment for the City of San Diego ("the City").

The City has submitted what is essentially a "trial brief." The City recites and argues its own evidence of non-discrimination and largely ignores Terry's evidence and the inferences of discrimination and retaliation that may reasonably be drawn from such evidence. Such a brief ignores the standard of review and fails to address the primary issue.

An important procedural issue is whether Terry received fair notice from the City's *moving* papers that the issue of the proper "comparison pool" was being *disputed* by the City. The City has failed to address that issue. A related issue is whether the district court fairly *decided* that issue without even considering Terry's supplemental brief. The City has failed to address that issue as well.

The summary judgment under review is not only the product of ambush by the City. It is the product of trial-by-declaration. The district court did not properly confine its role to determination of the *existence* (or non-existence) of genuine issues of material fact; it summarily *decided* them. Therefore, the district court's order granting the City's motion for summary judgment should be reversed

and the case remanded for trial.

## II. THE CITY HAS DISREGARDED AND VIOLATED THE STANDARDS OF DETERMINATION OF SUMMARY JUDGMENT MOTIONS, WHICH ARE EQUALLY APPLICABLE IN TRIAL AND APPELLATE COURTS.

The City completely ignores the standard of review and case law regarding summary judgment procedure in discrimination cases.

This Court "review[s] a district court's grant of summary judgment de novo." *Huppert v. City of Pittsburg*, 574F.3d 696, 701 (9th Cir. 2009). "In determining whether summary judgment was appropriate, [the court] view[s] the evidence in the light most favorable to the . . . non-moving part[y]." *Ibid*. "A grant of summary judgment is inappropriate if there 'is any genuine issue of material fact or the district court incorrectly applied the substantive law.'" *Ibid*., quoting *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007). "Summary judgment is not appropriate if a reasonable jury viewing the summary judgment record could find by a preponderance of the evidence that the plaintiff is entitled to a verdict in [her] favor." *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1088 (9th Cir. 2008).

"'As a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome the employer's motion for summary judgment.' [Citation.]" *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d

1201, 1207 (9th Cir. 2008). "As [the Court] ha[s] previously explained, '[w]e require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is one that can only be resolved through a "searching inquiry"—one that is most appropriately conducted by the factfinder, upon a full record.'" *Lam v. University of Hawai'i*, 40 F.3d 1551, 1564 (9th Cir. 1994), quoting *Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104, 1111 (9th Cir. 1991).

At the summary judgment stage, the court "do[es] not weigh the evidence or determine whether the employee's allegations are true." *Davis*, *supra*, 520 F.3d at 1088. Rather, in employment discrimination cases, this Court has "'emphasized the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses.' [Citation.]" *Id*. at 1089.

## III. THE DISTRICT COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT ON TERRY'S DISPARATE *IMPACT* CLAIM.

### A. Because the City Had Conceded Terry's Prima Facie Case in Its Moving Papers, the Appropriate Comparison Pool Was Not a Disputed Issue That Could Properly Have Been Decided by the District Court.

In its papers in support of its motion for summary judgment, the City neither mentioned nor addressed Terry's disparate impact theory. 1 ER 46-68. The City was well aware of Terry's disparate impact theory, having previously and unsuccessfully sought to have it dismissed in a motion in limine. 2 ER 226:19-21. The City never addressed the testimony of Professor Lackritz, or his report, despite having deposed him. 4 ER 834. The City presented no evidence that negated any part of Terry's disparate impact claim, or demonstrated that Terry could not make a showing sufficient to establish an essential element of that claim. 1 ER 46-68.

Indeed, the City conceded Terry's ability to establish prima facie sex discrimination: "Since the evidence necessary to satisfy plaintiff's initial burden of showing a *prima facie* case is so 'minimal,' the City begins with its burden of showing legitimate, nondiscriminatory reasons for the actions it took . . . ." 1 ER 60:1-3. The City also admitted: "the [City's] summary judgment motion is based upon the assumption, for the purposes of argument, that the plaintiff has already

made a *prima facie* case . . . ." 1 ER 174:18-19. Therefore, the district court should have denied the City's motion on Terry's disparate impact theory without even considering Terry's evidence on this theory.

The City's Appellee's Answering Brief ("AAB") does not address this issue (AAB, pp. 19-31), which was raised by Terry in her opening brief. Appellant's Opening Brief ("AOB"), pp. 2 (Statement of Issues Presented 1(a)), 32-36.

### B. Because Terry Proffered Uncontradicted Evidence of De-Selection, the Lifeguard I Population, Not the Lifeguard II Applicant Pool, Is the Appropriate Comparison Pool.

The use of the actual Lifeguard II applicant pool is not the appropriate comparison pool in this case because female Lifeguard Is would reasonably self-select themselves out of the pool of applicants. AOB, pp. 40-42. This occurs for several reasons.

*First*, because:

(1) subjective employee performance ratings ("EPRs") weigh heavily in the promotional process;

(2) several female lifeguards have been told that "an employee who does not receive the highest performance rating has very little chance to promote" and it would be a "waste of time";

(3) there is nothing in these annual evaluations which should favor men over women; and

(4) over a seven-year period, men have received the highest performance ratings at a statistically significant higher rate than women (AOB, pp. 40-41),

a reasonable inference can be drawn that female Lifeguard Is self-select themselves out of the pool of Lifeguard II applicants because they do not possess the highest performance ratings and do not wish to "subject themselves to personal rebuffs" and "the humiliation of explicit and certain rejection." *International Brotherhood of Teamsters*, 431 U.S. 324, 366 (1977); *Bates v. United Parcel Service*, 465 F.3d 1069, 1079 (9th Cir. 2006) (lack of minimum requirements to apply "of no moment" because allegedly discriminatory practices may have deterred plaintiff from seeking the minimum requirements). See AOB, pp. 36-42.

"There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977), citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). "The application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized

inability to meet the very standards challenged as being discriminatory." *Dothard* at 330, citing *Teamsters*, *supra*, 431 U.S. at 365-367; *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1272 (11th Cir. 2000) ("well-settled that an employer's reputation for discriminatory hiring practices can lead to self-selected applicant pool not reflective of the actual available labor pool [because] a rational qualified female candidate is likely to self-select out of the application process, declining to make what she considers a 'futile gesture'"); *Wheeler v. City of Columbus*, 686 F.2d 1144, 1152 (5th Cir. 1982) (applicant flow data should be treated with "[c]aution" because this data is "often distorted by . . . improper deteren[ce]"). "[I]n only a few cases will there be objective evidence of discrimination such as the posting of a 'Whites Only' sign on the hiring door." *Bouman v. Block*, 940 F.2d 1211, 1222 (9th Cir. 1991). "More often, potential applicants may discern subtle signs of discrimination." *Ibid*.

*Second*, de-selection occurs because female Lifeguard Is have difficulty in obtaining the necessary minimum objective requirements needed to apply for the Lifeguard II position. AOB, pp. 42-45.

*Third*, several female Lifeguard Is had resigned from the lifeguard service due to unrelenting sexual harassment. AOB, pp. 45-46.

*Fourth*, the lifeguard supervisorial ranks are heavily male. 2 ER 326. This

alone can deter applicants. *International Brotherhood of Teamsters, supra*, 431 U.S. at 465; AOB, p. 46.

### C. The City Has Failed To Address the Issue and Terry's Evidence of De-Selection.

Despite Terry's emphasis of de-selection and its role in deterring female Lifeguard Is from applying for the Lifeguard II position—and therefore justification for using a proxy pool of Lifeguard Is instead of the applicant pool—the City ignores the evidence of de-selection presented by Terry.[1]

Instead, the City argues that "even if one accepts [Terry's] theory that discriminatory policies prevented some women from applying for the job, and even if some women were disadvantaged because they did not have high performance reviews, [Terry] was not among those women. She was not deterred from seeking the job . . . ." AAB, p. 22, boldface omitted. The City completely misses the point. There is an exception to the general rule that statistical comparisons be made to the actual applicant pool when "persons who lack the challenged requirement will self-select themselves out of the pool of applicants." *Moore, supra*, 708 F.2d at 482.

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[1] Worse, the City incorrectly states: "[Terry] presented no evidence at all as to the reasons female Lifeguard Is did not apply for Lifeguard II." AAB, p. 25, n.12. It is one thing to fail to address the seven pages of evidence discussed in Terry's opening brief. AOB, pp. 40-46. It is another to incorrectly state that such evidence was never presented.

"When an employer requires such qualifications, the makeup of the pool of actual applicants does not fairly reflect the pool of individuals affected by the challenged requirement." *Ibid.* Thus, the issue is not what *Terry* did, but whether there is at least minimal evidence that *other female Lifeguard Is* self-selected themselves out of the applicant pool. Terry presented uncontroverted evidence of such self-selection. AOB, pp. 40-46.

Indeed, in discussing *Teamsters*, the City concedes that the "applicant pool [would not be] a good standard . . . [if] people were discouraged from applying." AAB 25. Because Terry presented evidence that several females were informed it would be a "waste of time"[2] to apply without the highest subjective performance ratings—which females, for reasons unexplained, rarely received—she demonstrated a genuine issue of material fact.

Further, Terry presented statistical evidence. 2 ER 273-306.[3] The City presented none. "If the employer discerns fallacies or deficiencies in the data

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[2] 2 ER 314:7-12 ("waste of time"); 2 ER 319:19-22 ("promotion difficult if not impossible" without highest ratings); 2 ER 312:2-3 (same); 307:22-24 (higher ratings improve chance of promotion).

[3] "The choice for statisticians faced with [self-selection] dilemma is 'usually between general population statistics and the statistics of the relevant labor market.'" *Stagi v. National R.R. Passenger Corp.*, 2009 WL 2461892, *5 (E.D. Pa. 2009), quoting *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983).

offered by the plaintiff, he is free to adduce countervailing evidence of his own." *Dothard*, *supra*, 433 U.S. at 331. "In this case no such effort was made." *Ibid.*

### D. If the Issue of the Appropriate Comparison Pool Was Properly Presented by the City, the District Court Abused Its Discretion in Refusing To Consider Terry's Supplemental Brief on That Issue, Because She Had No Earlier Opportunity To Address It.

After the City first raised the issue of the appropriate comparison pool in its *reply* brief (4 ER 811:8-813:7), Terry objected (4 ER 887-888) and filed a supplemental brief addressing the City's new arguments. 4 ER 859:23-865:3. But the court refused to consider it. 5 ER 1070:7 ("the Court disregards all responsive briefing"). This was an abuse of discretion.

It is improper for the moving party to introduce new facts, evidence or argument raised for the first time in reply papers. See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894-895 (1990) (untimely supplemental affidavits should not have been considered); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("district court need not consider arguments raised for first time in reply brief"); *Provenz v. Miller*, 102 F.3d 1478, 1484 (9th Cir. 1996) ("[w]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond").

## IV. THE DISTRICT COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT ON TERRY'S DISPARATE *TREATMENT* CLAIM.

"'Under *McDonnell Douglas*, a plaintiff alleging disparate treatment under Title VII must first establish a prima facie case of discrimination.' [Citation.]" *Nicholson v. Hyannis Air Service, Inc.*, 580 F.3d 1116, 1123 (9th Cir. 2009). "Specifically, a plaintiff must show that (1) [s]he belongs to a protected class; (2) [s]he was qualified for the position; (3) [s]he was subject to an adverse employment action; and (4) similarly situated individuals outside [her] protected class were treated more favorably." *Ibid*. The City does not dispute the presence of the first and third elements.

"The evidence may be either direct or circumstantial, and the amount that must be produced in order to create a *prima facie* case is 'very little.' [Citation.]" *Sischo-Nownejad, supra*, 934 F.2d at 1110-1111. "Normally, when such evidence has been introduced, a court should not grant summary judgment to the defendant on any ground relating to the merits." *Id*. at 1111. "Even if the defendant articulates a legitimate, nondiscriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove that the articulated reason is pretextual, summary judgment is normally inappropriate." *Ibid*. "'[W]hen a plaintiff has established a *prima facie* inference of disparate treatment through

direct or circumstantial evidence of discriminatory intent, he will *necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision.' [Citation.]" *Ibid*., italics in original. "Specifically, in evaluating whether the defendant's articulated reason is pretextual, the trier of fact must, at a minimum, consider the same evidence that the plaintiff introduced to establish her *prima facie* case." *Ibid*.

With regard to the second element of the prima facie case for a disparate treatment claim, qualification for the position, this Court "has long held that subjective criteria should not be considered in determining whether a plaintiff is 'qualified' for purposes of establishing a prima facie case under *McDonnell Douglas*." *Nicholson*, *supra*, 580 F.3d at 1123. "Instead, '[t]he qualifications that are most appropriately considered at step one [of *McDonnell Douglas*] are those to which objective criteria can be applied . . . .'" *Nicholson* at 1123, quoting *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1345, n.8 (9th Cir. 1981). "As we explained, 'subjective criteria, along with any supporting evidence, are best treated at the later stages of the process. To do otherwise would in many instances collapse the three step analysis into a single initial step at which all issues would be resolved . . . defeat[ing] the purpose underlying the *McDonnell Douglas* process.'" *Nicholson* at 1123, quoting *Lynn* at 1344.

Terry possessed all of the objective criteria for promotion to Lifeguard II, and the City does not contend otherwise.

With regard to the fourth element of the prima facie case for a disparate treatment claim, that males were treated more favorably, Terry presented three specific instances in which she was treated less favorably: (1) lack of three consecutive years of the highest subjective EPRs, (2) difficulty in obtaining a required PWC operator's certificate, and (3) concealment of critical promotional criteria.

Although the City concedes that it did not intend to contest Terry's ability to establish a prima facie case of disparate treatment discrimination (AAB, pp. 41-42), it now asserts that Terry cannot make out the fourth element of her prima facie case. According to the City, "[Terry] offered no evidence at all that she was treated differently during the PWC training process or that . . . [she] was treated differently during the promotional process because of the EPR ratings anyone got." AAB, pp. 43-44. The City also asserts: "[Terry] presented absolutely no evidence that whether a person was told about PC 832 and SRT courses had anything to do with whether that individual would be hired or not. There is simply no relationship between the two." AAB, p. 44. The City is entirely incorrect.

### A. Terry Presented Sufficient Evidence That Male Lifeguards Are Treated More Favorably Than Female Lifeguards in the City's Procedure for Promotion to Lifeguard II.

#### 1. *Male lifeguards consistently, but inexplicably, receive higher subjective performance ratings.*

In her opening brief, Terry demonstrated that male lifeguards consistently, but inexplicably, receive higher subjective performance ratings. AOB, pp. 6-9, 30-32, 50-51. While this evidence also supports Terry's disparate impact theory, it demonstrates that male lifeguards were treated more favorably than Terry was.

And it mattered, both generally, and specifically in the case of the 2006 Lifeguard II promotions. EPRs weigh heavily in the promotional process. 4 ER 702:24-703:1; 4 ER 682:15-683:10 ("interested in hiring the person with the best performance"); 4 ER 738:15-21 ("[i]t's certainly part of what we evaluate, previous performance"); 4 ER 725: 3-11 ("if you did a good job and received a higher EPR, in other words, outstanding, that you stood a better chance of being [promoted]"); 3 ER 571 (recommended list for 2006 Lifeguard II compiled by "thorough review of . . . 2003, 2004, and 2005 performance reviews (see attachment entitled EPR Highlights)"); 3 ER 556-557 ("EPR Highlights 2006 Lifeguard II Candidates" emphasizing ratings by placing only the rating in boldface); 1 ER 189:27-28, 192:14-15, 194:27-27 ("[e]mployment as a Lifeguard

II was offered to the applicants according to their ranking").

Of the six Lifeguard Is originally offered a promotion to Lifeguard II in February, 2006—all of whom were male[4]—four of the six had received three outstanding ratings[5] in the immediate three years prior to the hiring, and the other two received the highest ratings in two of the prior three years. 3 ER 558-568; 3 ER 569-571; 1 ER 58:20-21 ("panel reviewed the three most recent years"). No female Lifeguard I has *ever* received the highest rating three years in a row. 3 ER 559-571.

Professor Lackritz analyzed this data and declared that "the percentage of [outstanding/commendation] ratings for those lifeguard offered promotion in 2006 are significantly higher than the percentage of the [outstanding/commendation] ratings for those not offered promotion in 2006." 2 ER 280. Based on his analysis, he concluded: "[t]he likelihood of seeing the[se] results . . . from strictly random occurrence or chance is so low, that I conclude that the[y] . . . are not due to chance, but to a problem that exists within the evaluation structure and promotion policy of the City of San Diego lifeguard workforce." 2 ER 274:11-23;

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[4] 4 ER 729:24-731:2; 4 ER 730:13-731:1.

[5] In 2004 the City changed the name of the highest rating from "outstanding" to "commendation." 4 ER 717:1-3; 2 ER 311:27-312:1; 2 ER 314:4-6.

2 ER 281.

Because male lifeguards who received the 2006 Lifeguard II promotion were treated more favorably than Terry was—by receiving the highest subjective EPRs possible in the three years prior promotion—Terry met her minimal prima facie case to demonstrate disparate treatment.

**2. *The City makes it more difficult for female lifeguards to meet published criteria for promotion, such as PWC training.***

In her opening brief, Terry summarized the evidence she presented regarding at least five different ways her PWC operator's certificate was delayed.[6] AOB, pp. 9-13, 42-45. Ignoring the requirement that all inferences be drawn in Terry's favor, the City simply argues that other inferences, favorable to it, can and should be drawn from the evidence. AAB, pp. 11-19.

The City also contends that evidence presented by Terry—that she was told that (1) she needed two recommendations in order to be tested on the PWC, (2) those recommendations had to be typewritten, (3) testing could not occur if the surf

[6] (1) Denial of assignment to a beach with a readily-available PWC to facilitate training (AOB, p. 10); (2) falsely told she needed two recommendations instead of just one (AOB, pp. 10-11); (3) falsely told recommendations had to be typewritten (AOB, pp. 11-12); (4) unwritten "minimum surf-size requirement" (AOB, p. 12); and (5) falsely told no testing after Labor Day until the following summer. (AOB, p. 12.)

conditions were not right, and (4) testing could not occur after Labor Day—are "conclusory" and therefore insufficient to defeat summary judgment. AAB, p. 16. The City cites *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496 (9th Cir. 1997). Again, the City is incorrect.

In *National Steel*, the court held that evidence not based on personal knowledge, including a document a deponent "may have seen," were without sufficient factual support. *Id*., at 502. Conversely, "statements [are] not conclusory allegations [that are] based on . . . first-hand knowledge . . . ." *Cripe v. City of San Jose*, 261 F.3d 877, 887 (9th Cir. 2001); *Slade v. Baca*, 70 Fed.Appx. 446, 448 (9th Cir. 2003) (district court erred holding statement of former inmate which included factual data was conclusory).

Here, the evidence presented by Terry was factual, certain, and based on first-hand knowledge of statements made to her. 2 ER 308:10-12 ("I was told by Sergeant Stropky that I needed to obtain recommendations from two male PWC instructors[7] in order to even be allowed to take the PWC test"[8]); 2 ER 308:15-16

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[7] PWC testers and field training officers are all male. 1 ER 94:24-95:2, 95:7-22; 2 ER 307:26-28.

[8] Sergeant Stropky did not deny he told Terry she needed two letters of recommendation: "I don't recall. I've heard talk of it. May have been, may not have been." 4 ER 762:2-5. Terry's testimony is therefore uncontradicted. *Federal Election Comm'n v. Toledano*, 317 F.3d 939, 950 (9th Cir. 2002) ("failure to

("the testing sergeant (Stropky) claimed he did not receive the recommendations from two of Terry's PWC instructors in *typewritten form*"); 2 ER 308:17-21 (told "surf conditions were insufficiently rough for PWC testing" and "conditions were not right" for testing).

The City alternatively contends that the delay encountered by Terry in obtaining a PWC operator's certificate is irrelevant because there were no Lifeguard II promotions in 2004 or 2005. AAB, n.8. However, had Terry not been delayed, she would have had her PWC operator's certificate in time to apply for Lifeguard II promotion in October 2003. 3 ER 422. Moreover, City policy permitted Terry to apply in 2003 without a PWC operator's certificate if she had "documentation indicating she ha[d] completed all necessary [PWC] training, including completion of the field training guide . . . and [she] ha[d] been recommended by a certified PWC instructor." *Ibid*. Although Terry, based on her experience as a later-certified PWC operator, believed she was ready to test in 2003, she was denied a recommendation to permit her to test and told she needed two recommendations, not just one. 2 ER 308:1-13.

Finally, the City fails to address that several males were treated more favorably than Terry, for example, by needing only one, hand-printed

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remember and lack of knowledge are not sufficient to create a genuine dispute").

recommendation and by being permitted to test after Labor Day. AOB, pp. 10-12. Because male lifeguards were treated more favorably than Terry, she met her minimal prima facie case to demonstrate disparate treatment.

### 3. *Only male lifeguards are encouraged to meet insidious unpublished criteria for promotion, such as PC832 and SRT training.*

Without any record citation, the City disputes that Terry was treated less favorably than several male lifeguards who received promotion to Lifeguard II. The City incorrectly asserts: "[t]he Appellant presented absolutely no evidence that whether a person was told about PC 832 and SRT courses had anything to do with whether that individual would be hired or not. There is simply no relationship between the two." AAB, p. 44.[9]

To the contrary, Terry presented evidence—discussed twice in her opening brief—that her failure to take these courses, which were disclosed only to favored male applicants, were what cost her the Lifeguard II promotion. AOB, pp. 13-17, 54-57.

The 2006 Lifeguard II hiring decision was a "close call." (4 ER 697:3-5.)

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[9] Just four pages earlier in its brief, the City conceded that Terry was not promoted because she lacked these courses. "First, [Terry] lacked technical rescue courses, including rope rescue, PC832, rescue system 1 & 2 . . . ." AAB p. 40, quoting the district court.

"All of the candidates were very close" and the reason Terry was not chosen was "subtle." 1 ER 85:16. "Following submission of the interview results . . . the [interview] panel was tasked with generating a recommendation list from the [highly qualified] candidates." 3 ER 571. "The panel chair [Sergeant Vipond] then generated a table depicting a variety of relevant competencies and achievements to facilitate analysis of [highly qualified] candidates' job related education, training, and experience . . . ." 3 ER 571. The document Sergeant Vipond created was entitled "2006 Lifeguard II Hiring Process Work History," also known as the "matrix." 3 ER 559-568; 4 ER 667:4-668:5; 4 ER 714:20-715:20. Included among the relevant ranking criteria were whether the applicant had already completed PC 832, SRT-1 and SRT-2. 3 ER 564-567. As the City conceded in interrogatory responses: "[e]mployment as a Lifeguard II was offered to the applicants according to their ranking." 1 ER 189:27-28, 192:14-15, 194:27-27.

For the City's last two Lifeguard II hirings in 2003 and 2006, the only other highly qualified Lifeguard II candidates who had taken the PC 832 course were males. 3 ER 564-567 (2006); 3 ER 630-631 (2003). And, in both 2003 and 2006, the only other highly qualified Lifeguard II candidates who had taken the SRT-1 or SRT-2 courses were males. 3 ER 564-567; 3 ER 630-631. In 2006, three of these

men were offered Lifeguard II jobs. 4 ER 729:24-731:2.

What "hurt [Terry] the most," and what "separated [her] from the others" was her failure to have taken these classes. 2 ER 308:22-25; 3 ER 573-574; 1 ER 101:23-25; 2 ER 308:26-309:1; 3 ER 573 ("[t]hat's what made the difference and separated me from the new hires"). "[Sergeant] Vipond added that [PC 832] is weighted very heavily." 3 ER 573.

All three persons involved in the ranking of candidates (3 ER 570-571) confirmed this. Fire Department Captain Murray, explained why Terry was ranked so low among the highly qualified candidates: "All I remember is a general discussion about there were blank spots that separated her from the others. Blank spots in the matrix. Predominantly it was in certain areas of either additional class work or experience, as I recall." 4 ER 777. "[Terry] did not have the same motivation [as others because] I expected a motivated person to get the other classes needed. This is what . . . separated the motivated individual from the rest of the applicants." 1 ER 86:1-3. Captain Murray also corroborated Terry's contemporaneous notes (3 ER 573-574), and recalled that Sergeant Vipond told Terry that it would have helped Terry's promotional chances if she had taken PC 832. 4 ER 778.

According to another ranker, Sergeant Jackson, Terry was ranked lower

because she had not taken those courses. "When you compare her background, her training on [the] matrix, that's where she fell." 4 ER 718:13-14.[10]

Finally, Sergeant Vipond admitted that had Terry taken the courses it would have helped her chances of promotion. 4 ER 690:20-691:12.

However, Terry was *never told about those courses and their importance in the promotional process*. 2 ER 309:1-2. Although those courses had been previously used to make hiring decisions for Lifeguard IIs (4 ER 736:18-737:2; 3 ER 630-31), no mention of them *ever appeared* on the City's Lifeguard II job announcements. 3 ER 419-30.

Only *male* Lifeguard Is were told about this secret key to promotion—taking PC 832, SRT-1 and SRT-2—before the Lifeguard II interview. 3 ER 579-81 (2006 male candidate's 2004 performance review listing "goals and training" for include taking PC 832); 3 ER 582 (male candidate's 2005 performance review listing "goals and training for next year" include taking PC 832 and SRT-1); 3 ER 83 (male candidate's 2004 performance review listing "goals and training for next year" include taking PC 832); 3 ER 584 (male candidate's 2003 performance review listing "additional goals and training for next year" include taking "SRT-1

[10] Another sergeant agreed: "[The courses are] beneficial for the applicant to have taken, it's a plus, if you will, towards their promotion chances." 4 ER 735:3-21.

[and] SRT-2"); 3 ER 586 (male candidate's 2005 performance review noting he had already taken SRT-1 and PC 832).

This secret information was never contained in Terry's performance reviews (2 ER 328-417) or in the performance reviews of the other highly qualified *female* candidates. 3 ER 587-588-628. And other female Lifeguard Is interested in promotion were unaware of these courses. 2 ER 311:25-25, 312:17-18; 2 ER 318:25-26, 319:23-24.

Finally, the City attempts to overcome this evidence by arguing that not *all* males were told to take the undisclosed courses. AAB, pp. 8-9.[11] Terry is not required to prove that *every* male Lifeguard I was treated more favorably than her, only that those similarly-situated—i.e., seeking promotion to Lifeguard II—were. *Nicholson*, *supra*, 580 F.3d at 1122. Because several other successful male Lifeguard II candidates were tipped off far in advance to take courses that

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[11] The City cites Sergeant Vipond's *reply* declaration attempting to dilute the evidence Terry offered to demonstrate the direct correlation between her failure to take undisclosed courses and denial of promotion. There are at least four problems with the City's evidence. *First*, it was presented in a reply declaration and Terry had no ability to respond to it. See Section III(D), *ante*. *Second*, all inferences should be drawn in the light most favorable to Terry, not the City. *Third*, the City refutes a straw argument. Terry does not have to prove that *all* male lifeguards were treated more favorably, only that *some* were. *Fourth*, even crediting this evidence, the fact that so few men were tipped off to take the courses, and many of them were promoted, raises a reasonable inference that this is a secret key to promotion.

separated successful candidates from unsuccessful candidates, Terry met her minimal prima facie case to demonstrate disparate treatment.

### B. Terry Presented Sufficient Evidence To Show That the City's Claimed Reasons for Her Non-Promotion Are Pretextual.

"At the third step of the *McDonnell Douglas* scheme, 'the plaintiff must show that the articulated reason is pretextual either 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.' [Citation.]" *Nicholson*, *supra*, 580 F.3d at 1126-1127. "To avoid summary judgment at this step . . . the plaintiff must only demonstrate that there is a genuine dispute of material fact regarding pretext." *Nicholson* at 1127. "The amount of evidence required to do so is minimal." *Ibid.* "'[V]ery little evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive may suffice to raise a question that can only be resolved by a fact-finder.'" *Ibid.*, quoting *McGinest*, *supra*, 360 F.3d at 1124. "'When evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason.'" *Ibid*.

For numerous reasons, there is a triable issue of fact regarding the true

reason Terry was not promoted. *First*, the City *itself* has given conflicting reasons, and such *self-contradiction* demonstrates a genuine, triable issue of material fact with regard to pretext. Originally, the City told *Terry* she was not promoted because she had not taken PC 832 and SRT-1 and SRT-2. 2 ER 308:26-309:1; 3 ER 574. On *appeal*, the City tells *this Court*: "[t]he thing that kept her from promotion was the fact that she was not as good at saving lives as 13 other people who were ranked above her" (AAB, p. 44) and "public safety was the legitimate nondiscriminatory reason [Terry] wasn't certified [for the PWC operator's certificate] until 2005" (AAB p. 12).[12]

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[12] In an attempt to have an inference drawn in its favor, the City misstates the record by characterizing Captain Murray and Terry as being "close" friends. AAB, p. 6, n.6, p. 10. The record supports that the two were friends, but not "close" friends. Moreover, this friendship played no role in Murray's ranking of Terry. 1 ER 85:4-6. Therefore, the inference the City implies should be drawn *favorable to it*, that Terry was rated higher than she should have been because of her friendship with Captain Murray, is not supported by the evidence. Indeed, the evidence confirms that Captain Murray herself thought what hurt Terry the most was that she had not taken the undisclosed courses. 1 ER 86:1-3; 3 ER 574; 4 ER 777.

The City's implied argument that no discrimination occurred because the interview panel contained two females (AAB, pp. 1, 33) should also be rejected. *First*, there is no indication that any of the panelists were aware that male Lifeguards Is have a substantial advantage in the subjective EPRs, or that a few select male candidates were tipped off regarding heavily-weighted courses to take before the interview. *Second*, same gender discrimination is also unlawful. *Kelly v. City of Oakland*, 198 F.3d 779, 785 (9th Cir. 2000).

*Second*, the City's claimed reasons Terry was not promoted are subjective. AAB, pp. 31-39. "'[S]ubjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized.'" *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995), quoting *Jauregui v. City of Glendale*, 852 F.2d 1128, 1136 (9th Cir. 1988).

*Third*, "[s]tatistical evidence may support a plaintiff's showing of pretext in a disparate treatment claim." *Noyes v. Kelly Services*, 488 F.3d 1163, 1172 (9th Cir. 2007). The City neither addresses nor refutes the compelling statistical evidence of sex discrimination. 2 ER 326 (organizational chart); 2 ER 273-281 (statistical analysis); 3 ER 633-642 (EPR data analyzed). The City offers no explanation why male lifeguards are consistently rated higher than female lifeguards on *subjective* criteria, or why the City has offered 23 of the 24 supervisorial positions of chief, captain, lieutenant, and sergeant to men. Such evidence supports an inference of discriminatory motive. AOB, p. 50.

*Fourth*, the City fails to address, much less explain the insufficiency of, the testimony of several other female Lifeguard Is who had difficulty obtaining certifications necessary to be eligible to apply for promotion to Lifeguard II. 2 ER 316:26-317:2; 2 ER 318:22-319:1; 2 ER 314:13-16. Such evidence supports an inference of discriminatory motive.

*Fifth*, the City fails to address or explain why several female Lifeguard Is have resigned from the lifeguard service due to unrelenting sexual harassment. 2 ER 311:23-26; 2 ER 314:14-16; 2 ER 317:4-5; 2 ER 318:2-319:11. Such evidence supports an inference of discriminatory motive.

*Sixth*, regarding the necessity of obtaining a PWC operator's certificate before promotion to Lifeguard II, Terry presented *specific* evidence of pretext. For example, Lifeguard II Lisa Darling declared that the PWC is rarely used. 2 ER 314:22-23. Because Terry had been certified in the main tower, from which PWCs are deployed, and was responsible for training others (2 ER 334), the City's assertion that a PWC operator's certificate is needed to know how to deploy a PWC (AAB, p. 19) has a hollow ring.[13] And the City does not address (1) the evidence that male Lifeguard Is encountered less resistance than Terry in obtaining PWC operator's certificates or (2) the evidence that male lifeguards obtained such certificates with much greater frequency than female lifeguards. 3 ER 547-548; 3 ER 554 (67 male lifeguards obtained PWC operator's certificate from 2000 to 2005); 3 ER 544; 3 ER 554 (only 9 female lifeguards obtained PWC operator's certificate over the same period).

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[13] After all, General Eisenhower was not an experienced tank operator or fighter pilot.

In short, Terry presented more than sufficient evidence to warrant a trial of her disparate treatment discrimination claim.

## V. THE DISTRICT COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT ON TERRY'S RETALIATION CLAIM, BECAUSE AN INFERENCE OF CAUSATION CAN BE DRAWN FROM TERRY'S EVIDENCE.

Although the quantum of evidence needed to establish a prima facie case of retaliation is "minimal" (*Cordova v. State Farm Ins. Co.*, 124 F.3d 1145, 1148 (9th Cir. 1997)), the City contends that Terry failed to meet this threshold because she cannot show causation. AAB. P. 49 ("Appellee does not contest the first two elements of [Terry's] prima facie case, but does argue that [she] cannot show the required causal link between her protected activity and her lack of work in 2007"). Yet in her opening brief, Terry explained *four separate methods* of establishing the causal link (AOB, pp. 60-63), and the City addresses *only one* of them—temporal proximity. It ignores (1) participation in retaliatory conduct by those against whom discrimination charges were made, (2) conduct towards other employees, and (3) statements from other employees. AOB, p. 61.

Even if temporal proximity were the only method of establishing the causal link—which it is not (AOB, p. 61)—Terry established a prima facie case when the evidence is viewed in the light most favorable to her. Terry's employment as Lifeguard I was seasonal, typically from Memorial Day to Labor Day each summer. 2 ER 313:26-27. After Terry had been denied promotion in 2006, she

accepted other full-time employment and entered the 2006 partial schedule program ("PSP"). 2 ER 309:4-7. During the summer of 2006, Terry worked only "a total of 69 hours." *Ibid*. The 2006 Lifeguard I season ended on September 4, 2006 (*ibid.*), barely one month after the City filed its answer. 1 ER 17. Terry's very next employment opportunity—and the City's first realistic chance to retaliate—occurred after Memorial Day 2007, when the 2007 Lifeguard I season began. 2 ER 309:8-11. During that entire summer, Terry was never called in for work once.[14] *Ibid*. When she called to inquire, she "was told there was no work available." 1 ER 119. Because Terry suffered retaliation within a relatively short time period in the specific context of her *seasonal* job, causation can be inferred even under the temporal proximity method.

The City relies almost exclusively on the declaration of Michael Cranston and his averment that PSP guards, such as Terry, were required to call in to be scheduled. AAB, pp. 49-55. However, Terry has presented substantial evidence controverting Mr. Cranston's statement.[15] Moreover, his explanation that he was

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[14] Despite "a [2007] shortage of seasonal lifeguards" (1 ER 119) which caused the City to pay "substantial overtime" to other seasonal lifeguards. 2 ER 316:22-25.

[15] 2 ER 315; 1 ER 117 ("PSP lifeguards will generally *be called* after all full-time seasonal lifeguards have been assigned" (italics added)); 1 ER 114-115 (PSP application fails to mention the "call in for work rule," requests Terry's

too busy to call Terry from Memorial Day to July 13, 2007, because he was, among other things, occupied with lost children (AAB, p. 54), is so inherently implausible that it calls his credibility into question. Mr. Cranston had enough time to call *male* lifeguard Greg Davies. 2 ER 315:212-23 (similarly situated male lifeguard "was often called").

Because "the trier of fact can infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose" *(Reeves v. Sanderson Plumbing Products , Inc.*, 530 U.S. 133, 147 (2000)), the district court should have held Terry presented a prima facie case of retaliation. AOB, pp. 63-64.

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phone number, provided twice, her e-mail address, and her schedule availability: "as needed—on call"); 4 ER 764:10 (Sergeant Stropky acknowledged "calling people in" off of PSP list); 1 ER 119 (Terry called in for work three times).

## VI. CONCLUSION

"As early as 1993, one scholar examined the summary judgment procedure in Title VII and Age Discrimination cases, and concluded that courts in such cases weigh the evidence, frequently draw inferences in favor of the moving party employer, and seemingly make credibility determinations." *Nazir v. United Airlines, Inc.*, 178 Cal.App.4th 243, 286, n.22 (2009), citing McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases* (1993) 34 Boston College L.Rev. 203, 229. "Similar criticism has continued over the years." *Nazir* at 286, n.22, citing Miller, *The Pretrial Rush to Judgment: Are the 'Litigation Explosion,' 'Liability Crisis,' and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?* (2003) 28 NYU L.Rev. 982, 1064; Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorah?* (2004) J. Emp. L. Studies 591, 624. "In the colorful language of Chief Judge Wald: 'Its flame lit by *Matsushita*, *Anderson*, and *Celotex* . . . summary judgment has spread . . . through the underbrush of undesirable cases, taking down some healthy trees as it goes.'" *Nazir* at 286, citing Wald, *Summary Judgment at Sixty* (1998) 76 Tex. L.Rev. 1897, 1941.

"Besides an overall more particularized factual inquiry, a trial provides

insight into motive, a critical issue in discrimination cases." *Lam*, *supra*, 40 F.3d at 1564. "The existence of an intent to discriminate may be difficult to discern in depositions compiled for purposes of summary judgment, yet it may later be revealed in the face-to-face encounter of a full trial." *Ibid*. The summary judgment under review not only deprives Terry of a fair opportunity to prove her case, it nullifies her constitutional right to a jury trial. This Court should reverse that judgment and remand the case for trial.

DATED: November 19, 2009

Respectfully submitted,

Law Office of Michael A. Conger

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because:

This brief contains 6,995 words, excluding the parts of the brief excepted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: November 19, 2009

s/ Michael A. Conger
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## CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following:

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October 27, 2009

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**Re: Terry v. City of San Diego**
**United States District Court Civil No. 06-CV-1459 JAH(CAB)**
**United States Court of Appeals Docket No. 09-55579**

Dear Mr. Cordileone:

Please be advised that we have been granted a two-week extension by the Court Clerk to file the appellant's reply brief in the referenced appeal. Our reply brief is now due on Friday, November 20, 2009.

Please do not hesitate to contact me should you have any questions regarding the foregoing.

Very truly yours,

Michael A. Conger

MAC/pbm
cc: Ms. Alison N. Terry

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# Fax Coversheet

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**Date:** October 27, 2009

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