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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANGELA GONZALES; et al., Plaintiffs-Appellants, v. ORGANOGENESIS, INC., a Delaware Corporation and DOES, 1-50, inclusive, Defendants-Appellees.	No. 17-55943 17-56707 D.C. No. 3:15-cv-01530-CAB-NLS MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted February 5, 2019
Pasadena, California

Before: WARDLAW and BEA, Circuit Judges, and DRAIN,** District Judge.

In this employment discrimination and retaliation action under California's Fair Employment and Housing Act (FEHA), Angela Gonzales, Linda Boyd, and Brandee Colombo appeal the district court's grant of summary judgment to their

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gershwin A. Drain, United States District Judge for the Eastern District of Michigan, sitting by designation.

former employer, Organogenesis, Inc., on Gonzales's retaliation claim and Gonzales, Boyd, and Colombo's gender discrimination claims. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

1. The district court incorrectly concluded that Gonzales did not demonstrate a genuine dispute of material fact as to whether Organogenesis's proffered reason for her termination was pretextual. Just four months before her termination, Gonzales lodged a complaint to Human Resources about her supervisor, Oscar Ferrer. Gonzales presented sufficient evidence that Ferrer caused her termination, including evidence that Organogenesis managers made retaliatory comments directed towards her, that her alleged compliance violations were false, and that the investigation into her complaint about Ferrer was insufficient and irregular. This evidence, in addition to the close temporal proximity between Gonzales's protected conduct and Ferrer's launch of the investigation that resulted in her termination, creates a genuine dispute of triable fact precluding summary judgment. *See Miller v. Fairchild Indus. Inc.*, 885 F.2d 498, 505 (9th Cir. 1989); *Flait v. N. Am. Watch Corp.*, 3 Cal. App. 4th 467, 479, *reh'g denied and opinion modified* (Mar. 5, 1992). A reasonable juror could impute Ferrer's "retaliatory motive" to Organogenesis. *Poland v. Chertoff*, 494 F.3d 1174, 1183–84 (9th Cir. 2007).

2. The district court incorrectly concluded that Gonzales, Boyd, and Colombo could not make out a prima facie case of gender discrimination under FEHA because they could not show that Organogenesis had a discriminatory motive for their terminations. The district court based its determination on an erroneous interpretation of the law: contrary to its conclusion, an employee *may* use evidence of discrimination against other members of her protected class to prove that her employer's termination action was motivated by gender-based discrimination, even if she was not present for the discriminatory comments. *See, e.g.*, *E.E.O.C. v. Boeing Co.*, 577 F.3d 1044, 1046, 1050 (9th Cir. 2009) ("The discriminatory animus exhibited by Castron's supervisor constitutes direct evidence of pretext, even though the comments did not refer specifically to Castron."). At the same time Ferrer placed each woman on a performance improvement plan and objective setting plan, he repeatedly questioned each of them about whether they were planning to have a baby and directly told Gonzales that he needed to fire a female salesperson before she became pregnant. *See Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1149 (9th Cir. 1997); *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir. 1991) (direct evidence of sexual stereotyping where employer believed that the female candidates get "nervous" and "easily upset").

"[W]e have repeatedly held that a single discriminatory comment by a plaintiff's supervisor or decisionmaker is sufficient to preclude summary judgment for the employer." *Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1039 (9th Cir. 2005). Considering Ferrer's comments in their totality, Gonzales, Boyd, and Colombo presented enough direct evidence of Ferrer's discriminatory animus to survive summary judgment. *Chuang v. Univ. of Cal. Davis, Bd. of Tr.*, 225 F.3d 1115, 1128 (9th Cir. 2000) (concluding that "very little" direct evidence is needed at the summary judgment stage).

3. The district court's conclusion that Gonzales, Boyd, and Colombo could not show that Ferrer's discriminatory animus "more likely motivated" their terminations than Organogenesis's proffered nondiscriminatory reasons was also incorrect. *Boeing Co.*, 577 F.3d at 1049. Gonzales presented sufficient evidence that Ferrer not only made discriminatory comments but also caused her termination as discussed above. *See Galdamez v. Potter*, 415 F.3d 1015, 1026 n.9 (9th Cir. 2005) (explaining that an employee can prove gender discrimination "where the ultimate decision-maker, lacking individual discriminatory intent, takes an adverse employment action in reliance on factors affected by another decision-maker's discriminatory animus").

4. Boyd and Colombo have also presented sufficient evidence to create a genuine dispute of material fact as to whether Organogenesis's reason for their

termination—the Reduction in Force (RIF) that led to the termination of one-third of its workforce—was pretext for gender discrimination. Boyd and Colombo presented evidence that Ferrer's discriminatory animus directly affected each woman's selection for the RIF. In violation of company policy, Ferrer placed Boyd and Colombo on performance plans without any prior warning or counseling and then failed to provide each of them with the required guidance. Combined with the evidence that Boyd and Colombo were "preselected" for termination in the RIF, a reasonable juror could infer that Boyd and Colombo were chosen for termination because of their recent performance plans. Moreover, Ferrer's decision to take two of Boyd's sales accounts and give them to a male salesperson directly affected Boyd's ranking in the RIF because the male salesperson got credit for her sales. Summary judgment is "generally unsuitable" for employment discrimination cases when "the plaintiff has established a prima facie case because of the elusive factual question of intentional discrimination." *Yartzoff v. Thomas*, 809 F.2d 1371, 1377 (9th Cir. 1987) (internal quotation marks and citations omitted). Accordingly, the district court improperly granted summary judgment on the basis of Boyd and Colombo's failure to demonstrate pretext.

5. The district court's award of costs to Organogenesis as the prevailing party under Federal Rule of Civil Procedure 54(d)(1) is vacated.

REVERSED; REMANDED.