Docket No. 09-55579

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALISON N. TERRY, Plaintiff and Appellant, v. CITY OF SAN DIEGO, Defendant and Appellee.	Dist. Court No. 06cv1459 MMA (CAB)

On Appeal from the United States District Court
For the Southern District of California
The Honorable Michael M. Anello, Presiding

APPELLEE ANSWERING BRIEF

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I. INTRODUCTION

Focusing on the **key** facts, this is a simple case. Appellant's claim isn't against a governmental behemoth discriminating against women. She claims four people discriminated against her. She says three denied her a promotion and one refused to give her any work in retaliation for filing suit.

One, a woman, is Appellant's friend. All have worked with her for years. Other than the fact she was not rated number one on the list for promotion, she hasn't shown any thing that any of them did that is discriminatory. In contrast to the absence of evidence against them, all four state they did what they did for the legitimate nondiscriminatory purpose of keeping San Diego's beaches as safe as possible.

Appellant says that two women and one man conspired to deny her a promotion.1 She says they didn't want her to promote because they don't want women to be permanent lifeguards.2 She doesn't explain why someone like that would rank her as "highly qualified" and 14th best out of 33. She doesn't explain why they ranked a greater percentage of female applicants as "highly qualified"

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1 She also claims delays in certification as a personal watercraft operator are based on discrimination instead of the fact she wasn't ready to drive a powerful waverunner among holiday crowds.

2 The women are or were permanent lifeguards themselves.

than males.3 She doesn't even show they knew only 6 (and not 15) would be offered jobs.

Appellant says the fourth person retaliated against her a 1½ years after she filed by not giving her any work. He explained the mix-up was based upon his expectation that, with 13 years prior experience he thought she would what everyone else did and call for an assignment. Appellant didn't dispute his statements, and doesn't deny he asked her to call when she returned from her vacation in Turkey; she didn't call and doesn't say why she didn't.

The trial court arrived at the correct ruling. The Appellant has no material facts to put before a jury and cannot refute the legitimate nondiscriminatory reasons for what happened and cannot show that these things were pretext. There were only six slots for promotion and Appellant was not among the six **best** people for the job.

II. STATEMENT OF JURISDICTION

Appellee, City of San Diego does not object to Appellant's "Statement of Jurisdiction," commencing at page 1 of the Appellant's Opening Brief (AOB) and submits that it is adequate for issues Appellee intends to address.

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3 60% of all female applicants were "highly qualified;" only 43.5% of the male applicants were "highly qualified." [1ER100:14-17; 4ER837:7-18.]

III. PROCEDURAL HISTORY

Appellee, City of San Diego does not object to Appellant's "Statement of Procedure," commencing at page 24 of the AOB and submits that it is adequate for issues Appellee intends to address.

IV. DISCUSSION

A. The Basic Facts:

Appellant, Alison Terry was a Lifeguard-I employed by the City of San Diego since 1992. [2ER307:22-23.] Lifeguard-Is are seasonal employees. Normally, although they work full-time, they only work from Memorial Day to Labor Day. [2ER313:26-27; 4ER661:5-13.]

When asked to identify "each and every adverse employment action" that she suffered Appellant complained of only two things:[4]

> Beginning in 2003, my employer, the City of San Diego, made it very difficult for me to obtain the training and certification I needed (personal watercraft training and certification), in order to promote to Lifeguard-II. After I finally obtained the PWC5 certification after great

4 "Adverse employment action" was broadly defined as "any termination, suspension, demotion, reprimand, loss of pay, failure or refusal to hire, failure or refusal to promote, or other action or failure to act that adversely affects the plaintiffs rights or interests and which is alleged in the complaint." [1ER157:20–24.]

5 PWC stands for "personal watercraft." It is commonly called a "waverunner."

> difficulty, I sat for an interview in February, 2006 and was told that I lacked additional, previously unstated qualifications needed to promote. [1ER157:20–24.]

Later, she added a third claim, alleging retaliation for the suit she filed in early 2006 by not giving her work in 2007. [1ER39:12-13.]

B. Appellant's Three Charges of Disparate Treatment:

Appellant contended that she established a prima facie of disparate treatment case based on the following: (1) Appellant is a female, and as such, is part of a protected class under federal and state law; (2) Appellant was "highly qualified" for the position of Lifeguard-II; (3) She experienced an adverse employment action—she did not receive the promotion to Lifeguard-II; and (4) similarly situated male Lifeguard-Is were treated more favorably in several ways which substantially improved their chances for promotion to Lifeguard-II. [2ER233:16-23; 5ER1097:11-16.] As to the fourth element, Appellant asserted three ways in which male Lifeguard-Is were treated more favorably: (1) male Lifeguard-Is were able to obtain their certification on the PWC more quickly than women; (2) male Lifeguard-Is received three consecutive years of the highest ratings more frequently than women; and (3) male Lifeguard-Is were told about critical evaluation criteria and women were not. [2ER233:24-236:7; 237:5-239:13; 2ER233:24-25; 5ER1097:16-21.]

The Trial Court looked at the evidence and rejected the second and third bases of her disparate treatment claim. [5ER1097:22-27.] It said the first basis met the initial prima facie test, but then found there was a legitimate nondiscriminatory reason for Appellee's actions.

1. The "Highest Rating" Claim:

Addressing the last two first, the Court determined that the second basis for Appellant's disparate treatment claim was her contention that, unlike her male counterparts, she did not receive three consecutive years of the highest ratings on her EPRs. [2ER236:8-237:4.] Appellant relied on evidence that female lifeguards have a statistically significant lower percentage of outstanding or commendation (O/C) ratings than male lifeguards. [2ER236:17-21.] Appellant's argument, however, was that she was not promoted because she did not receive three consecutive O/C ratings. Appellant's data regarding Appellee's award of outstanding or commendation ratings did not support an inference of discrimination. Appellant offered evidence that during the years 1999 to 2003, six male Lifeguard-Is received the highest rating three years in a row. In determining who to promote to Lifeguard-II, however, the panel considered EPRs for 2003 to 2005. [2ER555-568.] Thus, the Court found her evidence was irrelevant. Appellant also asserted that, of the all-male Lifeguard-Is originally **offered** the Lifeguard-II

position, at least four received three consecutive O/C ratings. The Court found that the relevant data must include only those who were **actually promoted** to the position. [5ER1073:13-15.] The application for the Lifeguard-II position specifically stated that the Lifeguard-II position was contingent on passing a background investigation. [3ER419.] Although Appellee initially offered the position to six men, one of the male lifeguards failed the background investigation. Accordingly, Appellee offered the sixth Lifeguard-II position to a **female** Lifeguard-I [who was 7th on the list.] [4ER729:24-731:2.]

Thus, out of those actually promoted, only three had three consecutive O/C ratings. [3ER570-571.] The female who was offered the Lifeguard-II position had only one O/C rating, while Appellant had two. [3ER557.] Thus, Appellant's argument was undercut by the fact that the female lifeguard who was ultimately promoted to Lifeguard-II was promoted despite having fewer O/C ratings than Appellant.[6]

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6 The trial court considered Appellant's claim that female Maureen Rabe, was promoted due to her personal relationship with female Sergeant Jackson, one of the interviewers who ranked the candidates. [2ER229.] Appellant, however, offered no evidence of any favorable treatment during the interview process. Moreover, the Court noted that all of the ranking decisions were unanimous among the three-person panel. [5ER1081:18-20] and Appellant herself had a close relationship with Sergeant Jill Murray. But that relationship did not play a role in the ranking of Appellant. [5ER1075:28; 4ER830:15-23; 1ER84:1; 85:1-6.]

The Court also noted that among those ranked as "highly qualified," Appellant was ranked below several lifeguards who had fewer commendations or outstanding ratings than she. [5ER1067; 3ER570-571.] In order to show a prima facie case of disparate treatment based solely on statistics, the Court noted that Appellant had to show a "'stark' pattern of discrimination unexplainable on grounds other than gender." *Palmer v. United States*, 794 F.2d 534, 539 (9th Cir. 1986) (quoting *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 552 (9th Cir. 1982)). The Court noted that Appellant failed to make such a showing.[5ER1076:2-7.]

Since Appellant failed to offer relevant evidence on that aspect of her disparate treatment theory, the Court found Appellant's second contention—that male Lifeguard-Is received three consecutive years of the highest ratings more frequently than women—could not be a basis for Appellant's disparate treatment claim. [5ER1076:7-10.]

2. The "Secret Key to Promotion" Claim:

Appellant alleged that, unlike her male counterparts, she wasn't told about critical evaluation criteria that would have improved her chances for promotion. [2ER237:5-6.] Appellant said male Lifeguard-Is were told to take PC832 and two technical swift water rescue courses ("SRT-1" and "SRT-2"), and she was never

told about these courses and their importance in the promotional process. [2ER237:5-6.] Appellant, however, failed to provide relevant evidence supporting her argument. Of the seven lifeguards who were offered jobs, only one lifeguard took both the PC832 and SRT-1 courses. [4ER824:8-9.] Two others who were promoted took the PC832 course. Of the seven highly qualified candidates who were offered the job, only one had a mention of PC 832 in his EPR and actually took the course. [4ER824:3-6.] The other two lifeguards who took the PC832 course were not told to take the course in any EPR. [4ER824:3-6.] Although the evidence shows that the lifeguard who took the SRT-1 course was told to take the course in an EPR, two other lifeguards who were promoted were told to take the course in their EPRs but never did. [4ER824:3-6.] The evidence also demonstrated that one highly qualified female lifeguard was told to take the SRT course in an EPR. [4ER824:8-13.] Finally, the Court noted that several other candidates took either one or both of the courses, but did not receive an offer of promotion. [3ER559-568.] In short, there was no relation between the "secret key" and actual promotions.

In contrast to Appellant's rather bizarre "secret key to promotion"7 theory, the Court had a detailed and undisputed explanation of the legitimate

7 See Appellant's Opening Brief, pages 15, 55, 56

nondiscriminatory reasons that a tiny fraction of the EPRs recommended an individual take either a PC 832 or a SRT course. It was far more mundane than Appellee's theory of a vast conspiracy against women. The Vipond Declaration [4ER823-825], showed that every year, every Lifeguard-I got an EPR which included a section on goals. That section was a collaborative effort between the employee and his/her direct supervisor. EPRs include either the supervisor or the employee setting out what the two believe that individual can do for career advancement. Vipond explained in the 4 year period, from 2003 to 2006 inclusive, there were approximately 510 EPRs for male Lifeguard-Is. Of those 510 EPRs, only 10 (not quite 2%), prepared by 3 (out of 15) different supervisors, included a comment to a particular individual telling him he could benefit from completing a PC 832 police practices course. Others got different advice. Appellant cherry picked 10 of these custom tailored remarks representing less than 2% of the total written comments to males over a 4 year period. She then said these amounted to the secret key of information to be shared with all men and hidden from all women. [4ER824:20-825:6.] Appellant did not explain why it was that only 10 of 510 EPRs would contain this secret key nor why it had no impact at all on the actual promotion process that she took part in.

Vipond also noted that on several occasions, Appellant was given

individually tailored advice as to what she, personally, needed to do to promote (*viz.* get more operational experience-i.e. spend more time on the ocean saving lives). All three interviewers, including one who is a close friend of Appellant, gave evidence that it was her failure to follow that advice that kept her from getting a higher ranking. [1ER78:24-79:10; 86:6-10; 102:3-13; 4ER825:7-10; 810:20-811:7.]

Based on the foregoing, the Court said there was no "stark" pattern of discrimination that could only be explained by an inference of discrimination. Accordingly, the Court found that Appellant's third contention-that male Lifeguard-Is were told about critical evaluation criteria and female lifeguards were not-could not be a basis for Appellant's disparate treatment claim. [5ER1076:28-1077:2.]

3. The PWC Certification Claim:

As to PWC certification, the Court found that Appellant presented at least enough evidence to make a prima facie case which then shifted the burden to the Appellee. The Court held:

> The Court, however, does find that Plaintiff has presented evidence to satisfy the fourth element—that she was treated less favorably than similarly situated male Lifeguard-Is—on the asserted basis that, unlike her male counterparts, Plaintiff was prevented from obtaining her PWC certification in a timely manner, **which prevented her from seeking promotion at an earlier date**. Accordingly, because Plaintiff has established a prima facie case of disparate treatment, the burden shifts to Defendant, who must offer legitimate, non-discriminatory reasons for the alleged delay in Plaintiff's PWC certification.

[5ER1077:3-9; emphasis added.]

In fact, she was **not** prevented from seeking promotion earlier. This is because there were no opportunities for anyone to be promoted at all in 2004.[8]

In any event, assuming that she made a prima facie case and assuming non-certification in 2004 was relevant, the Court continued its analysis of the undisputed reason she was not certified.

C. The Legitimate Nondiscriminatory Reason to Certify in August 2005:

In early 2003, Appellant decided that she wanted to apply for permanent Lifeguard-II. [2ER307:25-26.] However, she lacked certification as a PWC operator. This certification is a prerequisite to applying for the position. [2ER307:25-26.] Appellant began the process on March 27, 2003 [3ER432] but didn't actually start training until July of that year. [1ER99:8-9; 160.] She became certified as a PWC operator 29 months later on August 8, 2005. [3ER463.]

Appellant contended the certification process took longer than necessary

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8 Besides its other defenses, Appellee suggests complaints of delays related to PWC certification are irrelevant. Other than serving as crew and sitting in a class, she didn't actually begin training until July 28, 2003. [[1ER99:8-9; 160.] She chose Junior Guards instead of beach work. No promotions were available between late 2003 and November 2005. [3ER422, 425; 4ER753:17-21, 754:3-9.] Even accepting her claim she lost the entire year of 2004 as a result of unfair delays, she was not disadvantaged as there were no promotional opportunities then. She qualified by August of 2005 and the first position available came 3 months later.

because of resistance from those who were charged with her training and testing. Appellant attributed the delay in certification to her gender. [1ER222:5-14.]

Appellee offered the following undisputed evidence in support of its claim that public safety was the legitimate nondiscriminatory reason she wasn't certified until 2005.

First, 29 months is not an unusual length of time for any guard, male or female to be certified on the PWC. [1ER99:6-9; 99:11-16; 74-22-23.] Many male lifeguards took between two and five years to qualify on the PWC. Moreover, the fact she became certified within the normal period of time could be considered evidence that she was treated better than average because, much of the time, she made choices that opted her out of training. For example, she chose to work in Junior Guards and did not actually commence training until the end of July 2003. [1ER99:8-9.]

Appellant was trained by several different Field Training Officers ("FTOs") all of whom noted that she had great difficulty handling the PWC in even mild wave conditions. Moreover, she was timid and unsure of herself operating the machine. [1ER70:1-71:3; 82:27-83:18; 88:1-28; 91:1-13; 95:7-15.]

Each FTO testified he had no discriminatory feelings or intent and the sole reason each delayed recommending her for testing was her lack of competence in

operating the device. [1ER70:1-71:3; 82:27-83:18; 88:1-28; 91:1-13; 95:7-15.] One FTO stated that while he was acting as a victim needing help, Appellant ran into him with the waverunner instead of rescuing him. [1ER91:3-5.] Another FTO, recalled that it was extremely unusual for a seasonal guard to receive extra training during the winter, and yet she was given that training. [1ER82:27-83:18.] The FTOs were unanimous: Appellant's PWC skills were weak and it was frustrating for them because they were spending numerous hours training her.

During the early fall of 2003 and the summer of 2004, Casey Owens, her FTO then, noted she was fearful of the area where the waves break (the impact zone), and it took more than a year and a half to get her to go into the impact zone with some comfort and some level of ability. Her discomfort was uncharacteristic for someone who had worked so many years as a lifeguard. Even with small surf she would enter the impact zone quickly and then exit the zone quickly as well. This is not good procedure for PWC operators. Eventually Appellant was able to relax and stay in the impact zone so that she could finally realize the capabilities of the PWC. [1ER88:1-28.]

Many other lifeguards hoped to train on the PWC but because Appellant had more seniority she almost always trained first. [1ER88:16-21.] Because she was not very strong on the PWC, and with only a few PWCs in the Service, other lifeguards

had to accept waiting until another time to get training (possibly even for an additional summer to be recommended to test for their operator's certification). [1ER88:16-21.] In the summer of 2004 Appellant was going to compete in some National or World swimming competition. During that time, for two to three weeks Appellant abandoned PWC training for fear of injuring herself and becoming unable to compete in the meet. [1ER88:22-27.] Review of her training log demonstrates a period in 2004 where she did not train. In the rest of the log, a great deal of training is apparent. [1ER160.]

Focusing on training issues she actually complained about, her own testimony is instructive. Appellant said she believed she was treated differently because of her sex in 2003, by Sgt. Stropky. She explained:

> I remember I was in the Mission Beach tower just bawling, just crying and Sergeant Stropky came up -- . . . And I told him everything that had been going on, and he -- and what we did -- he said okay. Let's go over some stuff of the PWC, and we did about an hour, maybe hour and a half, estimate, looking over the ski, talking about the engine, how the pistons work, how the engine works. I don't think that he ever would have done that with a guy, talking about how the pistons work in the engine. Because I had already been through that part of the training additionally, and then we went out on the ski for another three and a half hours with another Lifeguard-II, John Rahm. [1ER96:16-24.]

In other words, she **complained** because the instant two guards heard she had a problem, they dropped everything and spent five hours training her. For their

trouble, all she said was one discriminated against her because she **believed** he wouldn't have talked about engines if she were a man. In response to that claim, Sgt. Stropky noted he is required to train men and women alike on "how the pistons work" and because he wanted to help Appellant. The Appellee's nondiscriminatory purpose was to apply training standards universally to men and women. [1ER96:25-97:2.]

In short, there was no "delay" in her PWC certification. All the time was spent in training because Appellant had genuine problems operating the PWC. Appellee's legitimate nondiscriminatory reason to withhold certification is to ensure that rescuers are proficient with the machine and do not run over drowning victims.

The bottom line with respect as to PWC certification is: Appellant got through the training **faster** than most men or women, because many FTOs spent so much time with her. The evidence, including her own records, showed she had plenty of access to the PWC. [1ER160.]

After examining the evidence the Court concluded there was proof of legitimate, nondiscriminatory reasons to explain why Appellant could not certify earlier. It then addressed Appellant's claims that Appellee's undisputed reasons were pretextual.

Sergeant Stropky gave direct evidence that Appellant was only required to

provide one recommendation, and in November 2004, Owens submitted a recommendation on Appellant's behalf. [1ER95:16-27.] Appellant claimed her certification was delayed because, unlike the men, she was required to provide two recommendations but testing requirements required only one. [2ER234:17-235:10.] Appellant however failed to provide any evidence to support her conclusory statement that she was required to provide two recommendations prior to testing. She gave no evidence she actually obtained the two recommendations she insisted were required. The Court found nothing in the record to support her conclusion. It found only evidence of one recommendation. Appellant also contended that she was not permitted to test because she failed to have the recommendations submitted in typewritten form and was told that she could not test because "the conditions were not right." [2ER235:11-236:7.]

However, the Court found that, barring Appellant's conclusory statements, there was no evidence that Appellant was required to have her recommendations submitted in typewritten form, that two recommendations were actually submitted in typewritten form, or that she was not permitted to test because the conditions were not right. The court noted that conclusory allegations, without factual support, are insufficient to defeat summary judgment. *Nat'l Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997).

Appellant also asserted that she was denied training opportunities due to her assignment to South Mission Beach, a location without a PWC. [2ER241:1-3; 2ER308:-5.] According to Sergeant Katherine Jackson, the lifeguard service had a "vacancy at South Mission at that time that had to be filled by a Main Tower Lifeguard." [1ER76:21-22.] Jackson stated that Appellant filled the criterion, and that the main tower transfer to South Mission Beach was one of Appellant's goals listed on her 2003 Employee Performance Review. [1ER76:18-28.]

Appellant's completion of the main tower transfer was one of the reasons she was ranked "highly qualified." [1ER76:28-77:3.] Appellant's unsupported conclusory allegation that she was denied training on the PWC as a result of her assignment at the South Mission Beach tower, was contrasted with documentary evidence that Jackson went out of her way to ensure that Appellant received training on the PWC at the South Tower. [1ER77:4-20.] The evidence demonstrated that Appellant trained on the PWC on six of the twenty-three days Appellant was paid to work at South Mission. [1ER77:9-10; 160.] Appellant could have had more opportunities to train on the PWC, but Appellant either took time off or called in sick on six of the days she was scheduled to work and was unwilling to work on weekends. [1ER77:21-25.] The trial court found this evidence showed that Appellant was not treated differently than similarly situated male Lifeguard-Is.

The Court held there were legitimate, nondiscriminatory reasons for the amount of time it took Appellant to get her PWC certification, that Appellant experienced great difficulty in operating the PWC, which required her to obtain additional training, the lifeguard service accommodated her by providing more training, including otherwise rare training opportunities during the off-season, Appellant failed to provide complete paperwork, and then once she was permitted to test, Appellant requested that she be given additional time on the PWC. The evidence also demonstrated that Appellant frequently took time off, including almost a month during the summer of 2004, which limited her training opportunities. The trial court also found that despite Appellant's conclusory assertion that she was not given training opportunities during her assignment at South Mission Beach, in fact, the record demonstrated that she was given several opportunities to train. [5ER1080:1-15.]

Because the Court found that Appellee demonstrated legitimate, nondiscriminatory reasons for the length of time it took Appellant to become certified on the PWC, the burden shifted back to Appellant to articulate why those reasons were false and merely pretext for discrimination.

The only evidence Appellant offered of pretext was that Appellee failed to advance any reason for making PWC certification a prerequisite to applying for the

Lifeguard-II position when lifeguards rarely use the PWC. [2ER241:11-13.] The Court, however, was satisfied that, the fact that "the PWC is a tool that the Lifeguard Service uses to ensure public safety." [1ER77:13-14.] Appellee suggests that, if there is a potential to save even one child's life annually with a PWC, that potential is sufficient to defeat Appellant's unsubstantiated claim that requiring PWC certification before promotion is merely pretext to keep women down.

The Court noted that the PWC plays a role in two of a lifeguard's five essential skills: tower observation and prevention. In order to be considered an "outstanding lifeguard," he or she must know when a PWC is necessary for rescue, as well as how to deploy "a PWC in a timely manner so as to prevent rescues or critical rescues from developing." [1ER152.] The trial court found "Although use of the PWC may be infrequent, it is still a tool used by lifeguards to protect the public. When a situation calls for use of the PWC, it is understandable that the lifeguard service would want lifeguards who are able to operate the PWC." [5ER1080:27-1081:2.]

D. The Appellant Failed to Demonstrate a Disparate Impact Claim

Appellant spends a great deal of time addressing why her disparate impact claim should have been allowed to go forward notwithstanding the undisputed and dispositive statistical evidence that women are promoted in numbers proportionate

to their numbers among the applicants. Her suit addressed only a single promotional event, the one occurring in February 2006. Undisputed evidence showed that women were promoted in a slightly higher percentage than represented by their actual numbers among the applicants.

Her only argument was that the Court should have compared the percentage of women promoted from their percentage among women Lifeguard-Is. She is wrong. Her theory smacks of quotas. The trial Court used the pool of applicants for promotion as the gauge. This is the standard which is always used barring exceptional circumstances which did not apply here.

First one must make a distinction between a "facially neutral" disparate impact claim and a disparate treatment claim. Solely as to Appellant's **disparate impact claim**, Appellee presented evidence that women were promoted to Lifeguard-II in the same ratio as their numbers in the applicant pool.[9] That fact, in and of itself, was sufficient to overcome any prima facie disparate impact claim. However, Appellant responds by saying that using the pool of applicants is the wrong standard to follow. She relies on a number of cases which were class actions (or otherwise brought on behalf of large groups) for injunctive relief to change practices which on their face appeared neutral.

She now asks this Court to reject the applicant pool analysis **only as to her disparate impact** claim. She wants the Court to consider whether she was denied a promotion because, statistically, female Lifeguard-Is do not apply in numbers as great as male Lifeguard-Is for promotion to the position of Lifeguard-II. Without any sociological or anthropological testimony, her unqualified expert concludes that the only possible explanation for this is some kind of hidden discrimination against women. The claim should be rejected as unsupported by any evidence. But it also fails on legal grounds.

In making her disparate impact claim, she contends that **she** was denied **her** promotion because she claims (without evidence) that **other women** are discouraged from even applying for the position. Unburdened by any evidence, she argues that these other women know good employee performance reviews weigh heavily in the promotional process and that women do not get ratings as high as men.10 Therefore, she says, knowing that without a high performance rating there is little chance to promote, they decide not to apply for the position of Lifeguard-II because it is a "waste of time." AOB 40-41. For these reasons, she demands that

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9 Actually, their numbers were slightly higher 20% of the women who applied were promoted compared to 17.85% for men. [1ER100:14-17; 4ER837:7-18.]

10 How she can offer testimony about how countless numbers of unknown women know what lies in hundreds of confidential personnel files is problematic for her.

this Court depart from the appropriate standard for comparison: the pool of individuals who applied for the job and instead she wants to conduct a statistical analysis from a different source.

There is at least one fatal flaw in her theory and Appellant herself discloses it. She offers the example from *Bates v. UPS*, 465 F.3rd 1069, 1079, (9th Cir. 2006). At pages 41-42 of her brief she points out how, in *Bates*, the Court commented that even though Mr. Bates didn't meet the minimum job requirements, that fact was of "'no moment' because allegedly discriminatory practices may have deterred plaintiff from seeking" the job. *Bates* talks about an individual "***influenced*** by an allegedly discriminatory policy" who still has an interest in the position even though he did not apply for it. (*Id.*, at 1079; emphasis added.) **In that circumstance**, a plaintiff would still have a claim.

But here, **even if** one accepts Appellant'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, **the Appellant was not among those women.** She was not deterred from seeking the job and her performance reviews were fully on par with the men. **If** there was any disparity in a facially neutral policy, it had no impact whatsoever on the Appellant and she cannot sue for an injury she did not suffer or on a theory that does not apply

to her.

She was not disadvantaged or "influenced by an allegedly discriminatory policy." Appellant applied for promotion the very first opportunity she had. She went into the interview with high performance evaluations and she came out of it with a "highly qualified" rating. In fact she did better than most of the men did. If there was any disparate impact, she did not suffer from it.

Moore and *Stout*[11] outline the proper standard to apply. The trial court explained why:

> Given the statistical neutrality among the pool of applicants, and the statistically significant disparity among all Lifeguard-Is, Plaintiff's disparate impact claim necessarily depends on what the Court finds to be the appropriate comparison pool. Plaintiff relies on the Ninth Circuit case, *Hemmings v. Tidyman's, Inc*., 285 F.3d 1174 (9th Cir. 2002), for the proposition that the appropriate comparison pool is all Lifeguard-I employees. In *Hemmings*, the Ninth Circuit held that in cases involving claims of promotion discrimination, the proper comparison pool is the current employees in lower management positions. Id. at 1185–87. However, *Hemmings* is distinguishable from the case at bar. In *Hemmings*, higher management positions were filled by internal promotions and did not require employees to apply for the promotion. Id. Here, the Lifeguard-II position was filled by internal promotions, but included an application process requiring each applicant to demonstrate certain qualifications to be included on the "eligibility list." NOL, Ex. 22.
>
> The Court finds the Ninth Circuit's decision in *Moore* more instructive. In *Moore*, the Ninth Circuit rejected an argument similar to

11 *Moore v Hughes Helicopter, Inc*. 708 F.2d 475 (9th Cir. 1983 and *Stout v. Potter* 276 F3d 1118, (9th Cir. 2002).

Plaintiff's argument here on grounds that the Plaintiff failed to demonstrate that those in the proposed comparison pool were qualified for the upper-level positions. The Court held: "When the allocation [of the burden of proof] is applied to promotion cases, it will be necessary for the plaintiff to show that the pool of eligible employees is qualified for promotion to a position for which it is manifest that special skills are required."*Moore*, 708 F.2d at 483 (9th Cir. 1983). Here, the Lifeguard-II position is a position open only to persons who have the required special skills. Some of the qualifications that an applicant must demonstrate prior to being placed on the eligibility list include CPR certification, EMT certification, City of San Diego Main Tower Observation certification, SCUBA certification, and PWC certification. *NOL*, Ex. 22. Plaintiff suggests using the entire pool of Lifeguard-Is as the comparison **pool without any demonstration that all Lifeguard-Is are qualified to be promoted to Lifeguard-IIs**. Without such a demonstration, the Court finds that the appropriate pool for statistical analysis is that pool composed of Lifeguard-Is who applied for the position and were subsequently placed on the eligible list. Because the statistics show that a statistically neutral portion of women and men were promoted to Lifeguard-II, the Court finds that Plaintiff has failed to establish a prima facie case on her disparate impact theory.

[5ER1072:17-1073:18; emphasis added.][12]

Appellant relies upon *International Brotherhood of Teamsters v. United States* 431 U.S. 324 (1977) which was a claim for injunctive relief on behalf of all African American and Spanish surnamed individuals against a national common carrier and the Teamsters contending that facially neutral practices kept the class the government was representing from applying for jobs. The argument there was for using something **other than** the pool of individuals who actually applied for the job. The Court came noted the applicant pool was not a good standard in that case, because people were discouraged from applying. Moreover, there was no indication that special qualifications were required for the job. However, in this case, the Appellant **was not** discouraged from applying for the job and special qualifications

12 The highlighted portion of the Court's order is significant given Appellant's obligation to justify a standard other than the pool of applicants. Appellant presented no evidence at all as to the reasons female Lifeguard-Is did not apply for Lifeguard-II. Except for his admission that there was no statistical difference between ratios of men and women promoted during the process plaintiff was involved in, nothing else the expert testified to was admissible. This is because, other than the process plaintiff was involved in, the expert never had essential background information he needed to draw any conclusions. He did not know the makeup of any other the applicant pool for any other hiring process. The expert testified that there are 94 lifeguards employed in positions other than Lifeguard-I and that he did not know how many applicants there were for any of those 94 positions. As to the promotional session plaintiff participated in, **he did not know why women did not apply for the LGII position in the same ratio as they are represented among the LGIs**. [4ER836:4-21; 837:7-18.] Without information as

were required before one could apply.

Moreover the very thing which Appellant argues made her promotion less likely (*i.e.*, absence of O/C ratings) did not factor in the hiring at all. It is moot in many ways. Appellant said that high performance evaluations for women were not as frequent as for men, but this Appellant's high performance evaluations were on par with those of the men. Not only that, the Trial Court noted that people both men and women with fewer O/C evaluations were ranked above her for hiring.

Appellant also relies heavily upon *Wards Cove Packing Co., Inc., et al., v. Antonio* 490 U.S. 642 (1989), another class action lawsuit. But even a cursory reading of *Wards Cove* demonstrates that the Trial Court here utilized the correct approach. In fact *Wards Cove* supports the Trial Court.

In *Wards Cove* the Supreme Court noted that the appellate court relied solely on statistics showing a "high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in the noncannery positions." (*Id.*, at 650.) But such a disparity was "not relevant" to that case.

> "There can be no doubt," as there was when a similar mistaken analysis had been undertaken by the courts below in *Hazelwood, supra*, at 308, 97 S.Ct., at 2741, "that the ... comparison ... fundamentally misconceived the role of statistics in employment discrimination cases." The "proper comparison [is] between the racial

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to **why** a group other than the pool of applicants should be used, statistical evidence as to that other group is worthless.

> composition of [the at-issue jobs] and the racial composition of the **qualified** ... population in the relevant labor market.". . .
>
> It is clear to us that the Court of Appeals' acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers, was flawed for several reasons. Most obviously, with respect to the skilled noncannery jobs at issue here, the cannery work force in no way reflected "the pool of *qualified* job applicants" or the "*qualified* population in the labor force."
>
> . . .
>
> Such a result cannot be squared with our cases or with the goals behind the statute. The Court of Appeals' theory, at the very least, would mean that any employer who had a segment of his work force that was-for some reason-racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII.

Id., at 650-51.

Appellant engages in a selective reference to the *Moore* case to support her argument, but she did so by carefully culling out key language from the

case so that the message is misleading.13 The quotation below puts the thinking of Moore in context and shows the Trial Court used the correct standard. *Moore v Hughes Helicopter, Inc*. 708 F.2d 475 482-3, (9th Cir. 1983) (note that the text as quoted by Appellant is in ordinary text, emphasis Appellant added is in *italics* and key language from the case that Appellant omitted is underlined with **Appellee's emphasis in bold**:

> Disparate impact should always be measured against the actual pool of applicants or eligible employees unless there is a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate. Commonly, such a characteristic would occur in discriminatory hiring cases where the employment practice in question is in the nature of an "entrance requirement." In these cases, persons who lack the challenged requirement *will self-select themselves out of the pool of applicants*. Examples of such entrance requirements include height and weight specifications, [citation] and high school graduation, [citation]. 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. [Citation.*] In these cases, disparate impact may be established through reference to a reasonable proxy for the pool of individuals actually affected by the alleged discrimination. The choice is usually between general population statistics and the statistics of a relevant labor market.
>
> General population statistics are useful as a proxy for the pool of

13 Questionable case citation is nothing new for the author of Appellant's brief. For representative examples which led to difficulties at the Trial Court level, see for example: 4ER811:21-812:18; 811:27-28; 799:21-800:5; 786:5-787:6, 5ER1048:8-14; 1048:15-1049:2; 1049:3-20; 1049:21-1050:8; 1050:9-1050:14; 1050:15-1050:19.

> potential applicants, if ever, only when the challenged employer practice screens applicants for entry level jobs requiring little or no specialized skills. **If special skills are required for a job, the proxy pool must be that of the local labor force possessing the requisite skills.** [Citations.] This rule is a natural deduction from the commonsense observation that if a person is not otherwise qualified for a job, he is not deterred.

One can see from what Appellant omitted that the case is not at all on point. Appellant did not "self-select" out of the pool and she failed to take note of the qualifications and makeup of the Lifeguard-Is or information as to whether any or all of them had the "special skills" necessary many of which were readily available from other sources.[14]

In this case, the only appropriate statistical pool was the one the Court utilized. Those who applied for the job. The position of Lifeguard-II is open only to persons who have certain required special skills. Some of the qualifications that an applicant must demonstrate prior to being placed on the eligibility list include CPR certification, EMT certification, City of San Diego Main Tower Observation certification, SCUBA certification, and PWC certification. [1ER425-426.] NOL,

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14 At page 9 of her brief, Appellant reminds us of the many other special skills and training required of a person to become a Lifeguard-II such as "(1) 900 hours of ocean-front life guarding experience, (2) certification to act as a main watch tower guard, (3) a SCUBA certificate, and (4) a 'CPR for the Professional Rescuer' certificate from the American Red Cross. 3ER419-430." [AOB, 9 fn 6.]

Ex. 22.

In her opening brief, Appellant suggests the entire pool of Lifeguard-Is should be the comparison pool to analyze whether there is a disparity between the numbers of females promoted compared to males. However, the trial court found that the appellant failed to demonstrate that all Lifeguard-Is were qualified to be promoted to Lifeguard-IIs and without such a demonstration, the appropriate pool for statistical analysis was that pool composed of Lifeguard-Is who applied for the position and were subsequently placed on the eligible list.

It is not disputed that the ratio of promoted males to promoted females among the applicants is statistically neutral. Because of the statistical neutrality, the trial court found that Appellant failed to establish a prima facie case on her disparate impact theory and granted Appellant's Motion for Summary Judgment on the disparate impact theory.

Appellant contended that women were discouraged from applying for the position and that women were less likely to have high ratings among their performance reviews, however, Appellant herself DID apply and she DID receive outstanding commendations fully on par with or better than most of the male counterparts who applied for the position. (This is consistent with her having been

rated 14 out 33 applicants and her having been rated higher than the majority of the males who applied. Statistically, 60 % of the women who applied were rated "highly qualified" while only 43% of the men who applied had the "highly qualified" rating.

E. The Reason Appellant Was not Offered a Lifeguard-II Position:

The Court also concluded there was a legitimate nondiscriminatory reason for not promoting Appellant. This section outlines those reasons. Note first that Appellant only seeks damages related to the February 2006 promotion. There were no promotions available between late 2003 and November 2005.15 [3ER422, 425; 4ER753:17-21, 754:3-9.] Applications were open between November 4, and December 7, 2005. [3ER425.] Interviews followed in early 2006.

The interview panel, comprised of Sergeant Jon Vipond, Sergeant Katherine Jackson, and (Fire) Captain Jill Murray, convened on February 13, 14, and 15, 2006 to interview 33 applicants for the position. [3ER570.] The panel placed each applicant in one of two categories: Highly Qualified or Qualified.

The three individuals conducting the interview did not permit gender to enter the selection process. [1ER78:8-9; 85:12-14; 100:6-13.] One of the individuals who

15 See footnote 7 above discussing why Appellant was not disadvantaged even if there was a delay in her certification.

interviewed Appellant was her good friend and neighbor. [1ER84:23-24.] Not only were the evaluators uninfluenced by the gender of the applicants, each based her or his rankings upon objective criteria. [1ER78:8-9; 85:12-14; 100:6-13.]

After the initial evaluation process, 15 of the 33 applicants were rated as "Highly Qualified" and 18 were rated as "Qualified." In other words, all of them met the minimum qualifications to be hired. However, the interviewers were then required to rank the highly qualified individuals numerically from the very best to the 15th best. [1ER78:10-15; 85:7-10; 100:14-15; 101:1-8.] Appellant was unanimously ranked 14th. [1ER78:17; 85:7-12; 99:24-25; 101:9-11.] The top six candidates were offered Lifeguard-II positions, while the remaining applicants were not.16

Appellant alleged her ranking and subsequent denial of promotion was the result of gender discrimination because the City used a flawed performance review ("EPR") process which she claimed heavily favored men. She also claimed that promotion criteria was concealed from female candidates and disclosed only to male candidates. [2ER222:8-10.] The Court already considered and rejected these two arguments when it reviewed Appellant's disparate treatment claims.

The pool of qualified applicants included 33 people: 5 women and 38 men.

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16 One of the 6 failed background and the position was then offered to the 7th ranked guard. [4ER729:24-731:2.]

The three evaluators were unanimous in their rankings. They based the rankings on the following five factors:

a. Job Related Training and Experience and Education

b. Leadership Potential

c. Interpersonal Skills

d. Emergency Judgment and Decision Making

e. Verbal Communication Skills

No one category by itself was rated as having priority over any other. Rather, it was the interplay between all of the categories that led to the decisions on ranking the individuals. [1ER99:22-100:5.]

1. Statistical Neutrality:

Twenty percent of all the women who applied for the job were hired while only 17.85% of all the men who applied were hired. Two women and one man were on the panel that interviewed all of the applicants. Appellant was rated as "highly qualified" as were 60% of all the women who applied for the position while only 43% of the men obtained a "highly qualified rating." [1ER100:14-17; 4ER837:7-18.]

2. The Evaluator's Comments:

To understand why Appellant was rated 14th, one must consider the

testimony of the evaluators. Appellant's declaration did not challenge a single factual assertion made by any of them. She did not provide a shred of evidence supporting her claim that she was more qualified than any of those ranked above her. She didn't explain why a female friend of hers would be biased against women, or why a majority of women on the interview panel would allow gender to negatively another woman.

Unlike a toll booth operator or a parking lot attendant, a Lifeguard's job requires him to make life and death decisions on a moment's notice. Every year, when the seasonal guards return to work, every one of them, including Appellant, is told at the very first meeting that "there is no substitute for strong fundamental lifeguard skills," [1ER154; emphasis in original.] In a 4 page memorandum outlining everything that is expected of them, that phrase is the only one that is underlined. [1ER151-154.] These "core guarding skills," are defined as "the ability to survey a beach and an ocean crowded with men, women, and children and to spot an emerging life or death situation on the water, and then respond swiftly and appropriately to that situation." [1ER101:11-13.]

a. Evaluator Katherine Jackson:

Jackson said Appellant was very good at public relations but she was not as strong as the others in fundamental lifeguard skills. The mission of a Lifeguard-Is

public safety, not public relations. She was only standard overall as an oceanfront lifeguard. There is nothing wrong with that, but when ranking people whose basic job function calls upon them to save lives, Jackson wanted the best person the City could get. Appellant's core guarding skills did not warrant ranking her above 14th. [1ER78:14-23.]

In 2003 her supervisors noted that as an eleven year Lifeguard-I, Appellant's "Goals and Training for Next Year" included "work on improving overall skill in main tower observation." In 2004 it was noted she lacked experience in operations (another term for basic lifeguarding). In her 2005 evaluation it was noted she "continues to progress in her water observation and emergency response" and "she stopped working three weeks before the end of summer to take another job." It was an indicator that she did not have the same level of commitment that the other highly qualified candidates had. [1ER78:24-79:10.]

When a guard chooses Junior Lifeguards or chooses to quit guarding three weeks before the summer is over, or chooses to avoid working on weekends or Labor Day, he or she knows that action will impair his or her ability to hone those core guarding skills. She was encouraged to do more to improve her operational skills and yet she did not make choices that were consistent with improving those core guarding skills. [1ER80:1-17.]

In March of 2005, her EMT certification expired. (If EMT certification is not renewed periodically, it expires.) Before her interview in February 2006, she asked what she could do to get it reinstated. One must take action to keep it in place. Although she didn't know it at the time of the interview, City records indicate that even now, more than three years after her interview, Appellant still has not gotten her EMT certification reissued. [1ER80:18-28.]

Her failure to act on the EMT certification, by February 2006 was representative of a lack of commitment. [1ER81:1-2.]

Appellant didn't want to work on weekends. This is atypical of a seasonal guard serious about becoming a career guard. They seldom ask for both weekend days off. Weekends have the highest incidence of rescues and beach and water activity and therefore the greatest opportunity for fundamental ocean experience. Lifeguards who want to promote strive to work on days where the greatest number of rescues occur. [1ER81:3-12.]

The fact that she made it among the highly qualified acknowledges her remarkable skills in public relations. Even though they were non-essential skills and gave the Service nothing in terms of its primary mission, they were so good that they elevated a lifeguard who was merely "qualified" in the all important area of core guarding skills to "highly qualified" overall. But they were not enough to make

her a better lifeguard than the thirteen individuals ranked above her. [1ER81:13-21.]

b. Evaluator Jill Murray:

Jill Murray noted: 1) relative inexperience in the operational side of lifeguarding (i.e. infrequent staffing of beachfront towers, infrequent life saving versus great experience running the Junior Guard Program); 2) absence of dedication as demonstrated by relatively few actual hours she spent guarding over the span of 12 to 13 years she was a guard; [1ER85:17-19] 3) lack of dedication as evidenced by Appellant's taking time off from her stated career goal to compete in sports events; [1ER85:21-22] 4) lack of motivation when compared with the other applicants; [1ER86:1-5] and, 5) absence of a broad range of experience. [1ER86:6-10.] All of these things contributed to her decision to rank Appellant fourteenth. [1ER86:12-13.]

The fact that she fell short of 13 other people in these critical areas is not a criticism of her. However, these articulated reasons are legitimate nondiscriminatory reasons for her not being hired. Undisputed facts make it clear that in 2006, Appellant was highly qualified. In fact, she was the 14th most qualified person out of 33 qualified people who applied for the 6 open positions. Part of the reason she was qualified was the fact that she was an excellent public speaker. (She

may have been one of the best public relations people working for the guards.) [1ER86:12-13.]

c. Evaluator Jon Vipond:

Although she is a competent Lifeguard-I and excels in many non-core guarding areas such as public relations, everyone on the panel agreed that Appellant was not the number one choice. [1ER101:9-11.] This is because, when it comes to the ability to survey a beach and an ocean crowded with men, women, and children and to spot an emerging life or death situation on the water, and then respond swiftly and appropriately to that situation, (i.e. core guarding skills) Appellant's abilities were not as finely honed as thirteen other individuals ranked above her. [1ER101:14-15.]

No single thing that kept her from being hired. Rather it was the relationship among the various categories and her relative strengths and weaknesses in various areas. Appellant was very strong in public relations and in public outreach. She was not as strong as the other guards in the core guarding skills. [1ER101:11-15.]

She was advised more than once in her EPRs that she could increase the likelihood of advancement in the Service by improving on her operational skills. The term "operations" or "operational skills" is another way of referring to the core guarding skills, or the "basic functions" of the profession. Appellant is a talented

athlete, outstanding at public relations, and an able lifeguard. But among those competing for the positions which were available in February 2006, overall, she was not the best at the basic functions of lifeguarding. [1ER102:10.] She was the fourteenth. If Appellant had applied her considerable talents to the areas where she needed improvement she might have done better in the rankings. Instead, she ignored recommendations that she spend more time improving her core guarding skills. [1ER102:12-13.]

3. Appellant's Evidence as to the Promotion:

Turning to the question of whether she should have been promoted over the other 13 people who were ranked higher than she was, Appellant attempted to show pretext by arguing that she had superior qualifications. In support of this argument, Appellant pointed to evidence that she possessed more positive citizen feedback letters than any other candidate, that she had been selected "for the most special assignments," that she had the second-most seniority among all candidates, and that she is one of the fastest swimmers in the lifeguard service. [2ER242:2-11.] In response, the Court noted it was documented that the promotion process was highly competitive. [4ER697:3-5; 1ER85:15-20.]

The Court noted many citations to undisputed evidence indicating:

The members on the interview panel identified numerous reasons why

> Plaintiff, despite these other qualifications, was ultimately not promoted. First, Plaintiff lacked technical rescue courses, including rope rescue, PC832, rescue system 1 & 2, swift water rescue training, Coast Guard Auxiliary courses, Department of Boating & Waterways courses, etc. … Second, Plaintiff did not have as many skills in "operations" (i.e. core guarding skills). … The panel's ranking system relied in part on the substantive portions of the candidates' EPRs in 2003, 2004, and 2005. It was noted in all three EPRs that Plaintiff had an excellent grasp on the public relations side of lifeguarding, but needed to work more on developing her core guarding skills. … Plaintiff frequently took time off, including the last three weeks of the 2005 Summer season, the period immediately preceding the Lifeguard-II interview. All three of the panelists questioned Plaintiff's dedication to being a lifeguard. Based on the foregoing, the Court is simply not persuaded that Plaintiff was more qualified than the candidates who received the promotion. [5ER1081:27-1082-13; internal citations to record omitted.]

The Court ultimately concluded that Appellant failed to demonstrate that these reasons were fabricated or mere pretext for discrimination. As is discussed further below, the problem for Appellant is that she cannot show raise a triable issue of fact as to the reasons the Appellee did what it did. In fact, she did not present any evidence at all to gainsay the statements of the three evaluators.

Her problem is compounded by her inability to present evidence that the reasons proffered by the Appellee are pretextual. Quite simply, they are not.

F. The Appellant Cannot Not Prevail on Her Disparate Treatment Claim:

When it filed its MSJ motion, Appellee wanted to get to the heart of the case quickly. The general rules are not in dispute. Disparate treatment claims are

analyzed in MSJs through allocation of burdens established by the Supreme Court in *McDonnell Douglas Corp. v.Green*, 411 U.S. 792 (1973).

Plaintiff starts with a prima facie case of discrimination. In order to establish a prima facie case of sex discrimination on a disparate treatment theory, Plaintiff must show: "(1) [s]he is a member of a protected class; (2) [s]he was qualified for [the] position; (3) [s]he experienced an adverse employment action; and (4) similarly situated individuals outside [her] protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Fonseca v. Sysco Food Servs. Of Ariz., Inc.*, 374 F.3d 840, 847 (9th Cir. 2004). Under this scheme, "establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dep. of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253-54, (1981). Once this presumption is created, the burden shifts to the employer to produce evidence that "the plaintiff was rejected, or someone else was preferred for a legitimate, nondiscriminatory reason." *Id.* at 254.

If the defendant is bringing the MSJ, one option is to present evidence that the plaintiff cannot meet its burden. However, since the burden is not heavy, the defendant can just go straight away to the second step of showing a legitimate nondiscriminatory reason. In this case, to get to whether what it did was

nondiscriminatory, Appellee treated it as a given that the Appellant would be able to put **something** in front of the Court to persuade it that, at least for starters, it could come to Court.

This brings us to the third step. Once the employer presents evidence of a legitimate, nondiscriminatory reason for the adverse employment action, the plaintiff then has the burden to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253.

In opposing the MSJ below, Appellant had the option of simply agreeing with Appellee that she had a nominal case. Had she done so, she would have started with an attack on Appellee's evidence of legitimate nondiscriminatory reasons for its actions. Or, she could have gone straight to offering evidence that the reasons offered were pretextual. But Appellant chose to do something else. She presented evidence that she believed supported her prima facie case of discrimination. She made a conscious decision to share evidence of her prima facie case with the Court. [2ER233:16-23.] Once she put it in evidence, the Court was free to use it for any purpose. And when the Court examined the evidence, it found it wanting.

Now on appeal, she takes the Trial Court to task for doing its job. [AOB 48, fn 19.] Once the evidence was before it, did she expect the Court to ignore it? The Court

opted to analyze what was presented to determine whether in fact, it constituted sufficient evidence to make a prima facie case of discrimination. Unfortunately for the Appellant, the Court examined the evidence supporting three key claims and found that two of them were not sufficient even to make a prima facie case. It simply was not evidence of a prima facie discrimination case. The same thing would have happened had she gone to trial.

However, even though she has failed to make two parts of her case, the Court DID conclude that the she presented sufficient evidence on one theory to require the Appellee to shoulder the burden and present legitimate nondiscriminatory reasons for everything that Appellant complained of. And this is what Appellee did.

All of Appellant's arguments concerning different treatment for other guards, all of her discussion about the average male Lifeguard getting more O/C ratings than the average female Lifeguard never applied to anything that was in issue in her lawsuit. She gave evidence under penalty of perjury that her claims were limited to exactly three things: 1) difficulty obtaining her training certification; 2) failure to promote in February 2006; and 3) retaliation in 2007. [1ER157:20–24; 39:12-13.] Her arguments about how some women did not get evaluations as high as some men mean nothing since she regularly got high evaluations.

Moreover, no one's evaluations had anything to do with who was promoted in February 2006. Appellant offered no evidence at all that she was treated differently

during the PWC training process or that any woman (including her) was treated differently during the promotional process because of the EPR ratings anyone got.

Appellant spends a great deal of time focusing on matters that are irrelevant. The Court did not weigh any evidence. She repeats again in her Appellate brief arguments that she made at the trial court level. Arguments that were considered by the Court and rejected.

There is no evidentiary value in her claim that male lifeguards were told about a "secret key to promotion" [AOB 55] when in fact, there is no "secret key." The term "secret key" is not evidence. The **information** upon which the "secret key to promotion" is based is evidence of something, but it is not evidence of disparate treatment. It is not evidence that the Appellant was discriminated against in the promotional process. The thing that kept her from promotion was the fact she was not as good at saving lives as 13 other people who were ranked above her.

The 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.

She failed to present any evidence challenging the nondiscriminatory reasons behind any conduct and she failed to present any evidence that any of that conduct was pretextual.

And merely presenting evidence is not enough. It had to be sufficient to create a genuine issue of fact that is material to the outcome of the suit. *McCabe v. General Foods Corp*. 811 F.2d 1336, 1340 (9th Cir. 1987) "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*. (1986) 475 US 574, 586–587.

What this case really boils down to is whether the Appellant produced any **specific** and **substantial** evidence that the stated legitimate nondiscriminatory reasons for her non-promotion and for the timing on her certification were pretextual.

Note first that for purposes of this motion, we can assume, as did the Trial Court, that unless Appellee did something she could put her claims related to the PWC training, the non-hiring in 2006, and the retaliation before a jury. Any further discussion on those issues is pointless.

However, Appellee presented lots of undisputed evidence that the reasons for what it did were nondiscriminatory. Since Appellant did not controvert any of that evidence, the burden is on her to prove that all the reasons are pretextual. And it is

not enough simply to say "there is an issue of fact."

Note that she has no direct evidence of pretext. Everything she has presented so far to refute the evidence of nondiscriminatory conduct has been circumstantial evidence. But there are special rules as to circumstantial evidence of pretext. The Appellant must show the legitimate reasons offered by defendant were not its true reasons, but **merely a pretext for discrimination**—i.e., that "the employer's proffered explanation is unworthy of credence." *Reeves v. Sanderson Plumbing Products, Inc*., 530 US 133, 143, (2000). The plaintiff must put forward evidence rebutting each nondiscriminatory reason given by employer. *Ramirez v. Landry's Seafood Inn & Oyster Bar* 280 F.3d 576, 577(5th Cir. 2002).

Thus, plaintiff can prove pretext either (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. *Raad v. Fairbanks North Star Borough School Dist*. 323 F.3d 1185, 1194 (9th Cir. 2003) Here plaintiff has done neither.

Without direct evidence of retaliation all she had was circumstantial evidence. "Circumstantial evidence of pretext must be specific and substantial in order to survive summary judgment." *Bergene v. Salt River Project etc.* 272 F.3d

1136, 1142 (9th Cir.2001) Knowing this rule, Appellant offered nothing more than general and insubstantial evidence.

Appellant's reference to the cases of *Davis v Team Electric* 520 F.3d 1080 (9th Cir. 2008) and *Bergene v. Salt River Project etc.* 272 F.3d 1136, 1143 (9th Cir.2001) is inexplicable. She cites them for the proposition that "absence of female supervisors is circumstantial evidence of pretext." [AOB 58.] However, the citations are *non sequiturs.* In this case it was a female supervisor who concluded that Appellant was "highly qualified" for the position. She was just not the most qualified. Review of the two cases provides little help in that neither has anything to do with any issue before this Court. In *Davis* the issue was whether, in fact the plaintiff had presented prima facie evidence of discrimination and the Court concluded that she did. The defendant did not present any evidence of a legitimate nondiscriminatory reason for the discrimination. In other words, the holding of *Davis* puts Appellant exactly where the Trial Court put her when it began its examination of the legitimate nondiscriminatory reasons for the decisions that Appellee made in this case.

G. The Failure of Appellant's Retaliation Claim:

The Trial Court's analysis and review of evidence concerning the retaliation claim is thorough, concise, and insightful and therefore this portion consists mostly

of key elements of the ruling repeated here with little editing.

To establish a prima facie case, Appellant must demonstrate "(1) that she was engaging in protected activity, (2) that she suffered an adverse employment decision, and (3) that there was a causal link between her activity and the employment decision." *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 525-26 (9th Cir. 1994). "Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the Appellant engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). "Alternatively, the Appellant can prove causation by providing direct evidence of retaliatory motivation." *Miller v. Fairchild Indus., Inc*., 885 F.2d 498 (9th Cir. 1989).

If Appellant successfully establishes a prima face case, the burden of production then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment decision. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513–14 (9th Cir. 1989) (citing *Ruggles v. Calif. Polytechnic State University*, 797 F.2d 7823, 786 (9th Cir. 1986)). If the employer is successful, the Appellant must then prove by a preponderance of the evidence that the proffered reasons are pretexts for retaliation or that a discriminatory reason more

likely motivated the adverse employment action. *Id*.

Appellant states her retaliation claim as follows: (1) she engaged in protected activity when she filed her gender discrimination complaint on June 20, 2006, (2) she suffered adverse employment action by not receiving any hours to work in the summer of 2007, and (3) she did not receive any hours during the summer of 2007 as a result of her complaint against Appellee. [2ER243:19-23:17.] Appellee does not contest the first two elements of Appellant's prima facie case, but does argue that Appellant cannot show the required causal link between her protected activity and her lack of work in 2007. [1ER65:24-66:22.]

Specifically, Appellee contends that the action Appellant complains of did not occur until the summer following Appellant's filing of the complaint in the above-entitled action. [1ER65:24-66:22.] Moreover, the person responsible for assigning her work did not even know she had filed suit. Appellee presented undisputed evidence that the reason she did not get work assignments was because she had applied for a reduced workload and then failed to notify anyone that she was available for work.

In fact, Appellee provided a chain of undisputed evidence showing that:

(a) the person responsible for scheduling Appellant for work was unaware she had filed suit; [1ER72:27-73:4; 74:17-20;]

(b) the custom was for the guards to call in for assignments and not the other way around; [1ER73:8-12; 93:18-20;]

(c) a new supervisor took over the work program she signed up for and set up a procedure that was untested (but he relied upon the standard procedure in place of the guards calling in for assignments and notifying the schedulers of their availability); [1ER73:5-7; 73:27-74:5; 93:18-20;]

(d) for much of the time, Appellant was not in the country and could not be called to work; 1ER73:13-25; 93:4-6; 93:12-14;]

(e) after the issue was raised, Appellant promised to call upon her return from out of the country, but she never did; [1ER73:6-26;]

(f) given their many duties, in the context of the program she signed up for, it was extremely impractical for schedulers to call guards for assignments and the norm is the other way around; [74:6-16;]

(g) an inference can be drawn that Appellant may have been attempting to create a lawsuit where none existed by refusing to comply with the custom and refusing to notify anyone that she believed she was being excluded. 1ER73:5-7; 73:27-74:5; 93:4-6; 93:12-14.]

Besides the fact that passage of time creates a presumption of no retaliation, the Trial Court found that "it was evident that prior to Memorial Day 2006, the City

was aware that Appellant was pursuing a claim of discrimination." [5ER1084:10-11]

Yet Appellant was scheduled and worked 69 hours during the Summer 2006 season. [5ER1084:11-12.] Continuing the reasoning, the Court held that even if it were to use the June 20, 2006 complaint as the date of Appellant's protected activity, Appellant still could not show a causal link because Appellant worked throughout the Summer 2006 season. Appellant did not take issue with her work schedule during the Summer 2006 season, but instead contended that the City's failure to schedule her for work more than a year later, during the Summer of 2007, was in retaliation for her protected activity. [5ER1084:12-17.] The Court found that Appellant could not ignore the fact that she was scheduled to work during the Summer of 2006, when one would think retaliatory conduct would have been most likely to occur.

Appellant implied that the Court should disregard the Summer 2006 season because the season ended on September 4, 2006, "barely one month after the City filed its answer." But Appellant failed to provide any case law that would justify the Court's reliance on the date of Appellee's answer rather than the date Appellant engaged in the protected activity. Considering these facts, the Court could not find a causal link between Appellant's protected activity and her not being scheduled for

work during the Summer of 2007. [5ER1084:17-24.]

Moreover, even if the Court were to disregard Appellant's work during the Summer of 2006, Appellant failed to show that the person responsible for scheduling her during the Summer of 2007 had any knowledge of her protected activity. Michael Cranston, who was a Lifeguard-II at the time and responsible for scheduling all Lifeguard-Is for the Central District (where Appellant was assigned), stated that at no time during 2007 was he aware that Appellant had filed a lawsuit against the City. [1ER72:27-73:4; 74:17-20.] Appellant did not offer any evidence that showed otherwise.

Appellant attempted to rebut this evidence by showing that Sergeant Vipond, who was in charge of the PSP program, had knowledge of the lawsuit. However, there was no evidence that Sergeant Vipond had any involvement in scheduling the PSP lifeguards for work after he assigned the PSP lifeguards to their respective districts. Sergeant Vipond specifically stated: "After early June 2007 when I delegated the task of scheduling the twelve PSP guards, I was not involved with Appellant in any way until October 2007 when I conducted her performance review." [1ER107:7-9.]

Nor did Appellant explain how Captain Wurts's knowledge of the lawsuit is relevant when he stated during his deposition that Appellant's work schedule "falls

quite a bit below the level of operations that I ever get involved with. It's not really a fair question to ask me because I don't engage in that level of detail." [4ER742:8-13.] Without any evidence that someone with direct control over Appellant's schedule had knowledge of her protected activity, Appellant has failed to demonstrate a causal link between the protected activity and the adverse employment action. As a result, the Court finds that Appellant has failed to state a prima facie case for retaliation. [5ER1084:25-85:17.]

The Appellant has absolutely nothing to support her retaliation claim. Whether she made a prima facie case for retaliation or not is irrelevant. If one assumes that the mere fact she did not get called for work a year and a half after she filed her lawsuit can rise to the level of a prima facie case of retaliation, she is still stuck with the problem of the undisputed evidence from Michael Cranston that, he is the one who was responsible to give her an assignment and she never called in with an assignment.

Lifeguards were required to "identify days of the week they are available" [1ER117-#3] and Appellant didn't do that. Appellant did not refute any part of Sgt. Cranston's declaration concerning his conversations with her. A comparison of the Davies and Cranston declarations does not demonstrate that anyone lied. [1ER73; 2ER315.] Davies simply said he was often called. That doesn't mean he didn't call

Cranston as well. Appellant's argument here is deceptive. Cranston said:

> [T]here have been so many people involved and so many different schedules to coordinate that I could not have called each individual and inquire into that person's availability. The summer is an extremely busy time. Scheduling is only one small part of what the schedulers do. Like all other guards, they are involved with rescues, medical aid and lost children all of which take priority over making phone calls trying to track down guards for future work. The PSP people that I gave work were those who called me asking for work and I assigned them according to the days they said they were available. Alison Terry never gave me her dates of availability and, except for the one call on July 13, 2007, she never called me at all. [1ER74:7-16.]

He also said, "The PSP people guards would call me and advise me of their availability." [1ER74:1-2], "It is impractical if not impossible for the scheduler to contact the Lifeguard-Is to see if they can work." [1ER73:9-10.] A seasonal guard will naturally call in and advise of his availability. The scheduler will either assign him at that moment, or **having that guard's schedule in mind,** call him if the need arises at a time he is available. Appellant never called until the day she was going to leave town. Then, she never called again.

More important than any variances between Cranston and Davies, note that Appellant was a seasonal guard for more than 13 years. Knowing her retaliation claim was on the line, she added nothing to her declaration to say Cranston was lying and there is no longstanding custom among guards. All she had to do was gainsay that one remark.

Without direct evidence of retaliation all she had was circumstantial evidence. "Circumstantial evidence of pretext must be specific and substantial in order to survive summary judgment." *Bergene v. Salt River Project etc.* 272 F.3d 1136, 1142 (9th Cir.2001) Knowing this rule, Appellant offered nothing more than general and insubstantial evidence that someone might infer that Cranston lied about whether guards call in, and if he lied about that, he must also have lied about retaliating against her.

Setting aside the smoke and mirrors, just as with her PWC claim and hiring claim, even if Appellant made a prima facie case, Appellee presented evidence of a legitimate nondiscriminatory reasons for her not getting any assignments. From there, the Appellant failed to refute those reasons or to demonstrate that they were pretextual. Summary Judgment should be granted.

V. CONCLUSION

The Trial Court devoted 19 heavily researched and fully documented pages to analysis of the facts and the law in this case. If all it took to put a lawsuit in front of a jury was for an employee to be passed over for promotion, then business in America would shut down. Juries should not be in the business of second guessing normal hiring decisions of employers simply because someone is unhappy with the fact the he or she did not get hired. The undisputed facts demonstrate that a good

lifeguard was passed over by others who were better. She was told for years what she needed to do to promote and she rejected the advice. Juries should not be review boards for hiring committees. The Trial Court arrived at the correct decision in this matter. The judgment should be affirmed.

Respectfully submitted,

Dated: October 23, 2009

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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) because: This brief contains 12,797 words, excluding the parts of the brief excepted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: October 23, 2009

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Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on October 23, 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.

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s/ Joe Cordileone

STATEMENT OF RELATED CASES

Appellee is award of no related cases pending before this court.