

Delima v. Home Depot U.S.A., Inc.

United States District Court, D. Oregon. | April 23, 2008 | 616 F.Supp.2d 1055

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United States District Court,
D. Oregon.

Nancy **DELIMA**, Plaintiff,

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Home Depot U.S.A., Inc., doing business as Home Depot
Depot, Defendant.

Civil No. 06-328-JE. | April 23, **2008**.

Synopsis

Background: Former employee brought gender discrimination action against home improvement retailer after her employment was terminated. Both parties moved to strike and for summary judgment.


Holdings: The District Court, [Haggerty](#), Chief Judge, adopted the opinion of [Jelderks](#), United States Magistrate Judge, which held that:

- 1 fact issue existed as to whether disparity in pay between department heads constituted discrimination under the Equal Pay Act (EPA);
- 2 fact issue existed as to whether retailer discriminated in favor of male employees during Title VII's limitations period;
- 3 fact issue existed as to whether retailer violated Oregon wage-discrimination statutes;
- 4 fact issues existed on former employee's unlawful discharge claims under Title VII and Oregon law;
- 5 former employee failed to establish retailer's failure to promote her violated Title VII and Oregon law;
- 6 night operations manager's conduct was not sufficiently severe or pervasive to create a hostile work environment under Title VII or Oregon law; and
- 7 former employee failed to establish that retailer retaliated against her in response to her opposition to discrimination in violation of Title VII and Oregon law.



Motions granted in part and denied in part.

West Headnotes (57)


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- 1 Federal Civil Procedure**  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, assertion in regional human resources manager's declaration, that the higher pay rate of all department supervisors who were paid more than plaintiff reflected legitimate factors such as greater qualifications, education, work experience and job skills, higher wages from previous employers, longer tenure, or higher evaluations, was not based upon the requisite personal knowledge, making the assertion inadmissible for summary judgment purposes, absent evidence that regional human resources manager participated in the particular pay decisions at issue.

- 2 Evidence**  **Grounds for Admission of Secondary Evidence**
Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, assertion in regional human resources manager's declaration, that the higher pay rate of all department supervisors who were paid more than plaintiff reflected legitimate factors such as greater qualifications, education, work experience and job skills, higher wages from previous employers, longer tenure, or higher evaluations, was not a condensation of voluminous records, but instead reflected regional human resources manager's opinion, based upon her purported review of employment records, and therefore assertion was not admissible for summary judgment purposes under rule permitting voluminous records to be presented in the form of a summary. [Fed.Rules Evid.Rule 1006, 28 U.S.C.A.](#)

- 3 Federal Civil Procedure**  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, department supervisor did not lack personal knowledge required to provide admissible statement in his declaration, for summary judgment purposes, that he was offered a job by retailer without filling out an application, and without retailer knowing anything about his

background other than that he had been a police officer for 11 years; rather than a statement about what retailer knew about the department supervisor's background, the statement could have been interpreted as referring to what department supervisor told retailer.

4 **Federal Civil Procedure**  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, declaration statement of department supervisor, that, when he was hired by retailer, he had no prior painting experience, was inadmissible for summary judgment purposes, as it was inconsistent with department supervisor's deposition testimony, which stated that he had supervised a painting crew before he was hired by retailer.

5 **Federal Civil Procedure**  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, paragraph of department supervisor's declaration, stating that department supervisor had much more first hand experience working with plaintiff than did store manager or human resources manager, that plaintiff was an "exemplary employee" whose "top priority was to ensure there were no safety violations," and that plaintiff was as qualified as he was to work as a department head, was admissible for summary judgment purposes, despite retailer's argument that department supervisor was not competent to testify as to whether or not plaintiff was an exemplary employee, as to plaintiff's priorities, or as to whether plaintiff had the qualifications that retailer considered necessary for department head positions, in light of supervisor's testimony about the duration and closeness of his working relationship with plaintiff.

6 **Federal Civil Procedure**  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, paragraph of department supervisor's declaration, stating that department supervisor did not have any skills, experience, or education that justified a difference in pay when he and plaintiff both worked as freight team department heads, that, based upon plaintiff's performance, he did not believe there was any basis for paying her less than other department heads were paid, and that he was familiar with factors used to determine employees' rates of pay, and that he researched pay rates at other stores, was admissible for summary judgment purposes,

despite retailer's argument that department supervisor lacked personal knowledge to make the statements, in light of department supervisor's knowledge about plaintiff's experience and skills and the knowledge and skills required to work as a freight team department head, and department supervisor's experience working for retailer.

7 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, department supervisor had the requisite knowledge to provide admissible statements in his declaration, for summary judgment purposes, that he observed that plaintiff was treated differently than her male counterparts by retailer, and that when he told management that his male associates on the night shift were underpaid, pay increases were made outside the normal pay increase cycle, but that the store manager ignored plaintiff when she raised the issue of her pay, in light of department supervisor's personal experience working for retailer described in his declaration.

8 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, experience of merchandising assistant store manager, who had been reassigned from his position as a night operations manager, in spending several days reviewing personnel files, talking to other managers, and meeting with "the team" when he took over as night operations manager, as well as his experience working in several of the retailer's other stores, provided a sufficient basis for assistant store manager to provide admissible statements in his declaration, for summary judgment purposes, regarding practices in other stores, and for his assertion that plaintiff did not receive managerial support before he began working at store, in which plaintiff was working.

9 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, statement of merchandising assistant store manager, who had been reassigned from his position as a night operations manager, made in his declaration, that plaintiff had continued to work without a salaried manager present after he left the store was inadmissible for summary judgment purposes, absent an indication of how the assistant

store manager obtained that knowledge.

10 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, paragraph of declaration of merchandising assistant store manager, stating that any male with plaintiff's performance would have received at least an "achiever" rating in the performance evaluation, and that assistant store manager had no doubt that plaintiff's performance reviews were downgraded because of her gender, was admissible for summary judgment purposes, despite retailer's argument that assistant store manager lacked the requisite personal knowledge, as it appeared the assistant store manager had sufficient experience to offer his opinion regarding the specified matters.

11 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, paragraph of declaration of merchandising assistant store manager, stating that assistant store manager had a conversation with district manager confirming the importance, under retailer's pay guidelines, of paying employees in the district "equitably," and that, in reviewing rates of pay, he discovered that plaintiff was paid significantly less than other male department heads with similar lengths of service, was admissible for summary judgment purposes, despite retailer's arguments pertaining to personal knowledge and foundation; assistant store manager's statement about his conversation with district manager provided foundation for assertion that importance of equitable pay under retailer's pay policy was confirmed, and assistant store manager's basis for his conclusion that plaintiff was not paid equitably was disparity in pay between plaintiff and other male department heads with similar lengths of service.

12 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, merchandising assistant store manager's statement in his declaration, that no one working for retailer ever raised any legitimate reason as to why plaintiff was so "poorly compensated," was inadmissible for summary judgment purposes, as assistant store manager could not have known if anyone working for retailer ever gave a legitimate reason for plaintiff's compensation.

13 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, merchandising assistant store manager's statement in his declaration, that he never witnessed any reason why plaintiff should not have received a pay increase, and that the store manager could have obtained approval from the district manager for an out of cycle pay increase, and that plaintiff's greatest percentage increase resulted from the assistant store manager's approval of a raise for her while he was the acting store manager, were admissible for summary judgment purposes, despite retailer's challenge to the statement's admissibility, in light of assistant store manager's experience working for retailer.

14 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, paragraph of declaration of merchandising assistant store manager, stating that, during the time assistant store manager worked for retailer, assistant store manager was never aware of a supervisor or manager being terminated for disagreeing with a personnel decision or for condoning violation of a safety policy, and that assistant store manager challenged a decision to terminate an associate "for safety," and was not terminated, was not inadmissible for summary judgment purposes for lack of foundation; assistant store manager had requisite knowledge to testify as to whether he was aware of certain events, and he also had the requisite personal knowledge to state that he challenged a particular termination decision, and was not terminated.

15 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, plaintiff's statement, in her declaration, that she complained to night operations manager in mid 2003 that her rate of pay was discriminatory, was not necessarily inconsistent with her deposition testimony stating that she had a meeting in February 2003, in which she complained that she was not being paid enough, but that she did not, at that time, attribute the inadequacy of her pay to gender discrimination, so as to make statement inadmissible for summary judgment purposes; deposition question eliciting plaintiff's response did not ask plaintiff to list every subsequent complaint, and plaintiff could have concluded after February 2003 that her pay was discriminatory.

16 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, plaintiff's assertion in her declaration that she received no formal training was inadmissible for summary judgment purposes, in light of plaintiff's deposition testimony that she took one class of department supervisor training (DST).

17 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, plaintiff's assertion in her declaration that male employees received two weeks notice that training would be offered was inadmissible for summary judgment purposes, where plaintiff failed to provide a foundation for her purported knowledge of the notice provided to those employees.

18 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, plaintiff's statement, in her declaration, that she was not given a "counseling session" as represented in discipline tracking document, which referenced plaintiff's violation for ignoring retailer's banner barricade, was not necessarily inconsistent with plaintiff's deposition testimony stating that she recalled having a discussion about the banner barricade with the human resources manager, so as to make plaintiff's statement inadmissible for summary judgment purposes; plaintiff and human resources manager could have discussed the banner barricade requirements without any mention of plaintiff's alleged violation, or discussed plaintiff's violation without the conversation rising to the level of formal "counseling" implied by the record of the "discipline process tracking" document in question.

19 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, plaintiff's statement, in her declaration, that, after returning from maternity leave, she told assistant store manager that the night operations manager had teased her about expressing milk for her baby, had paged employees to go into the training room while she was expressing milk, and had taunted her by shaking the handle to the room and saying that he would bring cereal for the milk she stored in the

refrigerator, was not necessarily inconsistent with her deposition testimony stating that she did not recall asking the assistant store manager to talk to the night operations manager about his conduct but was “pretty sure he did,” so as to make statement in terminated employee's declaration inadmissible for summary judgment purposes.

20 Federal Civil Procedure  **Sufficiency of Showing**

In former employee's gender discrimination action against home improvement retailer, plaintiff's statement, in her declaration, that store manager was aware that the safety violation for which an employee on the night freight team had been terminated occurred on other shifts, but chose not to enforce the policy, except when minorities were involved, was inadmissible for summary judgment purposes, as the employee had no personal knowledge about the store manager's awareness or why he had chosen to enforce a policy.

21 Federal Civil Procedure  **Materiality and Genuineness of Fact Issue**

The substantive law governing a claim or defense determines whether a fact is material for summary judgment purposes.

22 Labor and Employment  **Willful Violations**

An employer can commit a “willful” violation of the Equal Pay Act (EPA), so as to invoke three-year statute of limitations, without “knowingly” violating the statute; instead, the three-year statute of limitations applies if the employer disregarded the very possibility that it was violating the statute. Portal-to-Portal Act of 1947, § 6(a), [29 U.S.C.A. § 255\(a\)](#); Equal Pay Act of 1963, § 3, [29 U.S.C.A. § 206](#).

23 Labor and Employment  **Discrimination in General**

In order to make out a prima facie claim of gender-based discrimination under the EPA, a female plaintiff must show that her employer paid different wages to men who were performing substantially equal jobs under similar working conditions. Equal Pay Act of 1963, § 3, [29 U.S.C.A. § 206](#).

24 Limitation of Actions  **Liabilities Created by Statute**

Unlike analyzing claims of discriminatory pay brought under Title VII, in

analyzing claims brought under the EPA, each alleged discriminatory paycheck may be considered a new, discreet discriminatory action for statute of limitations purposes. Equal Pay Act of 1963, § 3, [29 U.S.C.A. § 206](#); Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#)

25 Federal Civil Procedure  [Fair Labor Standards Act Cases](#)

Genuine issue of material fact existed as to whether disparity in pay between department heads at home improvement retail store was more likely than not based upon gender, precluding summary judgment in former employee's gender discrimination action against retailer under the EPA. Equal Pay Act of 1963, § 3, [29 U.S.C.A. § 206](#).

26 Federal Civil Procedure  [Fair Labor Standards Act Cases](#)

Genuine issue of material fact existed as to whether home improvement retailer willfully violated the EPA, precluding summary judgment on issue of whether three year, rather than two year, statute of limitations applied in former employee's gender discrimination action against retailer. Equal Pay Act of 1963, § 3, [29 U.S.C.A. § 206](#).

27 Federal Civil Procedure  [Fair Labor Standards Act Cases](#)

Genuine issue of material fact existed as to whether home improvement retailer would have been able to prevail on any of its affirmative defenses to former employee's gender discrimination claims under the EPA, precluding summary judgment on former employee's EPA claims. Equal Pay Act of 1963, § 3(d)(1), [29 U.S.C.A. § 206\(d\)\(1\)](#).


28 Labor and Employment  [Presumptions and Burden of Proof](#)

A defendant in a gender discrimination action brought under the EPA has the burden of pleading and proving affirmative defenses for pay disparities resulting from a seniority system, a merit system, a system that measures earnings or quantity or quality of production, or from a differential based on any factor other than gender. Equal Pay Act of 1963, § 3(d)(1), [29 U.S.C.A. § 206\(d\)\(1\)](#).

29 Civil Rights  [Continuing Violations; Serial, Ongoing, or Related Acts](#)

In the more common situation, a plaintiff asserting wage discrimination

complains that a decision directly affecting her own pay reflects intentional gender-based discrimination, and that decision starts the running of the administrative limitations period under Title VII; the statute of limitations may start to run again, however, if the employer subsequently discriminates, on the basis of gender, in establishing or raising the pay of another employee. Civil Rights Act of 1964, § 706(e)(1), [42 U.S.C.A. § 2000e-5\(e\)\(1\)](#).

30 Federal Civil Procedure  **Employees and Employment
Discrimination, Actions Involving**

Genuine issue of material fact existed, in former employee's gender discrimination action against home improvement retailer, as to whether pay raises home improvement retailer implemented for any similarly situated male employee within Title VII's statute of limitations period reflected discrimination in favor of that male employee, precluding summary judgment on former employee's Title VII claim based on the running of the statute of limitations. Civil Rights Act of 1964, § 706(e)(1), [42 U.S.C.A. § 2000e-5\(e\)\(1\)](#).

31 Federal Civil Procedure  **Fair Labor Standards Act Cases**

Genuine issues of material fact existed, in former employee's gender discrimination action against home improvement retailer, as to whether retailer's decisions concerning plaintiff's compensation reflected gender-based discrimination, precluding summary judgment on former employee's claims brought under Oregon statutes specifically addressing wage discrimination. [West's Or.Rev. Stat. Ann. §§ 652.220, 652.230\(1\), 659A.030\(a\), 659A.820\(1\)](#).

32 Civil Rights  **Sex Discrimination**

Claims of gender-based discrimination are analyzed under the burden-shifting procedure set out in *McDonnell Douglas*.

33 Civil Rights  **Practices Prohibited or Required in General;
Elements**

Civil Rights  **Sex Discrimination**

Under the *McDonnell Douglas* analysis for claims of gender-based discrimination, a plaintiff may establish a prima facie case of unlawful discrimination by showing that she is a member of a protected class,

performed satisfactorily, was terminated, and the employer demonstrated a continued need for the same services and skills by seeking a replacement with similar qualifications; establishing a prima facie case creates a presumption of unlawful discrimination, and shifts the burden to the defendant, who must produce evidence that the adverse employment action was not taken for impermissibly discriminatory reasons.

34 **Civil Rights**  **Motive or Intent; Pretext**


Civil Rights  **Sex Discrimination**

Civil Rights  **Sex Discrimination**

If, after a plaintiff bringing a gender-based discrimination action establishes a prima facie case of unlawful discrimination, the defendant produces evidence that the adverse employment action was not taken for impermissibly discriminatory reasons, the presumption of unlawful discrimination disappears, and the plaintiff must show by a preponderance of the evidence that the defendant's proffered reason for the adverse employment decision was merely a pretext for a discriminatory motive; to do so, the plaintiff must produce specific, substantial evidence of pretext, which can be established either by showing that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence.

35 **Civil Rights**  **Sex Discrimination**

Under the *McDonnell Douglas* analysis for claims of gender-based discrimination, the plaintiff always retains the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated for unlawful reasons.

36 **Federal Civil Procedure**  **Employees and Employment
Discrimination, Actions Involving**

Genuine issues of material fact existed as to whether performance of home improvement retailer's former employee was objectively reasonable, and whether the proffered reason for former employee's termination, namely, employee's failure to adequately enforce safety policies, was pretextual, precluding summary judgment on former employee's claims against retailer for unlawful discharge under Title VII and Oregon law. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#); [West's Or.Rev. Stat. Ann. § 659A.030](#).

37 Civil Rights  **Pleading****Civil Rights**  **Employment Practices**

Former employee of home improvement retailer stated a claim for discriminatory failure to promote under Title VII and the parallel Oregon law against retailer by explicitly alleging that retailer retaliated against her by failing to promote her to a night operations manager. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#); [West's Or.Rev. Stat. Ann. § 659A.030](#).

38 Civil Rights  **Promotion, Demotion, and Transfer****Civil Rights**  **Effect of Prima Facie Case; Shifting Burden**

In order to establish that denial of a promotion violated Title VII and parallel state statutes, a plaintiff must first make out a prima facie case showing that: (1) she belonged to a protected class, (2) she applied for and was qualified for an available position, (3) she was rejected, despite her qualifications, and (4) the position remained available and the employer continued to consider applicants who had comparable qualifications; if a plaintiff satisfies that burden, the *McDonnell Douglas* burden-shifting analysis applies. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#)

39 Civil Rights  **Particular Cases**

Former employee of home improvement retailer failed to establish that she was qualified for night operations assistant store manager position, or that retailer continued to seek to fill the position after she applied, as required to make out a prima facie case that retailer's denial of her promotion to that position was gender discrimination in violation of Title VII and parallel Oregon law. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#); [West's Or.Rev. Stat. Ann. § 659A.030](#).

40 Civil Rights  **Pleading**

Former employee bringing gender discrimination action against home improvement retailer did not plead a separate failure to train claim, along with her failure to promote claim, by stating she received less training and thereby less promotional opportunity than similarly situated male associates, as employee's allegations concerning training supported her claim that she was unlawfully denied a promotion.

41 Civil Rights  **Hostile Environment; Severity, Pervasiveness, and Frequency**

In order to establish a prima facie case of a gender-based hostile work environment under Title VII or parallel state law, a plaintiff must show that she was subjected to verbal or physical conduct because of her gender, that the conduct was unwelcome, and that the conduct was sufficiently severe or pervasive to alter the terms of her employment. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#)

42 Civil Rights  **Hostile Environment; Severity, Pervasiveness, and Frequency**

Discriminatory ridicule and insult can create a hostile work environment under Title VII or a parallel state law; in order to be actionable, the conduct must be both objectively offensive, and the plaintiff must have subjectively considered it offensive as well. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#)

43 Civil Rights  **Hostile Environment; Severity, Pervasiveness, and Frequency**

In evaluating a hostile environment claim under Title VII or parallel state law, the frequency and severity of the conduct, whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and whether the conduct unreasonably interferes with the employee's work performance must be considered. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#)

44 Civil Rights  **Knowledge or Notice; Preventive or Remedial Measures**

The *Ellerth/Faragher* defense to a hostile work environment claim under Title VII or parallel state law may apply when an employee's supervisor has created a hostile work environment, but the supervisor's harassment has not resulted in a tangible adverse employment action such as termination, demotion, or reassignment to an undesirable position; under these circumstances, an employer may assert an affirmative defense based upon the care it has taken to prevent and promptly correct any sexually harassing behavior, and upon a plaintiff's unreasonable failure to take advantage of preventative or corrective opportunities provided by the employer, or to otherwise avoid harm. Civil Rights Act of 1964, § 701 et

seq., [42 U.S.C.A. § 2000e et seq.](#)

[1 Cases that cite this headnote](#)

45 Civil Rights  [Knowledge or Notice; Preventive or Remedial Measures](#)

An employer's stated policy suitable to the employment circumstance is a factor in analyzing the employer's responsibility to prevent and correct harassing behavior on a hostile work environment claim under Title VII or parallel state law. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#)

46 Civil Rights  [Hostile Environment; Severity, Pervasiveness, and Frequency](#)

In former employee's gender discrimination action against home improvement retailer, night operations manager's conduct in rattling the door handle to the training room while plaintiff was expressing milk, making a comment about bringing in cereal for the milk, and making a few announcements on the public address system that employees should report to the training room while plaintiff was expressing milk, although boorish and rude, was simply not sufficiently severe or pervasive to alter the terms and conditions of plaintiff's employment and create a hostile work environment under Title VII or parallel Oregon statute. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#); [West's Or.Rev. Stat. Ann. § 659A.030](#).

[1 Cases that cite this headnote](#)

47 Civil Rights  [Knowledge or Notice; Preventive or Remedial Measures](#)




Home improvement retailer was entitled to affirmative *Ellerth/Faragher* defense on former employee's hostile work environment claim under Title VII and parallel Oregon statute relating to night operations manager's conduct when former employee would express milk, based upon the care it took to prevent and promptly correct any sexually harassing behavior, where retailer had an anti-harassment policy which provided employees with multiple avenues to present confidential complaints of harassment, and provided for investigation of allegations of harassment and for discipline of individuals found to have engaged in harassment, and former employee, though trained in the policy and aware of the policy's provisions,

did not report any of the night operations manager's conduct to the appropriate managers as required under retailer's policy. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#); [West's Or.Rev. Stat. Ann. § 659A.030](#).

[1 Cases that cite this headnote](#)

48 Civil Rights  [Practices Prohibited or Required in General; Elements](#)

To establish a prima facie case of retaliation under Title VII or parallel state law, a plaintiff must establish that (1) she engaged in protected activity; (2) her employer took adverse employment action against her; and (3) a causal nexus exists between the alleged protected activity and the adverse employment action. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

49 Civil Rights  [Motive or Intent; Pretext](#)
Civil Rights  [Causal Connection; Temporal Proximity](#)
Civil Rights  [Retaliation Claims](#)

To establish a retaliation claim under Title VII or parallel state law, a plaintiff must establish by a preponderance of the evidence that an adverse employment action was motivated, at least in part, by her protected activity, and that, but for that activity, she would not have been subjected to that action. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

50 Civil Rights  [Activities Protected](#)

The employer's awareness that the plaintiff had engaged in protected activity is a required element in establishing a retaliation claim under Title VII or a parallel state law. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

51 Civil Rights  [Activities Protected](#)

In former employee's gender discrimination action against home improvement retailer, there was no evidence that the store manager who terminated plaintiff was aware of any conduct by plaintiff undertaken in opposition to unlawful discrimination, as required to show that retailer retaliated against plaintiff in response to her opposition to discrimination in violation of Title VII and parallel Oregon statute. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#); [West's Or.Rev. Stat. Ann. §](#)

659A.030.

1 Cases that cite this headnote

52 Labor and Employment  **Termination; Cause or Reason in General**

In the absence of any contrary statutory or contractual provisions, Oregon law generally permits an employer to discharge an employee at any time and for any reason; a narrow exception applies for those circumstances in which strict enforcement of this “at-will rule” would be contrary to public policy and no adequate statutory remedy is otherwise available.

53 Civil Rights  **Practices Prohibited or Required in General; Elements**





Terminating an employee because of her gender will not support a claim for wrongful termination under Oregon common law.

54 Civil Rights  **Discharge or Layoff**

Terminating an employee in response to an employee's opposition to unlawful discrimination will support a claim for wrongful termination under Oregon common law.

55 Civil Rights  **Activities Protected**

In former employee's gender discrimination action against home improvement retailer, there was no evidence that the store manager who terminated plaintiff was aware of any conduct by plaintiff undertaken in opposition to unlawful discrimination, as required to show that retailer retaliated against plaintiff in response to her opposition to discrimination in violation of Oregon common law.

56 Civil Rights  **Presumptions, Inferences, and Burden of Proof**
Civil Rights  **Aggravation, Mitigation, or Reduction of Loss**
Civil Rights  **Employment Practices**
Civil Rights  **Employment Practices**

An employer bears the burden of establishing that a former employee seeking back-pay under Title VII or parallel Oregon statute has not made reasonable efforts to find employment following termination; to do so, the employer generally must show that substantially equivalent positions were

available during the time in question, that the employee could have obtained an equivalent position, and that the employee failed to use reasonable diligence in seeking another job, but the employer need not prove that comparable positions were available if it can establish that the employee made no reasonable efforts to seek such employment. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#); [West's Or.Rev. Stat. Ann. § 659A.030](#).

57 Civil Rights  [Aggravation, Mitigation, or Reduction of Loss](#)
Civil Rights  [Employment Practices](#)

In former employee's gender discrimination action against home improvement retailer, plaintiff's testimony that she stopped looking for work unless she walked into a store where she wanted to work which she knew had a night shift and "a position open or something" was insufficient to establish that plaintiff satisfied her obligations to mitigate her damages, as required to obtain back-pay from retailer. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#); [West's Or.Rev. Stat. Ann. § 659A.030](#).

Attorneys and Law Firms

***1064** [Craig A. Crispin](#), [Patty T. Rissberger](#), Portland, OR, for Plaintiff.

[Paul M. Ostroff](#), [Leah C. Lively](#), [Eric D. Wilson](#), Lane Powell PC, Portland, OR, D.
[Michael Reilly](#), Lane Powell PC, Seattle, WA, for Defendant.

Opinion

ORDER

[HAGGERTY](#), Chief Judge.

Magistrate Judge Jelderks issued a Findings and Recommendation (F & R) [111] in this action, recommending that defendant's motion for summary judgment [52] should be GRANTED in part and DENIED in part, GRANTING plaintiff's motion to strike [72] and GRANTING in part and DENYING in part defendant's motions to strike [88, 104]. On March 31, **2008**, the matter was referred to this court. When a party objects to any portion of a Findings and Recommendation, the district court must conduct a *de novo* review of that Findings and Recommendation. [28 U.S.C. § 636\(b\)\(1\)\(B\)](#); [McDonnell Douglas Corp. v. Commodore Bus. Mach. Inc.](#), 656 F.2d 1309, 1313 (9th Cir.1981).

The Findings and Recommendation provided a thorough analysis of the facts. This factual analysis is not objected to by petitioner, and need not be repeated here.

Defendant makes two objections to the F & R. First, defendant argues that plaintiff's wage claim pursuant to [O.R.S. § 652.220](#) is time-barred. Second, defendant ***1065** argues that plaintiff's Title VII wage claim is time-barred.

In finding that plaintiff's state wage claim pursuant to [O.R.S. § 652.220](#) was not time-barred, the F & R concluded that the statute of limitations under O.R.S. § 659A was applicable, and therefore plaintiff could recover under Oregon statutes for any unlawful discrimination on her compensation after December 10, 2003 (one year prior to the filing of her BOLI complaint). Defendant objects, and argues that [O.R.S. § 652.230](#) contains the relevant statute of limitations. [O.R.S. § 652.230](#) provides:

(1) Any employee whose compensation is at a rate that is in violation of [ORS 652.220](#) shall have a right of action against the employer for the recovery of: (a) The amount of unpaid wages to which the employee is entitled for the one year period preceding the commencement of the action; and [liquidated damages and attorney's fees].

[O.R.S. § 652.230](#). Instead of creating a separate statute of limitations for claims brought pursuant to [O.R.S. § 652.220](#), however, [O.R.S. § 652.230](#) merely places a limitation on the period for which damages may be recovered. This court adopts the conclusion of the F & R and finds that plaintiff's claim under [O.R.S. § 652.220](#) is not time-barred.

Defendant argues that plaintiff's Title VII wage claim is barred under [Ledbetter v. Goodyear Tire & Rubber Co.](#), 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007). On this issue, the F & R found that:

though the applicable statute of limitations precludes plaintiff's recovery under Title VII for any pay decisions implemented before February 13, 2004, [defendant's] motion for summary judgment on plaintiff's Title VII pay claim should be denied because material issues of fact exist as to whether pay raises [defendant] implemented for any similarly situated male employees after that date reflected discrimination in favor of that male employee.

F & R p. 46. Defendant asserts that the F & R erred by holding that pay raises awarded to other employees restarted the 300-day statute of limitations on her Title VII wage claim. This court agrees with the F & R's conclusion that "there is nothing in the [Ledbetter](#) decision that precludes the statute of limitations from starting to run

again if the employer subsequently discriminates, on the basis of gender, in establishing or raising the pay of another employee.” F & R p. 46.

The court has given the file of this case a *de novo* review, and has also carefully evaluated the Findings and Recommendation, the objections, and the entire Record. The Judge's reasoning and recommendations are sound, correct, and entitled to adoption.

CONCLUSION

This court adopts the F & R[111]. Accordingly, defendant's motion for summary judgment [52] is GRANTED in part, and DENIED in part, as set forth in the F & R.

IT IS SO ORDERED.

FINDINGS AND RECOMMENDATION

[JELDERKS](#), United States Magistrate Judge:

Plaintiff Nancy **Delima** brings this employment related action against defendant **Home Depot U.S.A., Inc.**, dba the **Home Depot (Home Depot)**. Defendant **Home Depot** moves for summary judgment, and both parties move to strike certain material related to that motion. Defendant's motion for summary judgment should be granted in part and denied in part as set out below. Plaintiff's motion to strike is granted, and defendant's motion to strike ***1066** is granted in part and denied in part as discussed below.

FACTUAL BACKGROUND

On August 25, 2001, defendant **Home Depot** hired plaintiff **Delima** to work as a night freight associate at its store in Troutdale, Oregon. In that position, plaintiff was paid \$10.00 per hour and worked on a team that received freight, stocked shelves, and prepared the store to do business on the following day.

During her first week on the job, plaintiff received a “new employee” orientation package which included defendant **Home Depot's** policy prohibiting harassment and discrimination, and instructions to report inappropriate conduct. Plaintiff also received training on **Home Depot's** safety policies, and was told that she would be warned or terminated if she violated those policies. The policies included a “banner barricade” policy requiring employees to use barricades to block customers or employees from entering aisles where pallets of merchandise are being placed overhead, and a policy prohibiting the use of a “rabbit button” that increases the speed of certain equipment.

Home Depot's “Code of Conduct” sets out guidelines for disciplining employees for safety violations, and states that managers who fail to enforce its provisions may be

terminated. Plaintiff knew that supervisors could be held responsible for safety violations committed by associates.

Rick Baird worked as the Troutdale **Home Depot** Human Resources Manager (HR Manager) from August, 2002, until April, 2004. In that position, Baird was responsible for setting the pay rate for new employees at the Troutdale store. Pay rates were set within ranges for various positions. According to his deposition testimony, in setting an employee's pay, Baird considered the new employee's existing skills, training, and experience, prior pay history, the pay of existing employees who held the same position, the rate of pay requested by the new employee, and the urgency of filling the position.

In January, 2002, **Home Depot** adopted written Pay Administration Guidelines concerning wage policies and practices. **Home Depot** determines pay increases based upon written performance reviews prepared by an employee's supervisor. The reviews include narrative evaluations and rate "overall performance" on a scale ranging from "outstanding" to "improvement required"; rate "leadership" from "exemplary" to "deficient"; and rate "potential" from "high" to "placement issue." Employees receive two written performance evaluations a year, and are considered for pay raises every February, based upon those reviews.

When **Home Depot** employees transfer from one store to another in Oregon, they are generally paid at the same rate as they earned at the store from which they transferred.

When a **Home Depot** employee is promoted, the new wage rate is based upon the employee's current pay, job experience, skill and knowledge, and documented performance. Pay increases for promotions generally range from 6% to 12%.¹

Before she began working for **Home Depot**, plaintiff worked for Hollywood Video from 1990 until 1994. She earned \$9.23 per hour in that position. She next worked for Target as a stocker for 13 months beginning in August, 1995. Plaintiff earned \$6.75 per hour in that position. After that, plaintiff did not work outside *1067 the home until she was hired by **Home Depot** in August, 2001.

When she filled out an application to work for **Home Depot**, plaintiff did not indicate what rate of pay she desired, because she intended to negotiate her starting wage. Plaintiff was told that the night freight position she accepted would require her to operate "heavy" equipment², and that the starting rate of pay would be around \$10 per hour. Plaintiff had not operated heavy equipment before, and was trained and licensed to operate this equipment within the first week of her employment.

Plaintiff received a generally positive performance review on October 5, 2002, and

received a \$.65 per hour raise two days later. According to her affidavit submitted in support of her opposition to the motion for summary judgment, plaintiff was satisfied with that raise because **Home Depot** managers misrepresented that the greatest raise for any **Home Depot** associate was \$.75 per hour.

Home Depot hired Ross Sears, a male employee, within a few days of hiring plaintiff. Both plaintiff and Sears were paid \$10.00 per hour initially. In October, 2002, when plaintiff's pay was increased to \$10.65 per hour, Sears' pay was increased to \$11.50 per hour.

On November 19, 2002, Baird promoted plaintiff to the night freight team supervisor position and increased plaintiff's pay to \$12.00 per hour. This amounted to a 12.67% raise. Plaintiff's supervisor recommended the promotion.

In her position as night freight supervisor, plaintiff was responsible for scheduling associates, drafting performance summaries, disciplining associates who violated safety policies, scheduling freight deliveries and signing for goods, ensuring that freight was unloaded and that overstocked merchandise was stored overhead, and for having the store clean by the time it opened.

On February 3, 2003, plaintiff's pay was increased from \$12.00 per hour to \$12.75 per hour. At the time of the raise, plaintiff received a performance review that rated her overall as a "performer," rated her leadership as "acceptable," and assessed her potential at the "grow in position" level. Plaintiff complained about the raise to Baird and Patrick Patterson, the assistant store manager. Patterson told her that it was the best he could do at the time.

Ken Meno was hired as the night operations manager at **Home Depot's** Troudale store in June, 2003. Plaintiff has testified that she complained to Meno about her raise, and that she told Meno that she was given an insufficient raise because of her gender. Meno was replaced by Mark Yamashita as the night operations manager in January, 2004.

In a performance review dated July 31, 2003, Meno assigned plaintiff an overall performance rating of "performer," rated plaintiff's leadership as "acceptable," and rated her potential as "grow in position." Meno had initially rated plaintiff's overall performance and leadership higher, and revised the marks downward based upon the advice of Baird and Patterson.

In early February, 2004, Meno was reassigned to a merchandising Assistant Store Manager position. In a performance evaluation dated February 2, 2004, Meno assigned plaintiff the same performance ratings he had assessed in plaintiff's earlier evaluation. According to Meno's declaration submitted in support of plaintiff's

opposition to the motion for summary *1068 judgment, while Meno was an assistant manager, the store manager required that he “downgrade [plaintiff’s] performance reviews two levels from Outstanding to Performer.” Meno adds that he has no doubt “that these performance reviews were downgraded because of [plaintiff’s] gender,” and that he “was never required to downgrade any other male department head evaluations.”

At the same time she received the February, 2004 performance evaluation, plaintiff received a 13% pay increase, which raised her pay from \$12.75 per hour to \$14.40 per hour. Baird testified that this raise was unusually high, and that plaintiff had been “lower in the pay band” of similar managers before the raise.

During the time in which plaintiff worked as a freight team department supervisor, 25 other employees at the Troutdale **Home Depot** worked at times as supervisors in the various **Home Depot** departments. **Home Depot** asserts that, including plaintiff, six of these supervisors were female, and that three of the female supervisors earned more than plaintiff. **Home Depot** asserts that the other two females, who earned less than plaintiff, became supervisors nearly two years after plaintiff was promoted. Plaintiff disputes this assertion, noting that, according to documentation **Home Depot** submitted to the Oregon Bureau of Labor and Industries (BOLI), the Troutdale **Home Depot** employed only two other female supervisors while plaintiff worked for **Home Depot** as a supervisor. Plaintiff adds that both of these females were paid more than she was because they transferred to the Troutdale store from other stores at a higher rate of pay.

Some male supervisors were paid more than plaintiff, and some were paid less. According to paragraph 10 of the declaration of Alisa Grandy, Regional Human Resources Manager for **Home Depot's** Pacific Northwest Region, other department supervisors who earned more than plaintiff did so because of legitimate factors such as greater qualifications, education, work experience, and job skills; higher wage pay while working for previous employers; a higher starting wage with **Home Depot** than plaintiff’s; longer tenure with **Home Depot**; and higher evaluations under **Home Depot's** merit system, based upon factors unrelated to gender. For the reasons briefly noted in the discussion section below, plaintiff’s motion to strike these assertions is granted.

Home Depot employs both day and night assistant store managers (ASMs). Plaintiff was interested in being promoted to a night assistant store manager position. When her deposition was taken, plaintiff stated that she applied for the night operations ASM position after Meno left in January, 2004, and was replaced by Yamashita. **Home Depot** has submitted documents indicating that plaintiff did not apply for the ASM position, and asserts that plaintiff testified that she told Meno before he left that,

though she was interested in his position, she knew she did not have the required experience. Plaintiff contends that the documents **Home Depot** cites should be stricken because they are not properly authenticated and are hearsay. She further asserts that, though she did tell Meno that she lacked the required experience for the ASM position, she did so when Meno first became her supervisor, not when he later left.

The transcript of plaintiff's deposition supports plaintiff's assertion as to the timing of her remark that she lacked the experience required for the ASM position: When asked when she first expressed an interest in the "night ops job," plaintiff said that she "expressed it to Ken Meno when he first came in," and that she knew *1069 she "didn't have the experience at the time" because she still needed training.

Yamashita was selected for the night ASM position in January, 2004, when Meno left. He had been a freight supervisor for 26 months when he was selected. Yamashita had been named Night Operations Manager of the Year in 2002, and had received very positive performance evaluations in 2003.

Yamashita left the night ASM position in August, 2004. Plaintiff applied for the position, which was not filled. **Home Depot** asserts that the position remained open because of budgetary restrictions. Plaintiff contends that budgetary restrictions did not prevent **Home Depot** from filling the position.

Home Depot offers Department Supervisor Training (DST) to employees who are interested in becoming Assistant Store Managers. This 36-hour training course is offered a few times a year at **Home Depot's** offices in Tigard.

Plaintiff requested DST training. **Home Depot** asserts that plaintiff would not make herself available for training during the day, when it was offered, and that it arranged for plaintiff to take that training by herself after her shift at the Troutdale store, with Meno available to answer questions.

Plaintiff completed one unit of DST training. **Home Depot** asserts that plaintiff was offered another DST class "on short notice but declined to participate." Plaintiff denies that she would not make herself available during the day for DST training, and asserts that Baird gave her a two-day oral notice of the training, but declined to schedule her for training. She further asserts that "male employees were placed on a schedule for DST training, with two or more weeks notice."

Home Depot asserts that on April 24, 2003, plaintiff was disciplined and received a "final counseling" for violating its "banner barricade" policy and for using the "rabbit switch" while operating machinery. A document in the record titled "Discipline Process Tracking" notes a violation of "ignoring banner barrier requirements during

initial open hours,” and “running ERJ with rabbit button on sales floor.” The document indicates that Baird conducted a “final counseling session,” and that plaintiff was concerned that the next violation would result in her termination. Plaintiff contends that she never received any disciplinary notices for safety issues or received a performance evaluation that indicated that she had any safety issues. In her declaration submitted in support of her opposition to the motion for summary judgment, plaintiff asserts that she never saw the document in question before this litigation, and that the “counseling session” referenced in that document did not occur.

Baird has testified that plaintiff had a number of performance problems, including “a sustained problem with attendance and with availability for any kind of activities outside of her very rigidly scheduled shift which was a graveyard shift.” He added that plaintiff had problems with “punctuality,” and “availability for shifts outside of her normally scheduled shift.” Baird testified that plaintiff “would never attend any store team meetings,” and that “there were a number of safety issues” involving plaintiff.

In July, 2004, Ryan Pieratt became the Store Manager of the Troutdale **Home Depot**. Pieratt told plaintiff that she needed experience on the day shift, and has testified that plaintiff's chances for a promotion were hurt because she would not work days.

The record before the court includes a copy of a **Home Depot** document entitled “Department Supervisor to Assistant Manager,” which describes the characteristics *1070 of a “Department Supervisor ready for promotion.” The required characteristics listed include customer and leadership skills, a good safety record, and the ability to enforce safety policies.

As noted above, Yamashita became the night operations ASM in January, 2004. In that position, he worked closely with plaintiff. Plaintiff has testified that Yamashita was a “practical joker” who made jokes at the expense of her and others.

Plaintiff went on maternity leave several months after Yamashita became the night operations ASM. When she returned from maternity leave, plaintiff arranged with Ryan Pieratt, the store manager, to start her shifts at a later time for a few months. According to plaintiff's declaration, though these later starts had been agreed upon, shift meetings that she had formerly run as a Night Supervisor were rescheduled from later in the shift to immediately at the beginning of the shift after she returned.

Yamashita met with the freight crew at the start of the shift, and would give plaintiff a hard time if she arrived during the meeting. Plaintiff testified that Yamashita knew that she would be late because of her arrangement with the store manager, and that he would “put her down” in front of the crew with comments about their supervisor being

late again, and not setting an example.

When plaintiff returned from maternity leave, Yamashita arranged for plaintiff to take breaks in the training room during her shift to express breast milk for her baby. Plaintiff testified that, on three occasions, Yamashita used the overhead page system to tell other employees to report to the training room while she was expressing milk, and rattled the door handle himself and sniggered several other times while she was in that room. She testified that no other employees entered the room, and that she considered Yamashita's conduct a joke the first time he made the announcement on the page system. Plaintiff also testified that Yamashita made comments about bringing cereal for the pumped milk that she stored in the managers' refrigerator. According to her declaration, plaintiff reported Yamashita's conduct to Meno, who in turn reported the conduct to the store manager. According to Meno's declaration, Pieratt ignored Meno's reports concerning Yamashita's treatment of plaintiff, and no corrective action was taken. Meno also states that Pieratt treated plaintiff less favorably than male employees and was not as responsive to plaintiff's complaints about issues with subordinates. Meno states that Pieratt characterized plaintiff's complaints as "whining," and told him that he was frustrated at having to deal with "women and all their issues."

Plaintiff complained to Baird that Yamashita was managing the freight team and usurping her managerial authority. She also complained to him about what she considered to be Yamashita's unsafe operation of equipment. After Baird spoke with him about these complaints, Yamashita told the freight team that he was very upset that someone had complained about him to management. Plaintiff testified that Baird told her he would not tell Yamashita who had complained, but that Yamashita saw plaintiff in Baird's office just before he told the freight crew that he was upset about the complaints. She further testified that Yamashita told the freight crew that whoever had complained was "in for it" because he did not like "back stabbers." She added that some members of the freight team told Yamashita that he deserved the complaints because of his conduct. Plaintiff asserts that, after seeing her talking with Baird shortly before he was reprimanded, Yamashita put "two and two together," and subsequently assigned her "cruddy jobs."

***1071** Plaintiff testified that **Home Depot** later terminated Yamashita after he allowed the freight team, including herself, to play football during a lunch break. She testified that she had understood that "horseplay" was a violation of the work conduct rules, and that an associate had been injured while playing football. In his declaration submitted in support of plaintiff's opposition to the motion for summary judgment, Jeff Pulicella, a Department Supervisor during this period, stated that Pieratt told him that Yamashita was terminated because he falsified documents, and would not have been terminated for the safety violations. Pieratt has testified that Yamashita was

terminated both for safety violations and for falsifying documents.

Pulicella has submitted a declaration stating that, though he was paid nearly \$2 per hour more than plaintiff while he and plaintiff were working as department supervisors, they did the same work and held the same title, and there was nothing in his experience or education that justified a difference in their pay. In addition, Pulicella stated that Pieratt offered him a fully flexible schedule, and assured him that he could come in late and leave early as often as he needed to without affecting his pay rate or opportunities for advancement. Pulicella also stated that, shortly after Pierrat became a store manager, he told Pulicella that he “would be getting rid of” plaintiff, and that, “as a woman,” plaintiff “could not handle the guys on the freight team.”

On November 9, 2004, Randy Kerr, a **Home Depot** loss prevention specialist, observed Kamil Samad, an employee on the night freight team, disregard the banner barricade policy. After Kerr reported this conduct, Pieratt terminated Samad. When Pieratt told plaintiff that Samad would be terminated for the safety violation, plaintiff told him it was “bullshit” and walked out. Plaintiff has testified that this exclamation reflected her opinion that Samad “was the hardest working person on the team,” and that she had been trying to have four or five other employees terminated because of their behavior, work ethics, and attendance. She added that she walked out after expressing her displeasure because Samad was entering the room and “they” wanted her out “while they terminated her.” According to plaintiff’s declaration, Pieratt was aware that the violations for which Samad was terminated had occurred on other shifts as well, but that the safety policies were only enforced “when minorities were involved.” Plaintiff adds that she was the only “minority” on the night freight team after Samad was terminated, and that the “only other woman on the freight team quit” on the day plaintiff was terminated.

On November 11, 2004, plaintiff was called into a meeting with Pieratt and Amy McDonald, who had begun working as the Troudale **Home Depot** HR manager in September, 2004. Pieratt asked plaintiff why she had made the “bullshit” comment. Plaintiff told him that others had committed safety violations far more serious than the one for which Samad was terminated. Pieratt has testified that he then terminated plaintiff after talking with Samad and finding that “they did not follow standard operating procedures at night with regard to safety” and “[a]fter discussing with [plaintiff] and finding out that that was true....”

In his declaration, Pulicella states that from Peirrat's statements, it was clear that plaintiff would not have been terminated if she was not female. He also states that Pieratt told him that he had been aware that various departments violated the banner barricade policy during the night shift, and that he did not enforce the policy “until

some time after [plaintiff] was terminated *1072 from employment.” In his declaration, Meno states that he is unaware of any time during his employment with **Home Depot** when “any supervisor or manager ... was terminated for disagreeing with a personnel decision or for condoning a safety violation.” He adds that he had “personally challenged a termination decision of an associate for safety,” and was not terminated.

Meno was plaintiff's direct supervisor beginning in June, 2003. Meno states that he considered plaintiff an exemplary employee whose performance exceeded that of any other department supervisor he had supervised. Meno states that plaintiff was able to perform both the Assistant Manager duties and the duties of her own position when Meno was not at the store. Meno opines that, as of February, 2004, plaintiff was fully capable of performing the Night Operations Manager duties. He also opines that, as of July 31, 2003, plaintiff was “on track” to be promoted to the Assistant Store Manager position by the end of July, 2004.

Meno's declaration further states that, when he became her supervisor, Meno realized that plaintiff was not being treated fairly, compared to her male counterparts, in several areas. As examples, Meno cites plaintiff's work on the night shift without a salaried manager present, **Home Depot's** failure to provide plaintiff Department Supervisor Training (DST), and plaintiff's rate of pay, which Meno characterizes as substantially lower than that of her male counterparts in the Troutdale **Home Depot** and at other **Home Depot** stores in the district. Meno states that he made several unsuccessful attempts through management to schedule plaintiff for formal DST classes, and finally obtained the course materials for plaintiff to work through on her own. Meno also states that he compared plaintiff's rate of compensation to that of her male counterparts in conversations he had with Joyce Snead, **Home Depot's** District Manager. Meno states that, though he raised the issue of the disparity between plaintiff's pay and the pay of male employees with store managers, the human resource manager, the district manager, and two employee relations managers, plaintiff did not receive a pay increase for more than eight months.

From November, 2002, through February, 2004, plaintiff was the lowest paid department supervisor at the Troutdale **Home Depot**. Baird, who testified that plaintiff was “clearly” the lowest paid department supervisor, said that plaintiff's pay was based upon her performance. After Meno complained that plaintiff was being paid less than comparable male employees, Baird asked for documentation of her performance that would justify higher pay. As noted above, Baird instructed Meno to downgrade the performance evaluation that Meno prepared.

Before bringing this action, plaintiff filed administrative complaints of gender-based discrimination with the Oregon Bureau of Labor and Industries (BOLI) and the Equal

Employment Opportunity Commission. In a Notice issued on December 9, 2005, BOLI stated that it had found no substantial evidence that **Home Depot** had retaliated against plaintiff based upon her alleged opposition to unlawful discrimination, and had found substantial evidence of “disparate treatment, termination” based upon plaintiff’s gender.

PLAINTIFF’S CLAIMS

Plaintiff brings several state and federal claims of gender-based discrimination.

The first claim, brought pursuant to Title VII, alleges that **Home Depot** discriminated against plaintiff in the terms and conditions of her employment, and terminated her, because of her gender. This claim alleges that plaintiff suffered lost ***1073** wages and benefits, and continues to suffer these losses. Based upon this claim, plaintiff seeks recovery of “future lost wages and benefits and lost earning capacity in amounts to be determined at trial.”

The second claim, which is also based upon Title VII, alleges that **Home Depot** unlawfully discriminated against plaintiff and terminated her “because she opposed defendant’s practice of discriminating against her on the basis of her sex in the terms and conditions of her employment.”

The third claim is brought pursuant to the federal Equal Pay Act, [29 U.S.C. § 206\(d\)\(1\)](#). This claim alleges that **Home Depot** did not pay plaintiff wages that were equal to those paid to its comparable male employees.

The fourth claim alleges that **Home Depot** violated [Or.Rev.Stat. § 652.220](#) by discriminating “between the sexes in the payment of wages for work of comparable character, the performance of which requires comparable skills.” In the alternative, or in addition, this claim alleges that **Home Depot** “paid plaintiff wages at a rate less than that at which it paid male employees for work of comparable character, the performance of which requires comparable skills.” This claim seeks recovery of allegedly unpaid wages and liquidated damages pursuant to [Or.Rev.Stat. § 652.230\(2\)](#).

The fifth claim alleges that plaintiff’s termination was wrongful under Oregon law because it “was motivated in substantial part in response to and in retaliation for plaintiff’s exercise of her important rights as an employee to be free from retaliatory and discriminatory treatment based on her protected classifications.” This claim further alleges that adequate remedies do not exist under plaintiff’s statutory claims for relief. Plaintiff seeks recovery of punitive damages, as well as attorney fees and costs, on this claim.

The sixth claim alleges that **Home Depot** violated [Or.Rev.Stat. § 659A.030](#) by

discriminating against plaintiff in the terms and conditions of her employment and by terminating plaintiff on the basis of her gender.

The seventh claim alleges that **Home Depot** violated [Or.Rev.Stat. § 659A.030](#) by retaliating against plaintiff in various ways based upon her opposition to gender-based discrimination.

DISCUSSION

I. Motions to Strike

Before analyzing defendant's motion for summary judgment, I will briefly address the parties' motions to strike.

A. Plaintiff's motion to strike

1 Plaintiff moves to strike the assertion, set out in Alisa Grandy's declaration, that the higher pay of all department supervisors who were paid more than plaintiff reflected legitimate factors such as greater qualifications, education, work experience and job skills, higher wages from previous employers, longer tenure, or higher evaluations. Plaintiff contends that Grandy is not competent to present evidence as to the basis for the pay decisions in question because she was not involved in those decisions.

2 I agree. Though it appears that Grandy is qualified to present evidence about **Home Depot's** wage policies and the factors that its managers are supposed to consider when establishing pay rates for employees, Grandy was not involved in the particular pay decisions at issue in this litigation. In the absence of evidence that she participated in the decisions, Grandy's assertion that all the decisions were based upon legitimate factors is not based upon the requisite personal knowledge. **Home Depot's** contention that paragraph 10 of ~~*1074~~ Grandy's declaration is admissible under [Fed.R.Evid. 1006](#) is not persuasive. That Rule, which provides that voluminous records may be presented to the court in the form of a summary, is inapplicable: Paragraph 10 does not include a condensation of voluminous records, but instead reflects Grandy's opinion, based upon her purported review of employment records. Accordingly, plaintiff's motion to strike this paragraph is granted.

B. Defendant's motions to strike

1. Declaration of Jeff Pulicella

Defendant moved to strike the declaration of Jeff Pulicella, or, in the alternative, for the opportunity to take Pulicella's deposition. During oral argument on October 11, 2007, I denied the motion to strike Pulicella's declaration, and granted the motion to take Pulicella's deposition. Defendant moves separately to strike paragraphs 2, 3, 6, 10, 11 and 12 of Pulicella's declaration.³

3 Paragraph 2 of Pulicella's declaration states that Pulicella was offered a job without filling out an application, and without **Home Depot** knowing anything about his background other than that he had been a police officer for 11 years.

Home Depot moves to strike this paragraph on the grounds that Pulicella has no personal knowledge of what **Home Depot** knew about his background, and provided no foundation for his knowledge of what factors **Home Depot** may have used in establishing his initial pay. I deny the motion to strike this portion of Pulicella's declaration because I interpret Pulicella's statement as referring to what he told **Home Depot**-a matter about which Pulicella could be expected to have personal knowledge. Though Pulicella subsequently testified that he informed **Home Depot** that he had experience supervising painting crews before he started working for **Home Depot**, he testified that he was offered a job in an earlier meeting, and did *not* testify that he referred to that experience in the earlier meeting. His testimony and declaration are therefore not inconsistent.

4 Paragraph 3 of the declaration states that, when he was hired, Pulicella had no relevant prior experience in construction or remodeling, other than work on his own home, and that he had no relevant prior retail experience. That paragraph adds that any information **Home Depot** has to the contrary is false. **Home Depot** moves to strike this paragraph on the grounds that though the statements "may be relevant to show that Pulicella lied on his application," they are not relevant to any claim in this action. It adds that the only facts that are relevant are those that were known to **Home Depot** when it determined Pulicella's compensation. **Home Depot** also asserts that this statement is inconsistent with Pulicella's testimony that he had supervised a painting crew.

I grant the motion to strike the portion of paragraph 3 of Pulicella's declaration stating that Pulicella had no prior painting experience before he was hired because it is inconsistent with Pulicella's deposition testimony. I deny the motion to strike the balance of paragraph 3.

5 Paragraph 6 of Pulicella's declaration states that Pulicella had much more first hand experience working with plaintiff than did Pierrat or Baird, that plaintiff was "an exemplary employee" whose "top priority was to ensure there were no safety *1075 violations," and that plaintiff was as qualified as Pulicella to work as a department head.

Home Depot contends that this paragraph should be stricken because Pulicella is not competent to testify as to whether or not plaintiff was an exemplary employee, as to plaintiff's priorities, or as to whether plaintiff had the qualifications that **Home Depot** considered necessary for the department head position.

I disagree. A trier of fact crediting Pulicella's testimony about the duration and closeness of the working relationship between Pulicella and plaintiff could conclude that Pulicella was competent to testify as to plaintiff's qualities as an employee. A trier of fact who concluded that Pulicella had worked closely with plaintiff could reasonably conclude that Pulicella had a knowledge of plaintiff's priorities that was based upon observation and experience, and could conclude that Pulicella had the knowledge and experience required to state an opinion as to whether plaintiff was as qualified as Pulicella to work as a department supervisor. I therefore deny the motion to strike paragraph 6.

6 Paragraph 10 of Pulicella's declaration states that Pulicella did not have any skills, experience, or education that justified a difference in pay when he and plaintiff both worked as freight team department heads. This paragraph adds that, based upon plaintiff's performance, Pulicella did not believe there was any basis for paying plaintiff less than other department heads were paid. This paragraph also states that Pulicella was familiar with factors used to determine employees' rates of pay, and that Pulicella researched pay rates at other stores.

Home Depot contends that Pulicella lacks the personal knowledge of the factors it used to determine employee's rates of pay, and that he has not established a foundation for his statement that there was no basis to pay plaintiff less than other employees working as department heads. It also contends that Pulicella's statement that he was familiar with the factors used to determine pay rates and researched pay rates at other stores is inconsistent with his testimony that he had never seen a copy of **Home Depot's** administrative guidelines.

It appears that Pulicella had sufficient knowledge about plaintiff's experience and skills and the knowledge and skills required to work as a freight team department head to offer an opinion as to whether there was a justifiable basis for paying her less than he was paid. It appears that Pulicella had enough experience working at **Home Depot** to form an admissible opinion as to whether there was a basis for paying plaintiff less than other department heads were paid. Pulicella's testimony that he had not seen a copy of **Home Depot's** administrative guidelines is not necessarily inconsistent with his declaration that he knew what factors were considered in determining rate of pay, because he could have learned of the relevant factors from other sources. I therefore deny the motion to strike paragraph 10.

In the 11th paragraph of his declaration, Pulicella states that he was very familiar with plaintiff's commitment to safety, and knew that plaintiff was not terminated for tolerating or condoning safety violations. This paragraph states that "Pierrat's statements made clear" to Pulicella that plaintiff would not have been terminated if she was not female.

Home Depot contends that this portion of paragraph 11 should be stricken because it lacks foundation and “is merely Pulicella's conclusory, subjective opinion of Pieratt's motivations.” It also argues that Pulicella's assertion that Pieratt stated that plaintiff could not handle the guys on the freight team is inconsistent with Pulicella's *1076 testimony that Pieratt said that the members of the team did not respect plaintiff because she was female. I disagree. Pulicella's declaration provides a sufficient foundation for his opinion that, but for her gender, plaintiff would not have been terminated. In addition, Pulicella's declaration about Pierett's statements concerning plaintiff's problems with the night crew is not necessarily inconsistent with his testimony on that issue. The motion to strike paragraph 11 is therefore denied.

7 In paragraph 12 of his declaration, Pulicella states that he had observed that plaintiff was treated differently than her male counterparts at **Home Depot**. As an example of this treatment, he states that, when he told management that his male associates on the night shift were underpaid, pay increases were made “outside the normal pay increase cycle.” Pulicella adds that Peirrat told him he could do this by “getting approval at the district level,” but that Peirrat ignored plaintiff when she raised the issue of her pay.

Home Depot contends that these statements should be stricken because Pulicella has not identified the male associates who allegedly received pay increases, because he did not establish that other employees were “proper comparators,” and because he “has no personal knowledge of how **Home Depot** made pay decisions for its associates.” I disagree, and deny the motion to strike these statements. Based upon the personal experience at **Home Depot** described in his declaration, it appears that Pulicella had the knowledge required to provide admissible testimony about the matters set out in paragraph 12 of his declaration.

2. Declaration of Ken Meno

Home Depot moves to strike all or portions of paragraphs 2, 3, 5, 7, 8, 14, and 15 of the declaration of Ken Meno.

8 Paragraph 2 includes Meno's statements that plaintiff had worked without the support of a salaried manager for several months before he arrived, and that she subsequently worked without such a manager even after he left the Troutdale store. Meno further stated that this was in contrast to other stores in the district in which male freight operation department heads worked with a salaried manager, and that plaintiff “was not receiving management support in addressing several issues.”

9 **Home Depot** contends that these statements should be stricken because Meno has not shown a foundation for his purported knowledge of whether a team was working without a manager, stated how he knew how other stores in the district were operating, or stated how he knew that plaintiff was not receiving support on

“several issues.” I disagree. In portions of paragraph 2 to which **Home Depot** does not object, Meno states that he spent several days reviewing personnel files, talking to other managers, and meeting with “the team” when he took over as Night Operations Manager. He also states that he had worked in several other stores before working at the Troutdale **Home Depot**. This experience appears to provide a sufficient basis for Meno's statements regarding practices in other stores, and for his assertion that plaintiff did not receive managerial support before he began working at the Troutdale store. Though Meno did not specify the “several issues” on which he found plaintiff was not receiving support, those issues appear to be sufficiently identified in the remainder of Meno's declaration. The motion to strike is therefore denied as to the preceding statements. The motion is granted as to Meno's statement that plaintiff continued to work without a salaried manager present after Meno left the Troutdale *1077 store, because nothing in Meno's declaration indicates how Meno obtained this knowledge.

Paragraph 3 includes Meno's statements that plaintiff needed to receive advanced notice of training classes because these were held during the day, which would require plaintiff to change her sleep patterns and schedule child care. It also includes Meno's assertion that plaintiff's male counterparts were sometimes notified of training sessions a month in advance, but plaintiff was given only a few days notice before classes were held.

Home Depot moves to strike these statements on the grounds that Meno “had no personal knowledge of what was more important for plaintiff or why,” and whether other employees may have had issues of sleep and child care that would have made their advanced receipt of notice of training programs no less important. **Home Depot** also asserts that the statements regarding other employees' advance notification should be stricken because Meno provided no foundation for his conclusion that others received more advance notice than did plaintiff, and because Meno failed to identify the “male counterparts” who received more notice.

Based upon a careful review of Meno's entire declaration, I conclude that Meno has established a sufficient foundation for these statements, with the exception of the assertion that, because of sleep and child care issues, plaintiff had a greater need for advanced notification of scheduled training than did other employees. Accordingly, the motion to strike is granted as to that portion of paragraph 3 of Meno's declaration, and is denied as to the balance of the paragraph.

10 In the challenged portion of the 5th paragraph of his declaration, Meno states that any male with plaintiff's performance would have received at least an “achiever” rating in the performance evaluation. Meno adds that he has no doubt that plaintiff's performance reviews were downgraded because of plaintiff's gender, and that

Seibert and Martindale did not work with plaintiff or have the opportunity to review her performance “other than possibly a rare or sporadic occasion.”

Home Depot moves to strike these statements on the grounds that Meno lacked the personal knowledge of how other employees would have been rated or why plaintiff's supervisors downgraded her review. It also contends that Meno did not have personal knowledge of whether Seibert or Martindale had an opportunity to observe plaintiff's performance.

I disagree, and deny the motion to strike this portion of Meno's declaration. Based upon a review of Meno's declaration as a whole, it appears that Meno had sufficient experience with the review process to offer an admissible opinion as to whether any other employee who performed as did plaintiff would have received at least an “achiever” rating. His statement that he had no doubt that plaintiff's performance review was downgraded because of plaintiff's gender addresses not a fact, but an opinion as to which it appears he is qualified to testify, based upon his experience. It also appears that Meno's work at **Home Depot** afforded him the opportunity to draw reasonable conclusions about the opportunities that Seibert and Martindale had to observe and review plaintiff's performance.

11 In the challenged portion of the 7th paragraph of his declaration, Meno states that he had a conversation with Joyce Speed, the District Manager, that confirmed the importance, under **Home Depot's** pay guidelines, of paying employees in the District “equitably.” This portion also includes Meno's assertion that, in reviewing rates of pay, he “discovered that Nancy **Delima** was paid significantly less *1078 than other male DH's with similar lengths of service.”

Home Depot contends that these statements should be stricken because Meno does not have the personal knowledge required to provide evidence on these matters, has not provided a foundation for his knowledge of the factors used to determine pay rates for various individuals, and has failed to identify the “male DH's” who were paid more than plaintiff was paid.

These arguments are not persuasive. Meno's statement about his conversation with Speed provides a foundation for his assertion that the importance of equitable pay under **Home Depot's** pay policy was confirmed. Meno set out the basis of his conclusion that plaintiff was not paid equitably, which was the disparity in pay between plaintiff and “other male DH's with similar lengths of service” in the District. This provides a sufficient basis for **Home Depot** to challenge Meno's conclusion, because it is expected to have employment records showing the length of service of other male department heads in the District at the time Meno states that he made this comparison. I therefore deny the motion to strike these statements.

12 13 In the portion of the 8th paragraph of Meno's declaration which **Home Depot** challenges, Meno asserts that no individual from **Home Depot** "ever raised any legitimate reasons as to why [plaintiff] was so poorly compensated," and that Meno never "witness[ed] any reason why Nancy should not receive an increase." **Home Depot** also challenges Meno's assertion that the store manager could have obtained approval from the district manager for an "out of cycle pay increase," and that plaintiff's "greatest percentage increase" resulted from Meno's approval of a raise for her while he was the acting store manager.

I grant the motion to strike Meno's statement that no one from **Home Depot** ever raised any legitimate reason as to why plaintiff was so "poorly compensated," because I agree that Meno could not know if *anyone* working for defendant *ever* gave a legitimate reason for plaintiff's compensation. I deny the motion as to the balance of the statements, however, because Meno can testify as to whether he ever saw any reason why plaintiff should not have received a raise: It appears that, from his experience working for **Home Depot**, Meno would know whether a store manager could obtain approval for an "out of cycle" pay raise. It also appears that Meno would know whether plaintiff's greatest percentage increase resulted from his approval of her raise.

14 In the portion of paragraph 14 which **Home Depot** challenges, Meno states that, during the time he worked for **Home Depot**, he was never aware of a supervisor or manager being terminated for disagreeing with a personnel decision or for condoning violation of a safety policy. **Home Depot** also challenges Meno's statement that he challenged the decision to terminate an associate "for safety," and was not terminated.

Home Depot contends that these statements should be stricken because Meno did not provide a foundation for his knowledge of "why *all* **Home Depot** supervisors or managers were terminated," and has not "identified a foundation for his allegations of why supervisors were or were not terminated."

These objections fail. Meno did not categorically state that no supervisors or managers were terminated for disagreeing with a personnel decision of condoning a safety violation while he worked for **Home Depot**. Instead, he simply stated that he "was unaware" of such occurrences. Meno has the required knowledge to testify as to whether he was aware of certain events. He also has the personal knowledge required *1079 to state that he challenged a particular termination decision, and was not terminated.

Home Depot challenges all of the statements set out in paragraph 15 of Meno's declaration, in which Meno lists 11 ways in which **Home Depot's** operations and management are centralized. **Home Depot** contends that Meno has no human

resources experience with **Home Depot**, and that he has not established a foundation for knowledge of the information listed in this paragraph.

Based upon Meno's experience described in the declaration, it appears that Meno would be expected to have sufficient knowledge to testify as to statements 2, 3, 4, 5, 6, 7, 8, and 10. The motion to strike is therefore denied as to those statements. Because it is not clear from the declaration that Meno's experience would have given him the knowledge to testify as to statements 1 and 9 in paragraph 15, the motion to strike is granted as to these statements.

3. Plaintiff's Declaration

Home Depot moves to strike portions of paragraphs 4, 6, 7, 10, and 11 of plaintiff's declaration.

15 In the portion of the 4th paragraph that **Home Depot** seeks to strike, plaintiff states that, in June of July 2003, she complained to Meno that her rate of pay was discriminatory.

Home Depot moves to strike this statement on the grounds that it is inconsistent with plaintiff's deposition testimony about her complaints concerning pay increases. **Home Depot** cites plaintiff's testimony stating that she had a meeting in February 2003 in which she complained that she was not being paid enough, but that she did not, at that time, attribute the inadequacy of her pay to gender discrimination. **Home Depot** asserts that plaintiff cannot create an issue of fact through a declaration that contradicts prior deposition testimony.

From the brief portion of plaintiff's deposition testimony cited in **Home Depot's** motion to strike, it is not possible to determine whether plaintiff's declaration is inconsistent with her deposition testimony. Plaintiff's assertion that she told Meno in mid 2003 that her pay was discriminatory is not necessarily inconsistent with a complaint to different managers in February of that year that did not cite gender discrimination as the reason for her inadequate pay. The deposition question eliciting plaintiff's response did not ask plaintiff to list every subsequent complaint about the pay reflected in the cited exhibit, and plaintiff could have concluded after February 2003 that her pay was discriminatory. Because plaintiff's declaration is not necessarily inconsistent with the cited deposition testimony, the motion to strike this portion of the declaration is denied.

16 17 In the portion of the 6th paragraph of plaintiff's declaration that **Home Depot** moves to strike, plaintiff states that she was willing to make herself available during the day for DST training, that Baird declined to schedule her for such training with the two weeks notice given to male employees, and that the DST documentation provided by **Home Depot** is inaccurate to the extent that it shows that she received

any formal training.

Home Depot seeks to strike plaintiff's statement that she received no formal training and that DST documentation to the contrary provided by **Home Depot** was inaccurate because it is inconsistent with plaintiff's deposition testimony that she took one class of DST training. It moves to strike plaintiff's assertion that male employees were provided with two weeks of notice of training opportunities on the grounds that plaintiff has not provided a *1080 foundation for her purported knowledge of the notice provided to those employees.

The motion to strike is granted as to plaintiff's assertion that she received no formal training, and to the extent that plaintiff states that male employees received two weeks notice that training would be offered. The motion is denied as to plaintiff's assertion that she was willing to make herself available for DST training during the day, because **Home Depot** has cited no deposition testimony that contradicts that assertion, and plaintiff's willingness to make herself available for training during the day is a matter about which she is competent to testify.

18 In the portion of the 7th paragraph of plaintiff's declaration to which **Home Depot** objects, plaintiff states that she has never seen a document entitled "Discipline Process Tracking" that references a "final counseling session" with Baird dated April 24, 2003, and references a violation for ignoring a banner barricade. Plaintiff also states that she was never given a "counseling session" that was referred to in the document. **Home Depot** objects to these statements on the grounds that they are inconsistent with plaintiff's deposition testimony in which, having been shown the document and asked if she recalled having any discussion with Baird about the banner requirement in early 2003, she replied that she "remember[ed] having a discussion with him."

I deny the motion to strike the challenged portion of paragraph 7 because it is not necessarily inconsistent with plaintiff's deposition testimony. In her declaration, plaintiff states that she was not given a "counseling session" as represented in the discipline tracking document. That is not necessarily inconsistent with plaintiff's deposition testimony that she recalled having a discussion about the matter with Baird, because plaintiff and Baird could have discussed the banner barricade requirements without any mention of plaintiff's alleged violation, and have discussed a violation by plaintiff without the conversation rising to the level of formal "counseling" implied by the record of the "discipline process tracking" document in question.

19 In the portion of paragraph 10 to which **Home Depot** objects, plaintiff states that, after returning from maternity leave in May 2004, she told Meno that Yamashita had teased her about expressing milk for her baby, had paged employees to go into

the training room while she was expressing milk, and had taunted her by shaking the handle to the room and saying that he would bring cereal for the milk she stored in the refrigerator.

Home Depot contends that these statements are inconsistent with plaintiff's deposition testimony that she did not recall asking Meno to talk to Yamashita about this conduct but was "pretty sure he did." **Home Depot** also objects to the statements as inconsistent with plaintiff's testimony that she complained generally about Yamashita's management style, but did not testify "that he had harassed her or treated her differently because she was a woman."

I deny the motion to strike these particular statements, because plaintiff's declaration is not necessarily inconsistent with her deposition testimony. Plaintiff's declaration that she told Meno that Yamashita harassed her is not inconsistent with her deposition testimony that she does not recall asking Meno to talk with Yamashita about his conduct. In addition, though portions of plaintiff's deposition testimony have been omitted from the record submitted to the court, it appears that plaintiff testified that she complained about the incidents involving Yamashita set out in paragraph 10 of her declaration. On page 214 of the plaintiff's deposition, counsel for **Home Depot** asked plaintiff if she had told *1081 everything that she recalled about the complaints she made concerning Yamashita. In response, plaintiff asked counsel whether he was referring to "just the harassment ones or any complaints?" This certainly suggests that plaintiff had characterized Yamashita's conduct as harassment.

20 In the portion of the 11th paragraph of plaintiff's declaration to which **Home Depot** objects, plaintiff states that Pieratt was aware that the violation for which Samad had been terminated had occurred on other shifts, "but chose not to enforce the policy, except when minorities were involved."

Home Depot contends that this statement should be stricken because plaintiff had no personal knowledge about Pieratt's awareness or why he had chosen to enforce a policy. I agree, and grant the motion to strike this statement.

II. Defendant's Motion for Summary Judgment

A. Standards for Evaluating Motions for Summary Judgment

[Federal Rule of Civil Procedure 56\(c\)](#) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party may discharge this burden by showing that there is an absence of evidence to support the nonmoving party's case. *Id.* When the moving

party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and show that there is a genuine issue for trial. *Id.* at 324, 106 S.Ct. 2548.

21 The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). Reasonable doubts concerning the existence of a factual issue should be resolved against the moving party. *Id.* at 630-31. The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1985). No genuine issue for trial exists, however, where the record as a whole could not lead the trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B. Plaintiff's Wage Claims Under the Equal Pay Act, Title VII, and Oregon Statutes

The Equal Pay Act (EPA), Title VII, and Or.Rev.Stat. § 652.220 all prohibit gender-based discrimination in compensation.

In her complaint, plaintiff alleges generally that, during the course of her employment, “male employees were paid more for performing substantially similar work than plaintiff.” Though she does not specifically identify particular pay decisions as discriminatory in her complaint, from the material submitted in support of and opposition to the motion for summary judgment, it appears that plaintiff's claim of discriminatory pay under the EPA, Oregon Law, and Title VII appears to center on two sets of decisions concerning plaintiff's pay. In the first of these, on October 7, 2002, plaintiff's pay was raised from \$10.00 per hour to \$10.65 per hour. Plaintiff contends that this raise violated state and federal law because a male co-worker received a larger raise. Plaintiff also contends that she was paid at a discriminatory rate after she was promoted to a supervisor *1082 position on November 19, 2002. Plaintiff contends that her initial pay in that position and the raises she subsequently received reflected gender-based discrimination.

In its memoranda in support of the motion for summary judgment, **Home Depot** analyzes these periods as if they were pleaded as distinct and separate claims, and argues that it is entitled to summary judgment as to each “claim” based upon the applicable statute of limitations and other factors. However, plaintiff has not in fact brought distinct “claims” as to the various decisions made affecting her pay. Accordingly, in the discussion below, I do not consider the various pay determinations as separate “claims,” and will not recommend granting partial summary judgment as to particular pay decisions. Instead, I simply address plaintiff's wage discrimination

claim under each of the statutes upon which plaintiff relies.

1. **Wage Claim Under Equal Pay Act**

22 A two-year statute of limitations applies to violations of the Federal Equal Pay Act that are not “willful.” 29 U.S.C. § 216 (applying statute of limitations set out in 29 U.S.C. § 255(a)). A three-year statute of limitations applies to violations that are “willful.” *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988); see 29 U.S.C. § 255(a). An employer can commit a “willful” violation without “knowingly” violating the statute. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-09 (9th Cir.2003), *aff’d*, 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005). Instead, the three-year statute of limitations applies if the employer “disregarded the very ‘possibility’ that it was violating the statute.” *Id.* at 909 (citing *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 141 (2nd Cir.1999)).

23 In order to make out a prima facie claim of gender-based discrimination under the EPA, a female plaintiff must show that her employer paid different wages to men who were performing substantially equal jobs under similar working conditions. *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir.1986); *Gunther v. County of Washington*, 623 F.2d 1303, 1313 (9th Cir.1979), *aff’d*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

Defendant **Home Depot** contends that plaintiff's claims under the EPA and Title VII are governed by the same “substantial equality” standards, and that plaintiff cannot establish that she was not paid the same as males who were performing substantially equal jobs under the same or similar work conditions. Defendant contends that, though plaintiff has identified male employees “who appear to have received a higher wage than herself,” she cannot show that these employees performed substantially equal work under the same or similar working conditions. It asserts that plaintiff's night freight team supervisor position was unique, and that plaintiff cannot establish that her work required substantially the same skill, effort, and responsibility, and took place under substantially the same working conditions, as any of the other department supervisor positions at the Troutdale **Home Depot**.

Home Depot also contends that plaintiff's claim under the EPA is barred by the statute of limitations, because the last pay determination of which plaintiff complains was made on February 2, 2004, more than two years before March 9, 2006, the date of the filing of this action. **Home Depot** also contends that it is entitled to summary judgment on this claim because plaintiff cannot make out a prima facie case of unlawful discrimination or overcome certain defenses to pay disparity permitted under the EPA.

24 *1083 I disagree. **Home Depot** acknowledges that, unlike analyzing claims of discriminatory pay brought under Title VII, in analyzing claims brought under the EPA,

“each alleged discriminatory paycheck may be considered a new, discreet discriminatory action.” Def. Mem in Support of Mot. for Sum. Jud. at 17 (*citing Gandy v. Sullivan County*, 24 F.3d 861, 864 (6th Cir.1994)). Therefore, the pay raise plaintiff received on February 2, 2004, which plaintiff asserts was discriminatory, is not beyond the two-year EPA statute of limitations for non-willful discrimination.

25 Plaintiff has made out a prima facie case of unlawful gender-based discrimination in compensation, and has cited evidence supporting the conclusion that all department heads at the Troudale **Home Depot** are appropriate wage comparators. Plaintiff has also produced substantial evidence supporting the conclusion that she was paid less than at least one male comparator, Pulicella, after March 9, 2004. Descriptions in the record of the duties and experience of Pulicella and plaintiff create issues of fact as to whether the disparity in these employees' pay was more likely than not based upon gender. In addition, plaintiff has shown the existence of evidence from which a trier of fact could conclude that **Home Depot's** purported legitimate reasons for the disparity were not the true reasons, but were pretextual. This includes evidence that **Home Depot** management required a supervisor to downgrade plaintiff's performance evaluation, and evidence that the manager who terminated plaintiff had said that he “would be getting rid of” plaintiff because he thought that women were ill-suited to plaintiff's position.

26 Even if the February 2, 2004 raise was beyond the statute of limitations period, I would recommend denying **Home Depot's** motion for summary judgment on the EPA claim because plaintiff has shown the existence of evidence creating material issues of fact as to whether **Home Depot** willfully violated the EPA. This evidence includes Meno's assertion that he was required to downgrade plaintiff's performance evaluation, and that he told **Home Depot's** human resources personnel, store managers, district manager, and employee relations specialist that plaintiff's pay was discriminatory. This evidence, along with evidence that **Home Depot** did not adjust plaintiff's rate of pay for more than eight months after Meno made these statements, raises a triable issue of fact as to whether **Home Depot** knowingly or recklessly paid plaintiff less than similarly situated male employees. Pieratt's transfer of Pulicella to the freight supervisor position, where it appears that he performed the same work plaintiff performed, but was paid substantially more, also supports plaintiff's assertion that **Home Depot** willfully discriminated against her in determining her compensation. Evidence that Pieratt stated that, as a woman, plaintiff was not well suited to supervise the freight team also supports plaintiff's assertion that **Home Depot** intentionally discriminated in establishing her compensation.

27 28 **Home Depot's** assertion that it is entitled to summary judgment because any pay disparity between plaintiff and male comparators is permitted under

exceptions to the EPA also fails. These exceptions permit pay disparities resulting from a seniority system, a merit system, a system that measures earnings or quantity or quality of production, or from a differential based on any factor other than gender. 29 U.S.C. § 206(d)(1); *Maxwell*, 803 F.2d at 446. The defendant has the burden of pleading and proving these affirmative defenses. *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 875 (9th Cir.1982).

***1084 Home Depot** contends that its published employment policies and the testimony of the Troutdale **Home Depot** HR Manager, the relevant Regional HR Manager, and the relevant District HR Manager, establish that it “sets the wages of its employees through a merit system as well as other nondiscriminatory business reasons based on factors other than sex.” It asserts that these policies and this testimony establish that plaintiff’s pay was based upon merit, as evaluated by her supervisors according to established standards, and upon relevant experience and education criteria.

I disagree. **Home Depot’s** adoption of an objective, gender-neutral pay policy, and the testimony of **Home Depot** managers that pay decisions are made on legitimate factors such as experience, education, and performance, does not conclusively establish that those policies were followed in pay decisions affecting plaintiff. As noted in the section above discussing the motions to strike, Grandy’s assertion that plaintiff’s rate of pay was based only on legitimate factors such as qualifications, education, experience, and job skills is inadmissible because Grandy did not participate in the decisions concerning plaintiff’s pay. In addition, as is also noted above, the record includes evidence that one of plaintiff’s supervisors was required to downgrade plaintiff’s performance evaluation, and evidence that the manager who ultimately terminated plaintiff had opined that women were not suited for plaintiff’s supervisory position. There is also evidence supporting the conclusion that plaintiff had more relevant experience than at least one comparator whose pay was considerably higher, and that **Home Depot** did not adjust plaintiff’s pay for many months after a supervisor had opined that plaintiff was being unfairly compensated because of her gender. This, and other evidence in the record, creates material issues of fact as to whether **Home Depot** can prevail on any of its affirmative defenses.

2. Wage Claim Under Title VII

Where, as here, a plaintiff initiates proceedings with a state agency, a claim must be brought within 300 days of the allegedly unlawful conduct. See 42 U.S.C.2000e-5(e)(1). Plaintiff filed her BOLI complaint on December 9, 2004, and timely filed her action in this court. Plaintiff therefore may recover under Title VII for any discriminatory conduct, including discrimination in compensation, that occurred up to 300 days earlier than that date. Accordingly, any discriminatory conduct occurring

after February 12, 2004, is within the statute of limitations period for Title VII.

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 127 S.Ct. 2162, 2174, 167 L.Ed.2d 982 (2007), the Supreme Court rejected the argument that each paycheck received following a discriminatory pay determination constitutes a separate, actionable violation of rights under Title VII, and restarts the statute of limitations period. Instead, the Court concluded that the statute of limitations period for bringing a discriminatory pay claim under Title VII begins to run when the employer establishes an employee's pay at an allegedly discriminatory rate.

The holding in *Ledbetter* bars plaintiff from recovering under Title VII for any discrimination in pay reflected in the amount of her February 2, 2004 raise. However, it is not clear that plaintiff's potential to recover under Title VII for discriminatory pay is entirely foreclosed under that decision. Plaintiff contends that, though *Ledbetter* precludes the argument that each paycheck restarts the statute of limitations period, subsequent raises for other employees that unfairly favor employees not of a plaintiff's gender can *1085 restart the running of the statute of limitations.

29 I agree. Certainly, in the more common situation, a plaintiff complains that a decision directly affecting her own pay reflects intentional gender-based discrimination, and that decision starts the running of the statute of limitations. However, I agree that there is nothing in the *Ledbetter* decision that precludes the statute of limitations from starting to run again if the employer subsequently discriminates, on the basis of gender, in establishing or raising the pay of another employee.

30 Plaintiff also contends that, after she received her last raise in February, 2004, **Home Depot's** increase of the pay of a male employee performing substantially similar work reflected gender-based discrimination against plaintiff. Based upon my review of the record, I conclude that there are material issues of fact as to whether this contention is well-founded. Accordingly, though the applicable statute of limitations precludes plaintiff's recovery under Title VII for any pay decisions implemented before February 13, 2004, **Home Depot's** motion for summary judgment on plaintiff's Title VII pay claim should be denied because material issues of fact exist as whether pay raises **Home Depot** implemented for any similarly situated male employee after that date reflected discrimination in favor of that male employee.

Except for the statute of limitations issue, claims of pay discrimination brought under Title VII are evaluated like those brought under the EPA. In *Forsberg v. Pacific Northwest Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir.1988), the Ninth Circuit observed that "[e]qual pay claims asserted under Title VII must satisfy the same substantial equality test applied to claims asserted under the EPA." Title VII claims

are also subject to the same affirmative defenses. *Maxwell*, 803 F.2d at 446.

These additional issues were addressed above in analyzing **Home Depot's** motion for summary judgment on plaintiff's EPA claim. For the reasons set out above, defendant's motion for summary judgment on the compensation component of plaintiff's Title VII claim should be denied.⁴

3. Wage Claim Under Oregon Statutes

Under *Or.Rev.Stat. § 652.230*(1), a claim of unequal pay brought pursuant to *Or.Rev.Stat. § 652.220* may be brought for “unpaid wages to which the employee is entitled for the one-year period preceding the commencement of the action.” Under *Or.Rev.Stat. § 659A.030*(a), a plaintiff may recover for damages incurred because of unlawful discrimination for a one-year period preceding the filing of a complaint with BOLI. Under *Or.Rev.Stat. § 659A.820*(1), a plaintiff must file a complaint with BOLI within one year of the alleged unlawful discrimination in compensation. Because plaintiff filed her BOLI complaint on December 9, 2004, she can recover under Oregon statutes for any unlawful discrimination in her compensation after December 10, 2003.

Home Depot contends that plaintiff's wage claim under Oregon law fails for several reasons. It contends that, though *Ledbetter* expressly governs only plaintiff's Title VII claims, that decision bars her state-law claims as well, because the Oregon Supreme Court would likely apply *Ledbetter* if presented with the same issue under Oregon law. **Home Depot** acknowledges that the Oregon Supreme Court has **1086* not addressed this issue, but asserts that it would likely reach the same conclusion because Oregon courts consider federal court decisions interpreting Title VII instructive in interpreting Oregon statutes prohibiting various types of employment discrimination. See, e.g., *Cantua v. Creager*, 169 Or.App. 81, 98-99, 7 P.3d 693 (2000); *A.L.P. Inc. v. Bureau of Labor and Industries*, 161 Or.App. 417, 422-23, 984 P.2d 883 (1999); *Winnett v. City of Portland*, 118 Or.App. 437, 442, 847 P.2d 902 (1993); *Harris v. Pameco Corp.*, 170 Or.App. 164, 176, 12 P.3d 524 (2000). **Home Depot** also contends that plaintiff's wage claims fail under Oregon law for the same reasons they fail under the EPA “because Oregon courts have recognized that comparators under *ORS 652.220* must be similarly situated to the plaintiff, and that an employees ‘different skills and experience’ can ‘justify a salary differential.’ ”

31 **Home Depot's** motion for summary judgment on the Oregon statutory wage claim should be denied. Though Oregon courts generally consider federal decisions interpreting Title VII instructive in evaluating claims under similar Oregon statutes, it is not clear that the Oregon Supreme Court would apply the holding of *Ledbetter* to claims under Oregon law. The Oregon Supreme Court might find that federal decisions interpreting the federal EPA, under which each discriminatory paycheck

restarts the statute of limitations, are more consistent with Oregon statutes specifically addressing wage discrimination. Even if the reasoning of *Ledbetter* were applied, for reasons discussed above, material issues of fact exist as to whether plaintiff can establish that decisions concerning her compensation that were implemented after December 10, 2003, reflected gender-based discrimination.

C. Plaintiff's Non Wage-Based Gender Discrimination Claims Under Title VII and ORS § 659A.030

Both Title VII and ORS § 659A.030 prohibit employers from terminating, refusing to promote, or otherwise discriminating against employees in the terms and conditions of their employment on the basis of gender. 42 U.S.C. § 2000e-2(a)(1); Or.Rev.Stat. § 659A.030(a)-(b).

1. Termination

32 33 Claims of gender-based discrimination are analyzed under the burden-shifting procedure set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).⁵ Under this analysis, a plaintiff may establish a *prima facie* case of unlawful discrimination by showing that she is a member of a protected class, performed satisfactorily, was terminated, and the employer demonstrated a continued need for the same services and skills by seeking a replacement with similar qualifications. *E.g.*, *Pejic *1087 v. Hughes Helicopters, Inc.*, 840 F.2d 667, 672 (9th Cir.1988) (citing *Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d 1072, 1075 (9th Cir.1986)).

34 35 Establishing a *prima facie* case creates a presumption of unlawful discrimination, and shifts the burden to the defendant, who must produce evidence that the adverse employment action was not taken for impermissibly discriminatory reasons. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). If the defendant produces such evidence, the presumption of unlawful discrimination disappears, and the plaintiff must show by a preponderance of the evidence that the defendant's proffered reason for the adverse employment decision was merely a pretext for a discriminatory motive. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir.1994) (citing *Lowe v. City of Monrovia*, 775 F.2d 998, 1007 (9th Cir.1985)). To do so, the plaintiff must produce "specific, substantial evidence of pretext." *Id.* at 890 (quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir.1983)). Pretext may be established either by showing that "a discriminatory reason more likely motivated the employer or ... that the employer's proffered explanation is unworthy of credence." *Chuang v. University of California Davis*, 225 F.3d 1115, 1123 (9th Cir.2000). The plaintiff always retains the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated for unlawful reasons. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

36 Defendant contends that plaintiff cannot make out a prima facie case of unlawful discharge under Title VII or [ORS § 659A.030](#) because she cannot establish that she was performing her job satisfactorily when she was terminated. **Home Depot** contends that plaintiff was fired because she failed to enforce its established safety standards, and that failure to enforce those standards constitutes unsatisfactory performance. **Home Depot** notes that its written Code of Conduct provides for discipline, including termination, of supervisors who do not enforce its safety policies. Defendant further contends that, even if plaintiff could establish a prima facie case of unlawful discrimination, she has not produced “specific, substantial evidence” of pretext in response to its articulated non-discriminatory reasons for her termination.

There is no question that **Home Depot** had a written policy allowing for the termination of supervisors who did not enforce its safety policies. Likewise, there is no question that plaintiff's failure to enforce **Home Depot's** safety policies was cited as a reason for her termination. However, plaintiff has shown the existence from which a reasonable trier of fact could conclude both that plaintiff's performance was objectively satisfactory, notwithstanding her purported failure to enforce safety policies, and that plaintiff's failure to adequately enforce safety policies was not the real reason for her termination. There is evidence supporting the conclusion that gender discrimination was a factor in plaintiff's termination. Plaintiff's performance evaluations were satisfactory, and would have been more favorable if a supervisor who worked closely with plaintiff had not been instructed to downgrade her evaluation. In addition, the record includes the opinions of a supervisor and a co-worker that plaintiff was an exceptionally competent and productive employee. Evidence that plaintiff was paid less than males performing the same or similar work at **Home Depot** supports an inference that plaintiff's termination may have been discriminatory. There is evidence that, though Yamashita was ostensibly terminated for safety violations, his falsification *1088 of documents was the real cause for his termination. There is evidence that Pierrat, who terminated plaintiff, had opined that, “as a woman,” plaintiff could not supervise men on the freight team, and that Pierrat had said that he “would be getting rid of” plaintiff before she was terminated. There is evidence that Pieratt was aware of safety violations before plaintiff was terminated, but did not enforce safety policies until plaintiff was terminated. There is evidence that no male supervisors were ever terminated for “condoning” safety violations. In addition, evidence that in October 2004, Pieratt moved Pulicella to the night freight supervisor position to perform the same work plaintiff performed could support an inference that **Home Depot** was preparing to terminate plaintiff before the safety violation incident that **Home Depot** cites as the reason for her termination.

From all this evidence, a trier of fact might reasonably conclude both that plaintiff's performance was objectively satisfactory, and that the proffered reason for plaintiff's

termination was pretextual. **Home Depot's** motion for summary judgment on the termination component of plaintiff's Title VII and Oregon statutory claim should be denied.

Part: 1 of 2

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