No. 15-15623

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DRUCILLA COOPER
Plaintiff-Appellant

v

UNITED AIR LINES, INC.
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL CASE NO. 3:13-cv-02870-JSC

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Plaintiff-Appellant Drucilla Cooper ("Cooper") served as a dedicated Security Supervisor at Defendant-Appellee United Air Lines, Inc. ("United" or "UAL") for nearly a decade, prior to her Fall 2011 demotion to a Security Officer. Cooper alleges that she was demoted as a result of complaints she made regarding the fact that she was being paid less than her male peers who performed the same work. To date, Cooper remains at United in her demoted position as a Security Officer.

Relevant to this appeal, the instant action alleged a violation of the Equal Pay Act (or "EPA") (29 U.S.C. § 206, *et seq*.) and Retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII") (42 U.S.C. § 2000e, *et seq*.). During discovery and at summary judgment, United admitted that it paid Cooper less than other male supervisors who performed the exact same duties as she, and that Cooper had complained about the pay disparity. Rather than correct the disparity, United demoted Cooper and hired an unqualified substantially younger male to replace her, paying him tens of thousands of dollars more per annum in salary, under the guise of a "reduction in force."

As described below, United failed to prove its affirmative defense to Cooper's Equal Pay Act claims, and Cooper presented substantial and specific

evidence that UAL's proffered reasons were not tied to any legitimate institutional interest and were so riddled with inconsistencies as to be unworthy of credence. At summary judgment, United's explanations for demoting Cooper were a hodgepodge of *post-hoc* rationalizations and citations to unidentified policies and alleged practices, which were not worthy of credence.

II. STATEMENT OF JURISDICTION

The District Court had federal question jurisdiction over Cooper's EPA and Title VII Retaliation claims pursuant to 28 U.S.C. § 1331 because both arose under federal law. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

On March 10, 2015, the District Court granted summary judgment to United, and thereon entered final judgment the following day. Cooper timely filed a Notice of Appeal on April 1, 2015. *See* Fed. R. App. P. 4(a)(1)(A).

III. STATEMENT OF ISSUES

1. Whether the District Court committed reversible error by finding that United had satisfied its burden to prove its affirmative defense that the pay disparity between Cooper and her male counterparts performing the same work as her was the result of a "factor other than sex?"

2. Whether the District Court committed reversible error by requiring Cooper to produce evidence that United's "factor other than sex" affirmative defense was

pretext for discrimination?

3. Whether the District Court committed reversible error by granting summary judgment as to Cooper's Title VII Retaliation claim despite the existence of multiple triable issues of material fact as to the pretextual nature of her September 2011 demotion?

IV. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

After 16 exemplary years of service as a police officer with the Berkeley Police Department, Cooper retired from the police force (EOR 113-14). On March 10, 1997, she was hired as a Security Officer at United. (EOR 82, 209).

Soon after the tragic events of September 11, 2001, United increased security by adding a second Supervisor of Security Officers position at its San Francisco Maintenance Hub. (EOR 194, ¶ 6). On January 27, 2002, after five exemplary years of service at United as a Security Officer, Cooper was promoted to a Supervisor of Security Officers position specifically because of her lengthy law enforcement experience. (EOR 81; 194, ¶ 7). At the time of Cooper's promotion, she was the first and only female Supervisor. (EOR 194, ¶ 8).

After nine years as a Supervisor of Security Officers, Cooper became aware that her male peers were being paid higher salaries to perform the same work as

her. (EOR 195, ¶ 12). In March 2011, she complained to Temporary Hub Manager Darlene Marvin-Nilsen ("Marvin-Nilsen") and to Human Resources Representative Sandee Singer ("Singer") about this pay disparity. (EOR 87-105). Knowledge of Cooper's complaints became widespread throughout United, involving the Compliance Manager Wayne Slaughter ("Slaughter"), Singer, Senior Manager – Base Maintenance Security Marvin-Nilsen, and Senior Staff Representative – Labor Relations Ahnvu Ly ("Ly"), all of whom were informed of Cooper's complaint. (EOR 293-94).

In April 2011, Cooper again complained about the pay disparity (EOR 87-105, 157-58), and had a conversation with then-Manager Marvin-Nilsen about being paid less than her male peers and United doing nothing to remedy the practice. (EOR 243-44).

Within approximately three months after United completed its investigation of Cooper's complaints regarding unfair pay and her beliefs that United was trying to get rid of her, she and the other Security Supervisors were informed that they would need to reapply for their Supervisor positions in what was later termed a departmental "reduction in force." (EOR 196, ¶ 23; 200, ¶ 6). Cooper was eventually demoted from her Supervisor position and returned to a Security Officer position as result of an alleged reduction in force. (EOR 81). Cooper's demotion

resulted in a pay cut of approximately -29.72%, or $16,675.20. (*Id*.). After removing Cooper from her Supervisor position, United allowed Russ Faultner ("Faultner") to apply for the Supervisor of Security Officers position, despite the fact that he did not meet the minimum qualifications of the position. (EOR 118, 132, 135, 148, 151, 238, 241). In fact, he lacked the relevant experience and had to be trained in patrolling and control center activities by William Knight ("Knight"). (EOR 201-02, ¶¶ 12-19). Faultner was paid $23,892 more as a Supervisor of Security Officers than Cooper was paid for the same exact work. (EOR 80, 151).

Only after the filing of this action on June 21, 2013 did United admit that Cooper was not demoted because of a "reduction in force," which was contrary to all of the contemporaneous documents and evidence. (EOR 83, 144, 304-05). Furthermore, upon Knight's retirement in November 2013, United did not return Cooper to her former supervisor position. (EOR 152, 236). Faultner left United in May 2014, yet United again did not return Cooper to her supervisor position. (EOR 155, 237-38).

B. RELEVANT PROCEDURAL HISTORY

On June 21, 2013, Cooper filed the instant action, alleging five claims: (1) Title VII Race Discrimination; (2) Title VII Retaliation; (3) Disability Discrimination under the American with Disabilities Act ("ADA"); (4) Age

Discrimination under the Age Discrimination in Employment Act ("ADEA"); (5) violation of the Equal Pay Act. (EOR 620). On December 18, 2014, Cooper filed her First Amended Complaint and withdrew her Title VII Race Discrimination claim. (EOR 589). On January 22, 2015, United filed its Motion for Summary Judgment (EOR 368). On March 10, 2015, the District Court granted summary judgment to United (EOR 6), and thereon entered judgment the following day. (EOR 5). Cooper filed her Notice of Appeal and an Amended Notice of Appeal on April 1, 2015, and another Amended Notice on April 7. (EOR 1-4).

V. SUMMARY OF THE ARGUMENT

Cooper appeals the District Court's summary judgment dismissal of only her Equal Pay Act and Title VII Retaliation claims. Cooper satisfied the *prima facie* elements of both claims. Regarding her EPA claim, the District Court committed reversible error by (1) finding that United had satisfied its burden to prove its "factor other than sex" affirmative defense, and (2) requiring Cooper to prove pretext based on a misinterpretation of Ninth Circuit case authority. Regarding Cooper's Title VII Retaliation claim, the District Court incorrectly found that she had not produced sufficient evidence that United's proffered legitimate business reason for demoting her was pretextual. Accordingly, this Court must reverse and remand the District Court's summary judgment ruling for further proceedings.

VI. LAW & ARGUMENT

A. STANDARD OF REVIEW

1. Equal Pay Act Claim

"The questions whether a plaintiff has established a prima facie case and an employer has sustained its burden of proving one of the exceptions to the Equal Pay Act are factual conclusions also subject to the clearly erroneous standard of review." *EEOC v. Maricopa Cnty. Cmty. Coll. Dist.*, 736 F.2d 510, 513 (9th Cir. 1984) (*citing Hein v. Oregon College of Education*, 718 F.2d 910, 913 (9th Cir. 1983)).

Nonetheless, the *Maricopa* Court relevantly noted: "If this case had been tried on stipulated facts, there would be no doubt then that the clearly erroneous standard of review should apply. The case was decided on summary judgment, however, where in our *de novo* review favorable inferences are drawn in favor of the losing party." *Maricopa*, 736 F.2d at 513. Questions of law decided at summary judgment should be reviewed *de novo*. *See id*. at 512-13.

2. Title VII Retaliation

The *de novo* standard governs summary judgment decisions, applying the same standards used by the district court. *Carver v. Holder*, 606 F.3d 690, 695 (9th Cir. 2010) (citation omitted). "The grant of a motion for summary judgment

is a drastic remedy and should be used with caution so as not to serve as a substitute for a trial on the merits." *Nelson v. A. H. Robins Co.*, 515 F. Supp. 623, 627 (N.D. Cal. 1981).

Summary judgment is appropriate only if there is "no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). This Court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000) (citations omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.").[1]

In *Reeves*, the United States Supreme Court articulated the summary judgment standard as it pertains to the testimony of interested witnesses in the employment cases:

[A]lthough the court should review the record as a whole, it must disregard

1 "Findings of fact should be eschewed in determining whether summary judgment should be granted." *Taybron v. City & County of San Francisco*, 341 F.3d 957, 959 n.2 (9th Cir. 2003) (holding, in the context of an employer's summary judgment motion on plaintiff's Title VII claims, that the district court erred in "weighing . . . the evidence and making findings rather than focusing on whether genuine issues of material fact are in dispute").

> all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses."

Id. 530 U.S. at 151 (citations omitted). All of United's currently employed witnesses were interested witnesses. (*See e.g.*, EOR 546, ¶ 1). Very little evidence is necessary 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." *Schnidrig v. Columbia Mach.*, 80 F.3d 1406, 1410 (9th Cir. 1996) (quoting *Lam v. University of Hawaii,* 40 F.3d 1551, 1563 (9th Cir. 1994)) (internal quotation marks omitted).

Summary judgment is ordinarily inappropriate on "any grounds relating to the merits because the crux of a Title VII dispute is the elusive factual question of intentional discrimination." *Warren v. City of Carlsbad,* 58 F.3d 439, 443 (9th Cir. 1995), *cert. denied,* 516 U.S. 1171, 116 S. Ct. 1261, 134 L. Ed. 2d 209 (1996); *see also U.S. Postal Service Bd of Governors v. Aikens,* 460 U.S. 711, 716, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983) (acknowledging that discrimination cases present difficult issues for the trier of fact, as "there will seldom be 'eyewitness' testimony

as to the employer's mental processes").[2] After viewing the evidence in the light most favorable to Cooper and disregarding all evidence and inferences favorable to United, this Court must reverse the summary judgment decision below to permit a jury to decide the genuine issues of material fact presented.[3]

3. Evidentiary Objections

Regarding evidentiary objections, "the selection of the applicable standard of review is contextual." *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000) (*citing United States v. Owens*, 789 F.2d 750, 753 (9th Cir. 1986)).

> The district court's construction of the Federal Rules of Evidence is a question of law subject to de novo review. Questions of admissibility of evidence which involve factual determinations, rather than questions of law, are reviewed for abuse of discretion. When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. If an "essentially factual" inquiry is present, or if the

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2 Because an employer is very unlikely to leave a "paper trail or 'smoking gun' attesting to discriminatory intent," a disparate treatment plaintiff must often "cumulatively undercut" defendants' proffered explanation by presenting an accumulation of circumstantial evidence. *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990); *accord Rosen v. Thornburgh*, 928 F.2d 528 (2nd Cir. 1991).

3 Furthermore, "'[t]he requisite degree of proof necessary to establish a prima facie case . . . on summary judgment is *minimal* and does not even need to rise to the level of a preponderance of the evidence.'" *Aragon v. Republic Silver State Disposal, Inc.,* 292 F.3d 654, 659 (9th Cir. 2002) (*quoting Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir. 1994)) (emphasis in original); *see also Chuang v. Univ. of Cal. Davis,* 225 F.3d 1115, 1124 (9th Cir. 2000) (an employment discrimination plaintiff need produce very little evidence in order to overcome employer's motion for summary judgment).

> exercise of the district court's discretion is determinative, then we give deference to the decision of the district court; otherwise, we conduct a de novo review.

Id. (citations omitted).

B. COOPER HAS PRESENTED TRIABLE ISSUES OF MATERIAL FACT AS TO HER EQUAL PAY ACT CLAIM.

At summary judgment, Cooper successfully presented evidence of a *prima facie* violation of the Equal Pay Act. The District Court committed reversible error by (1) finding that United had satisfied its burden of proof as to its "factor other than sex" affirmative defense, and (2) requiring Cooper to prove pretext based upon misinterpreted Ninth Circuit case authority. As described below, Cooper respectfully requests that the Court limit the pretext requirement only to cases involving Title VII disparate pay claims.

1. United Conceded that Cooper Satisfied Her *Prima Facie* Case.

The guiding principle of the Equal Pay Act, 29 U.S.C. § 206, *et seq*., is that employees doing equal work should be paid equal wages, regardless of sex. *Maricopa*, 736 F.2d at 513. "To establish a prima facie case of wage discrimination, a plaintiff must show that the employer pays different wages to employees of the opposite sex for substantially equal work." *Id.* "The Equal Pay Act creates a type of ***strict liability; no intent to discriminate need be shown***."

Maxwell v. City of Tucson, 803 F.2d 444, 446 (9th Cir. 1986) (*quoting Strecker v. Grand Forks County Social Service Board*, 640 F.2d 96, 99 n.1 (8th Cir. 1980)) (en banc) (emphasis added). United conceded that Cooper presented evidence of a *prima facie* case under the Equal Pay Act. (EOR 15).

2. United Failed to Prove Its "Factor Other than Sex" Affirmative Defense.

Upon Cooper's establishment of a *prima facie* EPA violation, the burden of proof shifts to United to show that the wage disparity is permitted by one of the four statutory exceptions to the Equal Pay Act: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). "These exceptions are affirmative defenses which the employer must plead and prove." *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 875 (9th Cir. 1982). United only presented evidence of its alleged "factor other than sex" at summary judgment. The analysis of the evidence supporting this affirmative defense must be subject to a "thorough and sensitive appraisal." *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 920 (9th Cir. 1983). A defendant must offer more than "post-hoc rationalizations" and instead justify wage disparities with "legitimate institutional interests." *Id.* (emphasis added). At summary judgment, United produced no admissible evidence that pre-dates the filing of the instant

action to justify its affirmative defense. Citing *post-hoc* rationalizations created for litigation, UAL argued that Cooper's wages as a Supervisor were calculated pursuant to unidentified company practices and unidentified formulas used when an employee accepts a Supervisor position.[4]

Originally, United did not plead any of the four statutory affirmative defenses in its Answer. Its first mention of the "factor other than sex" defense was made two months after its Answer as part of a joint case management statement, in which it denied "any liability under the Equal Pay Act and contend[ed] that Plaintiff's peers were paid higher salaries because of factors other than sex." (EOR 608). In that same case management statement, the parties noted that they "did not intend to amend their pleadings at this time." (*Id*.). Nevertheless, on January 23, 2014, over a month after the deadline for motions to amend pleadings passed, United filed a motion to amend or modify the scheduling order to amend its Answer to include the affirmative defense of "factor other than sex."[5] On February

4 The District Court misconstrued Cooper's position by contending that she "has cited no case which holds that an employer can *only* establish a legitimate nondiscriminatory basis for a pay differential through evidence of a written policy." (EOR 18) (emphasis added).

5 Since United made no request for leave to amend its Answer to assert the other three EPA affirmative defenses, any argument or evidence offered by UAL based upon a "merit system" or a "seniority system" is improper and inadmissible as it is relevant only to affirmative defenses that have been waived. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (an affirmative defense is a

28, 2014, the District Court granted United's motion to amend its Answer and include the affirmative defense of "factor other than sex" over Cooper's objection.

Under the EPA, the "analytical framework differs from the *McDonnell Douglas* burden shifting analysis," because a defendant cannot escape liability by articulating a legitimate, non-discriminatory reason for the employment action; rather, the defendant must prove that the pay differential was based on a "factor other than sex." *Taylor v. White*, 321 F.3d 710, 716 (8th Cir. 2003); *Fagen v. Iowa*, 301 F. Supp. 2d 997, 1002-03 (S.D. Iowa 2004) (holding that it is not appropriate to analyze the plaintiff's EPA claim under the *McDonnell Douglas* burden-shifting analysis, and noting that the critical difference between "the [EPA] framework and the McDonnell Douglas burden-shifting paradigm is which party has the ultimate burden of proof on the issue of discrimination.").

At summary judgment, United did not meet its burden by producing substantial evidence to establish an affirmative defense based on a statutory exception. In fact, United produced no evidence predating this litigation to justify its affirmative defense. UAL alleges that Cooper's salary as a Supervisor was

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defense that "the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver") (*citing* Fed. R. Civ. P. 8(c)(1), 12(b), 15(a)); *Arizona v. California*, 530 U.S. 392, 410 (2000) (observing that an "affirmative defense" is "ordinarily lost if not timely raised."); *Wood v. Milyard*, 132 S. Ct. 1826, 1832 (2012).

calculated pursuant to unidentified company policies and unidentified formulas used when an employee accepts a Supervisor position.[6] Conspicuously absent from the record are declarations from the individuals who set the salaries of the Security Supervisors during Cooper's tenure[7]. *See Rexroat v. Ariz. Dep't of Educ.,* 2013 U.S. Dist. LEXIS 3515, *16-17 (D. Ariz. Jan. 7, 2013 (Defendant provided declarations from the individuals who made recommendations for plaintiff's and her coworker's salaries. The record shows that the employer has a written hiring policy which includes a "special entrance rate" for salaries above the minimum.)

Rob Donohue, United's Fed. R. Civ. P. 30(b)(6) designee, could not identify

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6 Cooper specifically objected to the Donohue Declaration's references to unidentified policies as inadmissible hearsay (FRE 801, 802), best evidence (FRE 1002) and lacking foundation (FRE 602) (EOR 548-54, ¶¶ 6-22). Further, a witness may not testify to a matter "unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir. 1995). The Fed. R. Civ. P. 30(b)(6) testimony of this witness demonstrates the lack of personal knowledge such that the Court should disregard the declaration as a whole. (EOR 253). Cooper specifically objects to Exhibit 3 to the Donohue Declaration as hearsay, and best evidence, as there is no competent testimony that the "bands" were applied during the 2010-2011 time period. Cooper specifically objected to each instance in which Donohue asserts a fact in the passive voice (e.g., "the position of "Supervisor – Security Officers" was assigned a grade level "F"), as lacking personal knowledge and foundation. (EOR 548-54, ¶¶ 6-22). The District Court did not rule upon these objections. (EOR 11-12).

7 Marvin-Nilsen disclaimed any knowledge of the process of setting Plaintiff's salary (EOR 244-46), and the Fed. R. Civ. P. 30(b)(6) deponent provided vague and evasive answers, such as "would have" and "typically." (EOR 255-56, 257-58, 260, 261, 263, 264, 265, 266, 267, 271, 272, 273, 274, 282).

a single written policy that would establish a "factor other than sex." (EOR 255-56, 257-58, 260, 261, 263, 264, 265, 266, 267, 271, 272, 273, 274, 282). His answers were evasive and riddled with speculation. In his sham declaration at summary judgment, Donohue failed to cite to any document which either described the alleged practice or sets any of the unidentified policies. (EOR 548-54, ¶¶ 6-22).

UAL's summary judgment moving papers were silent as to its policy that ensures supervisors and managers have pay parity when the discrepancy has evolved over time. Cooper presented competent evidence that United regularly brings supervisors and managers to parity when the discrepancy has evolved over time. She testified that she witnessed United raise to parity the salary of a female manager, Joyce O'Neal, and that there was a process for doing this that was not applied to Cooper. (EOR 210-11, 212-13). United chose not to employ this process in Cooper's case. This disputed issue of material fact demonstrates that the grant of summary judgment on Cooper's EPA claim was improper.

Furthermore, Cooper objected to the Fed. R. Civ. P. 30(b)(6) deposition testimony and Declaration of Donohue and the Lewin Report based thereon as lacking foundation, lacking personal knowledge, and not identifying the formulas used in creating the "crosswalk" document and how a level of a promotion is

determined for the application of the alleged policy. (EOR 553-54, ¶ 22; 268; 269-70; 423-24, ¶¶ 25-26). Cooper further objected to the assertions and alleged evidence that United had a "practice" of setting salaries by a singular, rational process. (EOR 275-76; 277-81; 283-89; 425-27, ¶ 29-32; 550-553, ¶¶ 13-19; 578-81; *see also* EOR 586-88, ¶¶ 3-7). All this evidence violated Fed. R. Evid. 801, 802 to the extent that it purports to testify as to the contents of a computer program or other unidentified sources. By not identifying the sources, the proffered evidence was also objectionable as lacking foundation under Fed. R. Evid. 602.

United also offered the Declaration and Report of Mr. Lewin, whose expert report contained hearsay upon hearsay, legal conclusions and arguments, and contains no foundation laid as to any personal knowledge[8]. This Court should disregard this attempt to validate the hodgepodge of *post-hoc* rationalizations proffered by United as a "factor" other than sex. Whether or not the hodgepodge of practices articulated by United are "reasonable" is irrelevant to the question of whether the evidence offered constitutes a "factor" other than sex that is related to a legitimate interest of the institution.

The Lewin Declaration and report should be disregarded by this Court under

8 Plaintiff specifically objected to the Declaration of Mr. Lewin, as inadmissible hearsay (FRE 801, 802), best evidence (FRE 1002) and lacking foundation (FRE 602) impermissible legal conclusion (EOR 416-17, ¶ 11; 424, ¶ 27; 427, ¶ 32).

Federal Rule of Evidence 702, which provides the following: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge *will help the trier of fact to understand the evidence or to determine a fact in issue*." Fed. R. Evid. 702(a) (emphasis added). "The requirement that the opinion testimony 'assist the trier of fact' 'goes primarily to relevance.'" *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (*quoting Daubert v. Merrell Dow Pharms.,* 509 U.S. 579, 591 (1993). Indeed, "the district judge is 'a gatekeeper, not a fact finder.'" *Primiano*, 598 F.3d at 564-65 (*quoting United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006)). Accordingly, this Court should disregard the Lewin Declaration.

Given Cooper's uncontroverted evidence that United had a methodology of adjusting salaries to eliminate disparities based upon protected classes (EOR 210-11, 212-13) and that United failed to use it to remedy the clear disparity, substantial issues of material fact existed, precluding summary judgment. The evidence created a question of fact regarding whether Cooper's co-worker's larger salaries were reasonably attributable to their experience and prior established salaries.

The District Court's finding that United satisfied its burden as to its

affirmative defense was clearly erroneous. First, the lack of any cited UAL's compensation policies or practices do not satisfy this burden. The District Court's invocation of *Taylor v. White*, 321 F.3d 710, 717 (8th Cir. 2003) is readily distinguishable where the plaintiff argued that the "subjective, informal nature of the [employer]'s asserted policy necessarily gives rise to an inference of discrimination and that employers cannot rely on salary retention policies to explain unequal pay." *Id*. (emphasis added). The *Taylor* Court rejected subjectivity as categorically discriminatory: "although we recognize that an employer might apply a salary retention policy in a discriminatory fashion or use such a policy as a vehicle to perpetuate historically unequal wages caused by past discrimination, these potential abuses do not provide valid bases to adopt a per se rule that declares all salary retention practices inherently discriminatory." *Id*. at 718. Cooper made no such contention at summary judgment.

Rather, United's proffer of "unidentified company policies," none predating this litigation, cut against United's quantum of proof in the burden it was required to carry. (EOR 175-76). *See Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570 n.8 (11th Cir. 1988) (affirming that the employer had failed to prove its EPA affirmative defense, and noting that "the absence of a writing in the context of other written policies provides independent support for its finding that the 'policy'

was, in fact, an illegal practice.").

Second, without sufficient documentation, the evidence presented from active United employees is not amenable to disposition at summary judgment. As employees of United, Donohue, Hughes, and Sulgit are interested witnesses. *See United States v. Bayer*, 331 U.S. 532, 539, 67 S.Ct. 1394, 1397 (1947). Hence, based on the authority presented herein, a jury rather than this Court must determine whether they are sufficiently credible to sustain United's burden of proof as to its "factor other than sex" affirmative defense.

3. The District Court Erroneously Required Cooper to Prove Pretext.

While Equal Pay Act claims indisputably overlap[9] with Title VII sex discrimination claims based on disparate pay, Cooper never pleaded such a claim under Title VII. (EOR 589, 620). Layered misinterpretations of Ninth Circuit authority have resulted in the District Court's imposition of a pretext requirement to Cooper's standalone EPA claim that is inconsonant with Title VII's well-established *McDonnell Douglas* burden-shifting framework.

9 "Title VII and the Equal Pay Act overlap because both make unlawful differentials in wages on the basis of a person's sex. It is not unusual or improper for a plaintiff seeking equal pay for equal work to allege a violation of both the Equal Pay Act and Title VII." *Maxwell v. Tucson*, 803 F.2d 444, 446 (9th Cir. 1986). "Title VII incorporates the Equal Pay Act defenses, so a defendant who proves one of the defenses cannot be held liable under either the Equal Pay Act or Title VII." *Id*. (citation omitted).

a. Case Authority Does Not Support a Pretext Requirement.

The analytical starting point is *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 875 (9th Cir. 1982), wherein the Ninth Circuit considered a disparate pay case brought by a female plaintiff under Title VII, not the Equal Pay Act. *Id*. In exploring "possible interpretations of the term 'factor other than sex,'" *id.*, the Court opined that "[e]ven with a business-related requirement, an employer might assert some business reason as a pretext for a discriminatory objective." *Id*. at 876. This decision's singular reference to "pretext" is arguably dicta because the *Kouba* Court never expressly required the plaintiff to disprove that the employer "use[d] the factor reasonably in light of the employer's stated purpose as well as its other practices." *Id*. at 876-77.

The *Kouba* decision's fleeting reference to "pretext" laid the groundwork for this Court to rule in a joint EPA-Title VII disparate pay case that "[a]lthough discriminatory intent is not part of the employee's prima facie burden under the Equal Pay Act, an employee *may* rebut the employer's affirmative defenses with evidence that the employer intended to discriminate, and that the affirmative defense claimed is merely a pretext for discrimination." *Maxwell*, 803 F.2d at 446 (citing *Kouba*, 691 F.2d at 876) (emphasis added).

The *Maxwell* Court's telling choice of the word "may" further supported that

evidence of pretext was not required: "because Equal Pay Act standards apply to both claims in this case the dispositive issue is whether the [employer] established a defense to [plaintiff]'s claims. If the [employer] can establish a defense, it prevails; if it cannot, [plaintiff] prevails." *Id*. at 446. The *Maxwell* Court stopped short of reviewing any evidence of pretext because it affirmed the employer's failure to prove its affirmative defense. *Id*. at 448.

In the present matter, the District Court derived its authority to require Cooper to prove pretext from *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1076 (9th Cir. 1999): "[w]here the defendant demonstrates that a pay differential was based on a factor other than sex, the employee may prevail by showing that the employer's proffered nondiscriminatory reason is a 'pretext for discrimination.'" *Id*. (*quoting Maxwell*, 803 F.2d at 446). (*See* EOR 15).

The District Court's misapplication of pretext to Cooper's Equal Pay Act claim without a corresponding Title VII claim mirrors the *Stanley* Court's own misapplication of *Maxwell* to a standalone EPA claim[10], which the *Stanley* Court then paired with the Title VII pretext burden of a case without any EPA or disparate pay claims at issue. *Stanley,* 178 F.3d at 1076 (*citing Tex. Dep't of Cmty.*

10 There were no Title VII claims based on disparate pay at issue in *Stanley*. *See Stanley*, 178 F.3d at 1073.

Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089 (1981)). As such, the *Kouba-Maxwell-Stanley* line of case authority provides extremely limited support for extending a pretext requirement to an EPA claim in the absence of a Title VII disparate pay claim.

b. This Court Should Limit the Pretext Requirement Only to Title VII Disparate Pay Claims, or Alternatively, to Joint EPA-Title VII Cases.

As described above, a crystallized misinterpretation of pretext in the Ninth Circuit has prejudiced Cooper and her standalone Equal Pay Act[11] claim because United "bears the burden of proof on its affirmative defenses." *Hernandez v. Dutch Goose, Inc.*, 2013 U.S. Dist. LEXIS 153707, *5-6 (N.D. Cal. Oct. 25, 2013) (*citing Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, 492 (9th Cir. 1988)). The enumerated exceptions under 29 U.S.C. § 206(d)(1) are "affirmative defenses which the employer must plead and prove." *Kouba*, 691 F.2d at 875.

"[A]n affirmative defense, under the meaning of Federal Rule of Civil Procedure 8(c), is a defense that does not negate the elements of the plaintiff's claim, but instead *precludes liability* even if all of the elements of the plaintiff's claim are proven." *Barnes v. AT&T Pension Benefit Plan*, 718 F. Supp. 2d 1167,

11 Even though Cooper's operative First Amended Complaint alleges Title VII Retaliation (EOR 589), her workplace complaint of a gender-based pay disparity was the "protected activity" for that claim. The "adverse action" was her demotion following United's TAS. (EOR 597-98, ¶¶ 46, 57).

1173 (N.D. Cal. 2010) (quoting *Roberge v. Hannah Marine Corp.*, 1997 U.S. App. LEXIS 21655 (6th Cir. Aug. 13, 1997) (emphasis added).

Having established her *prima facie* case, Cooper is prejudiced because there is no reason for the imposition of a pretext requirement where she did not allege disparate pay under Title VII and United failed to preclude liability by meeting its burden of proof. A successful EPA affirmative defense compels dismissal of any Title VII gender-based disparate pay claims. *See Maxwell*, 803 F.2d at 446; *see also Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) (holding plaintiff's "EPA claim could not survive summary judgment; therefore, her equal pay claim under Title VII also fails.").

However, Cooper's standalone EPA claim is analytically distinct from the *McDonnell-Douglas* burden-shifting framework, wherein the ultimate burden of proof always belongs to the plaintiff. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000); *Baptiste v. LIDS*, 17 F. Supp. 3d 932, 944 (N.D. Cal. 2014); *see also Johnson v. Transp. Agency*, 770 F.2d 752, 762 (9th Cir. 1984) ("The burden of proof under the *McDonnell Douglas* test never shifts from the plaintiff. The burden of proof to demonstrate the validity of a separate affirmative defense rests with the person asserting it: the employer in Title VII cases. It is logical to require the employer to prove the validity of its [affirmative defense]

since it is the employer's plan that has allegedly caused a Title VII injury.")
(Wallace, J., dissenting).

Therefore, Cooper respectfully requests that this Court limit the pretext requirement only to Title VII disparate pay claims, or alternatively, to Equal Pay Act cases that also plead corresponding Title VII claims. Pretext analysis makes more sense in cases where a plaintiff pleads both claims.[12] The Seventh Circuit has recently held that that burden-shifting is appropriate to a Title VII claim, but "is not the way the Equal Pay Act is written." *King v. Acosta Sales & Mktg.*, 678 F.3d 470, 474 (7th Cir. 2012). The *King* Court elaborated further:

> An employee's *only* burden under the Equal Pay Act is to show a difference in pay for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" (§206(d)(1)). An employer asserting that the difference is the result of a "factor other than sex" must present this contention as an affirmative defense—and *the proponent of an affirmative defense has the burdens of both production and persuasion*.

Id. (emphasis added). Other Circuits have similarly held that EPA claims do not follow the *McDonnell Douglas* burden-shifting framework. *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1311 (10th Cir. 2006) ("because the employer's burden in an EPA claim is one of ultimate persuasion, 'in order to prevail at the summary judgment stage, the employer must prove at least one affirmative defense so clearly

12 *See e.g., Lewis v. Smith*, 255 F. Supp. 2d 1054, 1063 (D. Ariz. 2003); *Parker v. Arizona*, 2013 U.S. Dist. LEXIS 91782, *27 (D. Ariz. June 28, 2013).

that no rational jury could find to the contrary.'") (*quoting Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3rd Cir. 2000), *followed by Riser v. QEP Energy*, 776 F.3d 1191, 1198, 1199 (10th Cir. 2015) (reversing grant of summary judgment to employer). This case warrants reversal because United has not met the burden to prove its affirmative defense, and the District Court did not apply the correct legal standard.

C. COOPER STATED A *PRIMA FACIE* TITLE VII RETALIATION CLAIM.

To established a Title VII Retaliation claim, a plaintiff must show the following: (1) engagement in a protected activity; (2) a subsequent adverse employment action; (3) and a causal link between the two. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982); *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161, 68 L. Ed. 2d 751, 101 S. Ct. 2242 (1981). At summary judgment, United claimed there was no evidence of causality between any alleged "protected activity" and the decision not to hire Cooper for a Supervisor position.

The District Court correctly held that Cooper had stated a *prima facie* claim for Retaliation under Title VII. (EOR 36). Nonetheless, for purposes of *de novo* review, Cooper will recount the triable issues of material fact she identified:

1. Cooper Engaged in Protected Activity.

Cooper engaged in at least four instances of "protected activity": (1) from 2008-11, she made several complaints to Bernard Petersen, Sheila Asfaha, and Sandee Singer regarding being stripped of duties and feeling ostracized because of, *inter alia*, her age; (2) in October 2009, she complained to Ally Zauner regarding, *inter alia*, workplace discrimination; (3) in July 2010, she investigated race discrimination complaints against Del Campo; and (4) in April 2011, she complained to Anhvu Ly regarding, *inter alia*, regarding pay inequities, which she also raised with UAL Compliance Manager Wayne Slaughter. (EOR 217-19, 224-25). At summary judgment, the District Court correctly identified that Cooper's counsel had narrowed the relevant inquiry to Cooper's April 2011 complaint about pay disparity. (EOR 34) (*citing* EOR 59).

Cooper's most recent complaint "that her salary was lower than that of her 2 male counterparts" occurred on April 12, 2011, about 4 ½ months before her TAS interview. (EOR 247). UAL's Human Resources in San Francisco and at World Headquarters both apparently reviewed this complaint. (*See* EOR 94). Accordingly, the complaint was unquestionable protected activity. (*See* EOR 34).

By the May 2011 statement, "we can state that [Cooper] has been paid in accordance with United's guidelines," United's management condoned and ratified

her pay disparity with her equally or less experienced male counterparts. (*Id*.).

2. Cooper Suffered an Adverse Employment Action.

The District Court correctly identified Cooper's adverse action: "that she was demoted from her role as supervisor in September 2011." (EOR 23). The District Court took exception to some of the additional adverse actions Cooper alleged: "removing her from a security supervisor position, not rehiring during Talent selection Process, not rehiring her after William Knight resigned, and [not] rehiring her when Russ Faultner resigned." (EOR 34) (*quoting* EOR 187). Specifically, the District Court claimed they were neither in Cooper's FAC, nor raised in discovery. (EOR 34).

Notwithstanding *Iqbal-Twombly*, notice pleading still prevails. Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice."). The fact that Cooper, despite her experience, was *never* rehired into a Security Supervisor following her demotion is a reasonable inference to draw from the operative pleadings. (EOR 590, ¶ 5; 596-97, ¶¶ 43, 46-47, 49-50). No discovery is necessary. *See Fontana v. Haskin*, 262 F.3d 871, 877 (9th Cir. 2001) ("Specific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief.").

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3. Cooper Presented Triable Issues of Material Fact as to Causation.

To demonstrate causality, Cooper must present at trial evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action taken against her by United. *Cohen*, 686 F.2d at 796. "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity." *Id.*

On May 18, 2011, Slaughter, an employee in United headquarters, issued a case closure letter to Cooper. (EOR 92-93). On August 29, 2011, Marvin-Nilsen rated her with nearly the lowest possible TAS interview score, ensuring that she would lose her supervisory position. This temporal proximity is sufficient for causation.[13] *See Keyser v. Sacramento City Unified Sch. Dist*., 265 F.3d 741, 751-52 (9th Cir. 2001) ("proximity in time between the protected action and the allegedly retaliatory employment decision [i]s one [way] a jury logically could infer [that the plaintiff] was terminated in retaliation.") (internal quotations

13 The District Court's contention that "[a] several-month gap in time does not provide the requisite causal link" is off-base. (EOR 35). "The Ninth Circuit has found proximity of *a few months* to be sufficient to establish an inference of causation…" *Lamont v. Anning-Johnson Co.*, 2011 U.S. Dist. LEXIS 60302, *8, 11 (D. Or. June 6, 2011) (emphasis added) (a three-month period between the protected activity and adverse action was sufficient to satisfy minimal *prima facie* burden that complaint could have reasonably motivated the employer's retaliatory action); *contrast to Villiarimo v. Aloha Island Air, Inc*., 281 F.3d 1054, 1065 (9th Cir. 2002) (noting an 18-month lapse is too long) (citation omitted).

omitted); *see also Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). Temporal proximity can itself constitute sufficient circumstantial evidence of retaliation as to both *prima facie* and pretext. *Bell v. Clackamas County*, 341 F.3d 858, 865-66 (9th Cir. 2003); *Miller v. Fairchild Indus., Inc*., 797 F.2d 727, 731-32 (9th Cir. 1986).

At summary judgment, United argued that Marvin-Nilsen was unaware of Cooper's protected activities regarding disparity in pay, citing *Cohen*, 686 F.2d at 796; *Morgan v. Regents of Univ. of California*, 88 Cal. App. 4th 52, 73 (2001). However, Marvin-Nilsen actually was well aware of Cooper's protected activities. (EOR 220-22). On March 18, 2011, Singer met with Cooper to discuss Cooper's concerns about the medical process and to allow her to express her feeling that she felt that United was trying to get rid of her. The two spoke again on March 30, 2011 and discussed why her salary was so much lower than her two peers. Cooper mentioned at this point that others had gone to the EEOC but that she did not want to go down that path. (EOR 99-100). Marvin-Nilsen's sham declaration[14] on this point must be disregarded because she did recall have having a conversation with Cooper wherein Cooper expressed her concerns that she felt that it was unfair that

14 *See* EOR 478, ¶ 21 ("I was not aware of any of these complaints until after this lawsuit was filed, and certainly had no knowledge of them at the time I made the decision to not select Ms. Cooper for a Supervisor position in 2011.").

the other supervisors were making more money than she was. (EOR 234). This conversation occurred before the Talent Selection Process (EOR 244). Accordingly, taken in the light most favorable to Cooper, a question of material fact remains for trial regarding the causal link between Plaintiff's protected activity[15] and the adverse employment actions taken against plaintiff by Defendant.

D. COOPER HAS ARTICULATED TRIABLE ISSUES OF PRETEXT.

Upon Cooper's establishment of a *prima facie* case of Title VII Retaliation, the burden shifts to United to articulate some legitimate, non-retaliatory reason for the adverse action. *Cohen*, 686 F.2d at 796. UAL's reasoning for removing Cooper from her Supervisor position essentially amounted to: (1) a company-wide process was used, and (2) Cooper did not interview well. The burden then shifts

15 The Court properly could grant summary judgment on the basis of causality because the declaration of the decision maker contradicts her deposition testimony regarding knowledge of Cooper's protected activity and would have required the District Court to make impressible credibility determinations. In any case, a jury would be at liberty to reject all the declaration statements: "'[I]n this Circuit (as in others) the rule is that the trier of fact is at liberty within the bounds of reason to reject entirely the uncontradicted testimony of a witness which does not produce conviction in his mind of the witness' testimony.'" *White Glove Bldg. Maintenance, Inc. v. Brennan*, 518 F.2d 1271, 1274 (9th Cir 1975) (*quoting Joseph v. Donover Co.*, 261 F.2d 812, 824 (9th Cir 1958)); *Portland v. Bureau of Labor & Indus.*, 298 Or. 104, 116 n.6, 690 P.2d 475, 482 n.6 (1984) ("Where the credibility of witnesses is concerned, the trier of fact is not necessarily bound by uncontradicted testimony, for the trier of fact may simply not believe the witnesses.").

back to Cooper to show that these reasons are merely pretextual. *Id.* As described below, United's company-wide "Talent Selection Process" was unnecessary and unworthy of credence.

1. A Reduction in Force Amongst Security Supervisors Was Unnecessary and Not Performed According to United's Policies.

On September 9, 2011, Cooper was informed that she would no longer serve as a security supervisor because of a Reduction in Force. (EOR 84-85). This statement was inconsistent with the statements of her previous manager, Bernie Petersen, who informed her and her peers that he did not believe that Talent Selection would be necessary for the Security Supervisors. (EOR 226-28, 229-30).

Indeed, no reduction in force occurred as to the Security Supervisors. Prior to Talent Selection, United had three security supervisors; after Talent Selection, United continued to have three security supervisors. (EOR 235-36).

United did not follow its own published guidelines in effectuating Cooper's demotion. As an allegedly company-wide effort, United promulgated specific flow charts, policies, and procedures that covered how to determine whether and how Talent Selection would apply to a given position. Those procedures were not followed. (EOR 150).

When requested to produce all documents concerning the Talent Selection

Process, United failed to produce contemporaneous records that are generated as a matter of course in Talent Selection. (EOR 206, ¶¶ 31, 32; 308; 338). These documents include contemporaneous Talent Selection forms and communications evidencing an approval process for subjecting a given position to Talent Selection. (EOR 338, 355-57). These documents are sent by the Managers to the members of the Human Resources team, and are designed to help hiring mangers determine if their position should go through the talent selection process. (*Id.*).

United produced no contemporaneous emails demonstrating the process used to put the Security Supervisor position into Talent Selection. (EOR 339-42, 343-46, 347-50, 351-54, 355-57, 358-62, 363-66). Talent Selection triggered numerous email chains between managers and members of human resources concerning candidate eligibility, including the determination as to whether incumbents could only apply. (*Id.*).

All of these documents are absent from United's document production in this case. (EOR 206, ¶¶ 31, 32; 308). In fact, United has produced no documents in this case that announce the Talent Selection Process nor that show the decision making process to post the Supervisor - Security Officer position. (*Id.*). Marvin-Nilsen never informed Cooper in writing that she would be subjected to Talent Selection. (EOR 197, ¶ 25). Indeed, the only way Cooper knew that she had to

apply for the position was when a representative from Houston called her while she was on an approved leave and informed her that she had one day to complete the application. (*Id.*).

In this case, Marvin-Nilsen testified that she was instructed to post the new position; however, she did recall who instructed her to do this. She only had one manager above her, Kathryn Cassley:

> A. Because in the talent selection process, all positions were evaluated throughout the company, starting at the CEO on down. When it got to her position, we -- I was required to rewrite a job description, which expanded the roles and responsibilities of a security supervisor. And at that point, we posted the position to evaluate the best available talent at the company.
>
> Q. You said you were required to rewrite the job description. In what way did the job description change?
>
> A. The last job description was very vague. It did not have requirements for the position. I don't recall that it had experience requirements for the position. My intent was to elevate the leadership role.
>
> Q. Who gave you the directive to rewrite the job description?
>
> A. Every job in the company had--every job description was rewritten and approved.

(EOR 248-49).

> * * *
>
> MR. SMITH: At some point in time in 2011, you were informed to rewrite the job description for the supervisor of security officers?

A. That's correct.

Q. And did that directive come through a memo or did someone speak with you?

A. I don't recall.

(EOR 249).

* * *

Q. Do you recall if you consulted with anyone?

A. I reviewed it with my boss.

Q. Who was your boss at the time?

A. Kathy Cassley.

(EOR 250). The foregoing is the sum total of the actual evidence produced in discovery by United on how the process of selecting the Security Supervisor position was subjected to Talent Selection. Marvin-Nilsen's claimed lack of recall on how Talent Selection was approved or decided upon for the Security Supervisor Position would permit a reasonable juror to draw an inference either that information has been withheld, or that United did not follow its own rules, both of which are substantial and specific evidence of pretext. (EOR 249-50).

2. The Individual Who Displaced Plaintiff Did Not Meet the Minimum Qualifications of the Job.

United failed to produce the contemporaneous records required by Talent Selection to permit non-incumbents to apply for the Security Supervisor position. Faultner, another laid-off employee from the Stores Department, was permitted to apply for the position, despite the fact that he did not meet at least one of the minimum qualifications of the position: the possession of a valid California BSIS Guard license. (EOR 116-17, 331). BSIS records indicate that prior to August 11, 2010, he did not have a license, and based upon the records, appears to have never been licensed under BSIS regulations as a security guard. (*Id.*).

Further, United produced no contemporaneous records in this case confirming in writing the events that Marvin-Nilsen testified to at her deposition concerning Faultner's lack of the required application components. Marvin-Nilsen, the hiring manager for the position, had knowledge that Faultner applied to the position without having his guard card. (EOR 241). Marvin-Nilsen discussed Faultner's situation with the talent recruiter, Vanessa, who agreed to make Faultner eligible based on Marvin-Nilsen's representation that he was in the process of "renewing" his guard card. (EOR 241-42).

Furthermore, Marvin-Nilsen's sworn deposition testimony that Faultner was

"renewing" his license[16] appears to be either based upon a misrepresentation by Faultner or a false statement under penalty of perjury. Faultner never had a license, based upon BSIS records and his deposition testimony[17]. If it had lapsed or was cancelled, the BSIS system would so indicate[18]. A reasonable juror would be entitled to disregard all Marvin-Nilsen's self-serving declaration based upon this disputed issue of material fact.

Furthermore, Faultner had no real security experience. (EOR 201, ¶¶ 9-14). As set forth in the Declaration of William Knight, Faultner had to be trained in basic security issues. (EOR 201, ¶¶ 13-14).

3. United's Proffered Reasons Change Over Time.

Despite its failure to produce numerous contemporaneous Talent Selection documents which should have been produced about Cooper's demotion, the contemporaneous documents that do exist informed Cooper that her position had been eliminated as a reduction-in-force. (EOR 84, 85). Marvin-Nilsen's *post-hoc* explanation is that it was a "form" or a "mistake" has never been corrected. As with its other production failures, United has not produced the "correct form" that

16 (EOR 241).

17 (EOR 120, 122, 298-99, 331).

18 (EOR 333).

should have been used, nor corrected this mistake in Cooper's personnel file. (EOR 206, ¶ 33).

United's continually evolving explanations for the pay disparity is further evidence of pretext[19]. Originally, Cooper was told of a policy that outside hires must be put at the mid-point of the salary range, a statement UAL knew was false: "There is no policy that states that externals will be hired at mid-point. We have had to pay higher salaries, usually around the mid level in order to attract people to United." (*See* EOR 90, 94). At deposition, Cooper testified that others had their salaries adjusted, confirmed by UAL's own documents that reflect a policy of review to eliminate pay disparities. (EOR 212-13, 91). Accordingly, Cooper has presented trial issues of material fact as to the pretextual nature of her demotion.[20]

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19 *See Equal Employment Opportunity Com. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (where "'fundamentally different justifications'" were offered, changing explanations could be considered "pretextual, developed over time to counter the evidence suggesting age discrimination").

20 It should be noted in passing Cooper's summary judgment opposition papers contained one section that presented her evidence of pretext for her Title VII Retaliation and also her disparate treatment claims not on appeal. (*See* EOR 187-92). Nevertheless, the District Court bifurcated the analysis without any apparent reason (*see* EOR 26-33, 36-38), then set up a "straw man" argument which Cooper did not raise at summary judgment: that her deposition testimony regarding her belief that Marvin-Nilsen disliked her was being proffered as pretext. (EOR 37) (*citing* EOR 217-19). The cited deposition testimony appeared only once in Cooper's moving papers—as evidence of her protected activities. (EOR 180).

E. THE DISTRICT COURT ERRED IN RULING ON THE EVIDENTIARY OBJECTIONS.

1. Donohue's Sham Declaration

The District Court erred in ruling that Donohue's Declaration was not a "sham" (EOR 11-12), in so far as Donohue provided specific information he could not, or would not, provide in response to direct deposition questions.

2. Plaintiff's Request for Judicial Notice

The District Court erred in ruling that the Exhibits attached to Cooper's Request for Judicial Notice were judicially noticeable but inadmissible (EOR 12-13), as Cooper offered the exhibits not for the truth of the contents, but for the simple fact that no records existed that Faultner was registered at the relevant time. United never presented any competent evidence to contradict this.

3. *Bonillas* Documents

The District Court erred in ruling that the *Bonillas* documents are inadmissible as lacking foundation and hearsay (EOR 13-14), as these documents were produced by United in the previous matter and concern the same Talent Select Process that resulted in Cooper's demotion.

VII. CONCLUSION

Based on the foregoing, Cooper respectfully requests that this Court reverse and remand the District Court's summary judgment decision for further

proceedings.

Dated: August 10, 2015

SMITH PATTEN

/s/ Dow W. Patten
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Statement of Related Cases for Appeal No. 15-15623

Pursuant to Circuit Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Appellants states that he is unaware of any related cases pending in this Circuit.

Respectfully submitted this 10th day of August, 2015.

SMITH PATTEN

s/Dow W. Patten

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Attorneys for Appellant

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