TAB 8

LEXSEE 2007 U.S. DIST. LEXIS 85535

DEBORAH J. DODSON, Plaintiff, v. MORGAN STANLEY DW, INC., Defendant.

Case No. C06-5669RJB

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2007 U.S. Dist. LEXIS 85535

November 8, 2007, Decided
November 8, 2007, Filed

SUBSEQUENT HISTORY: Reconsideration granted by *Dodson v. Morgan Stanley DW Inc., 2007 U.S. Dist. LEXIS 85631 (W.D. Wash., Nov. 20, 2007)*

COUNSEL: [*1] For Deborah J Dodson, Plaintiff: Terry Allen Venneberg, LEAD ATTORNEY, BREMERTON, WA; Kenneth R Friedman, FRIEDMAN RUBIN & WHITE, BREMERTON, WA.

For Morgan Stanley DW Inc, Defendant: L Julius M Turman, LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS (SF), SAN FRANCISCO, CA; Mark S Dichter, LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS (PA), PHILADELPHIA, PA; Stephanie Pennix Berntsen, LEAD ATTORNEY, Thomas Vincent Dulcich, SCHWABE WILLIAMSON & WYATT (SEA), SEATTLE, WA.

For Cypheredge Technologies Inc, Cyphermetrix Inc, LINKOUS, JAMES B., ThirdParty Defendants: Stephanie Pennix Berntsen, LEAD ATTORNEY, SCHWABE WILLIAMSON & WYATT (SEA), SEATTLE, WA.

JUDGES: ROBERT J. BRYAN, United States District Judge.

OPINION BY: ROBERT J. BRYAN

OPINION

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant's Motion for Summary Judgment. Dkt. 43. The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

PROCEDURAL HISTORY AND RELEVANT FACTS

Employment History. Plaintiff Deborah Dodson ("Plaintiff") is a woman who began working as a financial advisor for Dean Witter in 1996 in the firm's Tacoma, Washington branch office. Dean Witter later became Morgan Stanley. [*2] Through its financial advisors, Defendant Morgan Stanley provides its clients with comprehensive financial planning services. Branch managers are responsible for the daily operation and administration of branch offices, including personnel matters. Quang Bui was the Tacoma branch manager during the relevant times of Plaintiff's employment.

According to Morgan Stanley, financial advisors are required to perform at a level that is consistent with their years of experience in the industry. Financial advisors are expected to increase their books of business, including the number of accounts, assets under management and gross production in a manner that is consistent with their peers with equal industry experience. Financial advisors sometimes enter into Joint Production Agreements ("JPA") with other financial advisors to share some or all of their clients. Individual financial advisors select partners based on a variety of factors, including family relationships, friendships, and the type of business or type of clientele on which they focus.

According to Morgan Stanley, branch managers do not "direct or require individual financial advisors to form JPAs with other specific financial advisors." [*3] Dkt. 43, at 8. Morgan Stanley branch managers approve the establishment of JPAs by "ensuring that the parties have executed and completed the required paperwork, after the interested financial advisors themselves have already identified the person(s) with whom they would like to team." *Id.* Ultimately, a Morgan Stanley regional director "blesses" a JPA. Dkt 54-4, at 3.

In 1998, Plaintiff entered into a JPA with John West, a senior financial advisor at Morgan Stanley. The West-Dodson JPA created a partnership for the purpose of sharing income from a limited number of accounts. Mr. West had created several partnerships with other male and female financial advisors in the Tacoma branch, but his partnership with Plaintiff was, according to Mr. West, one of his "biggest." Dkt. 54-3, at 3.

Initially, Plaintiff performed well within the West-Dodson JPA, and the partnership experienced some growth. According to Mr. West, the partnership later began to experience a decrease in business. According to Morgan Stanley, this decrease was partly due to a market decline, but also resulted from deficiencies in Plaintiff's work habits. Mr. West stated that he began to observe Plaintiff coming into the [*4] office at later hours and less frequently, and staying at work for shorter periods of time. Mr. West further stated that some clients informed him that they had trouble contacting Plaintiff, while another client requested that Plaintiff not work on that client's account. Mr. West did not express any of these criticisms to Plaintiff or to anyone at the Tacoma branch, including the branch manager. Additionally, Mr. Bui stated that Plaintiff had no deficiencies in her performance reviews, but that he had expressed concerns to Plaintiff about the number of hours she was working. Dkt. 54-4, at 20.

West-Lucero Joint Partnership Agreement. On or about November 21, 2003, Mr. West entered into a JPA with a male financial advisor named Christopher Lucero. Mr. Lucero was junior to Plaintiff in terms of years worked at Morgan Stanley. The West-Lucero JPA was a full partnership, and included all of the assets managed by both men individually. According to Plaintiff, the West-Lucero JPA was "dramatically different in scope" than the West-Dodson JPA, as the West-Dodson JPA included only specific, limited assets. Dkt. 51, at 4. Morgan Stanley described the West-Lucero JPA as "similar to those West [*5] had with other Financial Advisors, though with a larger number of clients and more assets." Dkt. 43, at 11.

According to his deposition, Mr. West chose to partner with Mr. Lucero based on Mr. Lucero's work ethic and knowledge about stocks and trading. Mr. West also stated that he liked Mr. Lucero's approach to client service, and noted that Mr. Lucero's production numbers showed significant growth. The parties dispute whether Mr. Bui was involved in Mr. West's selection of Mr. Lucero. Morgan Stanley contends that Mr. West chose to partner with Mr. Lucero on his own volition, and without prior encouragement or facilitation by Mr. Bui. Plaintiff contends that Mr. Bui encouraged Mr. West to partner with Mr. Lucero. Plaintiff also claims that when asked by Plaintiff about the reason Mr. West partnered with Mr. Lucero, Mr. West responded, "You know Deborah, good old boys network." Dkt. 54-2, at 12. Plaintiff has also alleged that prior to the formation of the West-Lucero partnership, Plaintiff repeatedly refused requests by Mr. Bui to set him up with her female friends. Mr. Bui denies having made these requests.

Plaintiff completed an intake questionnaire with the EEOC in August 2004, and [*6] alleged that she was passed over for the partnership based on her gender. Dkt. 54-14. Plaintiff signed the EEOC form on August 19, 2004. The signature block included a declaration which stated in part, "I further give my consent for the EEOC, to file this questionnaire as a charge, if necessary to meet timeliness purposes...". *Id.* Plaintiff's formal charge was entered on October 15, 2004. Dkt. 60, at 5. On July 26, 2006, the EEOC issued a determination as to Plaintiff's charge, finding that "there is reasonable cause to believe that [Morgan Stanley's] policy of allowing established financial advisors choose partners for lucrative agreements resulted in [Plaintiff] being denied a partnership in November 2003 because of her sex." Dkt. 54-13.

As part of a force-reduction, Plaintiff's employment was terminated on or about August 11, 2005. Plaintiff subsequently worked elsewhere as a financial consultant and broker. Some of Plaintiff's clients maintained Plaintiff as their financial advisor, while others kept their business with Morgan Stanley.

Alleged Defamatory Statements. Plaintiff claims that, at some point after he entered into the West-Lucero JPA, Mr. Lucero made defamatory statements [*7] about Plaintiff to Plaintiff's clients. Mr. Lucero denies making such statements. In her deposition, Plaintiff states: "When [Mr. Lucero] inherited a large portion of my clients, he told [Plaintiff's clients] that [Mr. Lucero] and [Mr. West] did business differently than I did. They only charged per transaction, whereas I charged them a fee whether I did anything or not. My clients that I talked to who told me about this took that to mean that I was overcharging them." Dkt. 44, at 48. In response to the question, "So Chris Lucero never said Deborah is overcharging you and doing nothing, is that correct, that you know?", Plaintiff responded, "That I know of...yes." *Id.* But later in the deposition, Plaintiff states that Mary El-

strom, presumably a client of Plaintiff, told Plaintiff that Mr. Lucero "said some very nasty things about me, said I was overcharging her...". Dkt. 44, at 49.

In response to an interrogatory, Plaintiff did not explicitly state that clients had told her that Mr. Lucero made statements that Plaintiff "overcharged", but Plaintiff did state, "clients interpreted [Mr. Lucero's statements] as 'Deborah is overcharging you and doing nothing.'" Dkt. 60, at 12. Plaintiff does [*8] not appear to have provided any affidavits from clients prior to Plaintiff's filing of her response to Morgan Stanley's motion for summary judgment.

Procedural History. On November 16, 2006, Plaintiff filed a complaint in this Court. Dkt. 1. Plaintiff filed the following causes of action: (1) violations of Title VII and *RCW 49.60.180* because Defendant's act of urging and facilitating lucrative partnership agreements to the benefit of male employees and detriment of female employees, and depriving Plaintiff of a lucrative partnership interest in favor of a less experienced male employee, constitutes disparate treatment discrimination; (2) violations of Title VII and *RCW 49.60.180* because Defendant's policy of allowing established financial advisors to subjectively choose partners for lucrative agreements constitutes disparate impact discrimination; (3) promissory estoppel because Defendant, through its financial advisor John West, promised Plaintiff a substantial portion of Mr. West's book of business; (4) defamation because Defendant is liable for defamatory statements made by its employee, Christopher Lucero; and (5) interference with business expectancy based on the statements made [*9] by Mr. Lucero. Additionally, while not specifically alleged in the first and second causes of action alleging sex discrimination, Plaintiff incorporates paragraphs from the facts section of her complaint into these causes of action alleging, "...it was the pattern and practice of defendant Morgan Stanley...to deprive female Financial Advisors of opportunities to enter into lucrative Joint Production Agreements with senior Financial Advisors...". *Id.*, at 4-5.

MOTION FOR SUMMARY JUDGMENT

On September 18, 2007, Defendant Morgan Stanley filed a motion for summary judgment, contending that (1) Plaintiff's promissory estoppel and interference with business expectancy claims fail as a matter of law; (2) Plaintiff cannot establish intentional sex discrimination because there has been no adverse employment action by Defendant, the formation of the West-Lucero JPA was a legitimate non-discriminatory act, and Plaintiff has failed to establish pretext; (3) Plaintiff's allegation that Defendant engaged in a pattern and practice of sex discrimination fails because Plaintiff has not offered evidence of discriminatory intent; (4) any allegations of disparate treatment or disparate impact discrimination for [*10] acts occurring before December 19, 2003, are time-barred; and (5) Plaintiff cannot establish her defamation claim because no false communications were made, Morgan Stanley is not liable for alleged statements made by Mr. Lucero, and Plaintiff cannot demonstrate that she suffered damage. Dkt. 43. Morgan Stanley moves the Court to dismiss all of Plaintiff's claims. *Id.*, at 7.

On September 27, 2007, Plaintiff filed a response to Defendant's motion for summary judgment. Dkt. 51. Plaintiff contends that summary judgment as to the sex discrimination claim is not appropriate because Plaintiff suffered an adverse employment action, and Defendant's inconsistent explanations for offering the partnership to Mr. Lucero constitute pretext under the *McDonnell Douglass* burden-shifting test. Plaintiff further contends that summary judgement as to the defamation claim is not appropriate because Mr. Lucero's statements made to customers about Plaintiff constitute defamation per se, the statements were made within Mr. Lucero's course and scope of his employment with Defendant, and damages are presumed under Washington law. Plaintiff also provides affidavits of two of Plaintiff's clients in support of [*11] her defamation claim. In her response, Plaintiff abandons her promissory estoppel and interference with business expectancy claims. *Id.*

On October 23, 2007, Defendant filed a reply. Dkt. 59. First, Defendant contends that Plaintiff's intentional discrimination claim fails because Plaintiff has failed to state a prima facie case of discrimination and has not presented any evidence that Defendant's non-discriminatory reasons for Mr. West's offering of the partnership to Mr. Lucero is pretext for intentional discrimination. Second, Defendant contends that Plaintiff has failed to raise a triable issue of fact regarding her disparate impact claim because Plaintiff has not alleged the existence of a practice or policy and has not established that a policy had significant effects on her or on women. Third, Defendant argues that Plaintiff's defamation claim must be dismissed because evidence of allegedly defamatory statements is inadmissible, any allegedly defamatory statements were non-actionable opinion, Plaintiff failed to present evidence that Morgan Stanley is vicariously liable for statements allegedly made by Mr. Lucero, and Plaintiff failed to demonstrate that she suffered damages.

On [*12] October 24, 2007, Plaintiff filed a surreply. Dkt. 63. Plaintiff requests that the Court strike Defendant's motion for summary judgment as to Plaintiff's disparate impact discrimination claim because Defendant did not raise this argument in its motion for summary judgment.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c)*). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1985)*. There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical [*13] doubt."). *See also Fed.R.Civ.P. 56(e)*. Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987)*.

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial -- e.g., a preponderance of the evidence in most civil cases. *Anderson, 477 U.S. at 254*, *T.W. Elect. Service Inc., 809 F.2d at 630*. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc., 809 F.2d at 630* (relying on *Anderson, supra*). Conclusory, non specific [*14] statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990)*.

DISCUSSION

1. Promissory Estoppel and Interference with Business Expectancy Claims

In her response, Plaintiff abandons her claims under promissory estoppel and for intentional interference with business expectancy. Dkt. 51, at 24. The Court should dismiss these claims with prejudice.

2. Timeliness of Plaintiff's Sex Discrimination Claims.

Morgan Stanley dubiously contends that the alleged unlawful employment acts or practices raised in Plaintiff's complaint that pre-date December 19, 2003, are time-barred because, although Plaintiff filed an intake questionnaire in August 2004, she did not file a formal EEOC charge until October 15, 2004. Dkt. 43, at 13 n. 9. Morgan Stanley cites several 11th Circuit cases in support of its position that an intake questionnaire is not treated as a formal EEOC charge for the purpose of applying the time requirements of *42 U.S.C. § 2000e-5(e)(1)*.

In the same string of citations, however, Morgan Stanley includes a 9th Circuit Court of Appeals case which directly contradicts the position taken by Morgan [*15] Stanley. Dkt. 43, n.9, citing *Laquaglia v. Rio Hotel & Casino, Inc., 186 F.3d 1172, 1175 (9th Cir. 1999)*. This case states, "we previously have held that a detailed, signed intake form...may serve as a charge to initiate administrative proceedings." *Id., citing Casavantes v. California State Univ., 732 F.2d 1441, 1442-43 (9th Cir. 1984)* (an intake questionnaire is sufficient to constitute a charge).

In its reply, Morgan Stanley states that the Supreme Court has granted certiorari to address the issue of whether an intake questionnaire may constitute a charge of discrimination. Dkt. 59, at 2 n. 1.

Plaintiff filed her complaint in this Court, which is located in the 9th Circuit. That the Supreme Court may address this issue in the future is not relevant, as no decision has yet been rendered. Accordingly, the Court should apply the legal standard set forth by the 9th Circuit Court of Appeals and deny Morgan Stanley's motion to dismiss based on its contention that Plaintiff's claims are time-barred.

3. **Sex Discrimination Claims under Title VII and *RCW 49.60.180***

Plaintiff claims that she was not offered a lucrative partnership based on her sex, in violation of Title VII and *RCW 49.60.180*. In [*16] the first and second causes of action in Plaintiff's complaint, Plaintiff alleges that Morgan Stanley's facilitation of a partnership for a male employee, and depriving Plaintiff of the same opportunity, constitutes disparate treatment discrimination. Dkt. 1. Plaintiff also alleges that Morgan Stanley's "policy of allowing established financial advisors to subjectively choose partners for lucrative agreements constitutes disparate impact discrimination." *Id.* . Additionally, while not specifically alleged in the first and second causes of action, Plaintiff incorporates a paragraph from the facts

section of her complaint into these causes of action alleging practice and pattern discrimination. *Id.*, at 4-5.

Under Title VII, an employer may be found liable for unlawful sex discrimination under one or more of the following legal theories: disparate impact discrimination, pattern and practice discrimination, or disparate treatment discrimination. *See E.E.O.C. v. Joe's Stone Crab, 220 F.3d 1263, 1274 (11th Cir. 2000).*

a. Pattern and Practice Claim.

Plaintiff alleges "it was the pattern and practice of defendant Morgan Stanley in November 2003 to deprive female Financial Advisors of opportunities [*17] to enter into lucrative joint Production Agreements with senior Financial Advisors, under which female Financial Advisors would have stood to enjoy substantial increases in income and client base." Dkt. 1, at 4. Plaintiff also alleges that "... the facilitation by Morgan Stanley of a lucrative Joint Production Agreement with a senior Financial Adviser and a male, less experienced and accomplished Financial Adviser is part of a pattern and practice of sex discrimination at Morgan Stanley, where female Financial Advisers have been deprived of lucrative partnerships and financial opportunities routinely offered to their male counterparts." Id. at 5. In its motion for summary judgment, Morgan Stanley moves the Court to dismiss Plaintiff's pattern and practice claim because Plaintiff has not provided evidence of discriminatory intent on the part of Morgan Stanley. Dkt. 43, at 19 n.10. Plaintiff did not address the pattern and practice claim in her response. *See* Dkt. 51.

A plaintiff alleging pattern and practice sex discrimination claim must provide a prima facie case of discrimination. *Obrey v. Johnson, 400 F.3d 691, 694 (9th Cir. 2005).* A plaintiff must also present a triable issue of fact [*18] as to whether the employer defendant possesses discriminatory intent. *See Joe's Stone Crab, 200 F.3d at 1274*. By demonstrating the existence of a discriminatory pattern or practice, a plaintiff establishes a presumption that the plaintiff has been discriminated against on the account of gender. *See Johnson, 400 F.3d at 694*. To establish a general discriminatory pattern, statistical data is relevant because it can be used to establish such a pattern. *See id., citing Diaz v. Am. Tel. & Tel., 752 F.2d 1356, 1363 (9th Cir. 1985).* Ultimately, a plaintiff must prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id., citing Int'l Bhd. Of Teamsters v. United States, 431 U.S. 324, 336, 97 S.Ct. 1843*. These legal standards also apply to pattern and practice discrimination claims filed under the Washington Law Against Discrimination, *RCW 49.60, et seq. See Oda v. State, 111 Wn.App. 79, 94, 44 P.3d 8 (2002).*

Plaintiff has failed to establish a prima facie case of sex discrimination based on pattern and practice. Morgan Stanley made a showing of an absence of an issue of material fact as to discriminatory intent. In her response, Plaintiff did not address the pattern [*19] and practice claim. The evidence provided in the record in support of this claim appears to be limited to Plaintiff's own statement that "[t]hey're aren't any females with lucrative partnerships with senior brokers", and her statement in her EEOC charge that another female financial advisor was "passed over" by senior brokers. Dkt. 44, at 47, and Dkt. 54-13.

Plaintiff provides no statistical support for her pattern and practice claim, including any evidence reflecting percentage comparisons of male and female partners with "lucrative" joint production agreements. Plaintiff describes only the West-Dodson JPA and the West-Lucero JPA, and no specific comparisons to other JPAs involving female or male financial advisors are provided. Plaintiff admits that female financial advisors employed at Morgan Stanley are parties to joint production agreements, yet has not provided a definition of "lucrative" in a manner that makes it possible to distinguish a typical joint production agreement from a lucrative one. As a result, Plaintiff has not provided evidence that affords a trier of fact the opportunity to determine whether the alleged pattern and practice exists.

Accordingly, the Court should [*20] grant Morgan Stanley's motion for summary judgement in part and dismiss Plaintiff's sex discrimination claim based on pattern and practice under Title VII and *RCW 49.60.180*.

b. Disparate Impact Discrimination Claim.

Plaintiff contends that Morgan Stanley's policy of "allowing established financial advisors to subjectively choose partners for lucrative agreements constitutes disparate impact discrimination against plaintiff because of her sex..." Dkt. 1.

A disparate impact discrimination claim challenges "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Stout v. Potter, 276 F.3d 1118, 1121 (9th Cir. 2002)* (citations omitted). At the outset, the plaintiff making such a claim must make out a prima facie case, and carries the burden of demonstrating that the challenged employment practices produce a significantly discriminatory selection pattern. *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee, 833 F.2d 1334, 1338 (9th Cir. 1987).* "It is not [*21] sufficient to present evidence raising an inference of discrimination...the plaintiff 'must actually prove the discriminatory impact at issue.'" *Stout, 276 F.3d at 1122*. A prima facie case is

"usually accomplished by statistical evidence showing that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants." *Id.*

Plaintiff filed a surreply and requested that Morgan Stanley's motion to dismiss the disparate impact discrimination claim be stricken because Morgan Stanley did not raise this argument in its motion for summary judgment. While Morgan Stanley did not specifically address Plaintiff's disparate impact discrimination claim in its motion for summary judgment, it did move the Court to dismiss *all* of Plaintiff's claims. Plaintiff is thus required to establish a prima facie case of disparate impact discrimination.

Plaintiff has not established a prima facie case of disparate impact discrimination. She has offered no evidence supporting her claim that Morgan Stanley's policy of allowing financial advisors to subjectively choose partners discriminates against women. Plaintiff has provided no statistical evidence [*22] and has not described any partnerships other than the West-Dodson and West-Lucero JPAs.

The Court should grant Morgan Stanley's motion for summary judgment in part and dismiss Plaintiff's disparate impact discrimination claim under Title VII and *RCW 49.60.180* with prejudice.

c. Disparate Treatment Discrimination Claim.

In its motion for summary judgment, Morgan Stanley moves the Court to dismiss Plaintiff's intentional sex discrimination claims because (1) Plaintiff did not suffer an adverse employment action, and (2) Plaintiff is unable to establish that Morgan Stanley's non-discriminatory explanation for offering the partnership to a male was pretext for a discriminatory motive. Dkt. 43, at 19-24.

Under Title VII of the Civil Rights Act of 1964, it is unlawful for an employer to discriminate against an employee on the basis of sex. *See 42 U.S.C. §2000e-2(a).* Disparate treatment discrimination is "the most easily understood type of discrimination...[t]he employer simply treats some people less favorably than others" because of one or more of their protected characteristics. *Hazen Paper Co. v. Biggins, 507 U.S. 604, 609, 113 S.Ct. 1701, 1705, 123 L. Ed. 2d 338 (1993), citing Teamsters v. United States, 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 1855 n.15, 52 L. Ed. 2d 396 (1977).* [*23] "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment...". *Id.*

The three-stage burden-shifting test set forth in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973),* applies to both federal and state claims for disparate treatment discrimination under Title VII and the Washington Law Against Discrimination, *RCW 49.60, et seq. See Coghlan v. American Seafoods Co., LLC., 413 F.3d 1090, 1093-94 (9th Cir. 2005)*; *Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 181, 23 P.3d 440 (2001).*

Under the *McDonnell Douglass* test, the plaintiff must first establish a prima facie case of sex discrimination consisting of the following elements: (1) plaintiff belongs to a protected class; (2) she was performing the job satisfactorily; (3) she suffered an adverse employment action; and (4) other employees with qualifications similar to her own were treated more favorably. *McDonnell Douglas Corp., 411 U.S. at 802.* If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment decisions. *Id.* Once the defendant satisfies this [*24] burden, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for a discriminatory motive. *Id. at 804.* A plaintiff may establish pretext either directly, by showing that unlawful discrimination more likely motivated the employer, or indirectly, by showing that the employer's proffered reason is unworthy of belief. *See Nidds v. Schindler Elevator Corp., 113 F.3d 912, 918 (9th Cir. 1996).*

Prima Facie Case. Morgan Stanley contends that Plaintiff has not established a prima facie case of sex discrimination. Morgan Stanley argues that Plaintiff has not demonstrated that she suffered an adverse employment action because (1) Plaintiff was already a partner to Mr. West, and there was no promise of a more lucrative partnership made to Plaintiff, (2) Plaintiff's employment termination constituted an intervening event which would have otherwise prevented her from inheriting Mr. West's business, and (3) in any event, Morgan Stanley cannot be held liable for actions taken by Mr. West.

An employer may not discriminate against an employee with respect to her compensation, terms, conditions, or privileges of her employment. *See 42 U.S.C. §2000e-2(a)(1).* [*25] If consideration of an employee for selection in a partnership is a term, condition, or privilege of employment, the protections of Title VII apply. *Hishon v. King & Spalding, 467 U.S. 69, 104 S.Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984).*

Plaintiff has established that she suffered an adverse employment action. First, Plaintiff has provided evidence that the partnership offered to Mr. Lucero was more lucrative in terms of compensation than the West-Dodson JPA. See Dkt 54-4 and Dkt. 54-12. Morgan Stanley has not disputed that the West-Lucero JPA was a more lucrative partnership. There is also evidence which suggests that the opportunity to enter into partnerships with finan-

cial advisors may be a privilege of employment at Morgan Stanley, thus triggering the protections of Title VII. Morgan Stanley had a policy of allowing financial advisors to enter into JPAs, and though advisors were permitted to subjectively choose their partners, advisors were ultimately required to obtain Morgan Stanley's approval. Dkt. 43, at 8.

Second, Plaintiff's 2005 employment termination does not constitute an "intervening event" that precludes recovery for the acts of sex discrimination alleged to have taken place in 2003. Plaintiff [*26] has provided evidence that at least some of the benefits of the more lucrative partnership, including a potentially higher income, may have taken effect prior to 2005. *See* Dkt. 54-4 and Dkt. 54-12.

Third, Morgan Stanley has not demonstrated that, as a matter of law, it is not liable for actions taken by Mr. West. Plaintiff has provided evidence that Quang Bui, the branch manager, encouraged the formation of the West-Lucero JPA, and acted on behalf of Morgan Stanley in approving the JPA. *See* Dkt. 54-1 and Dkt. 54-7. In addition, the parties agree that Mr. Bui had authority to approve or reject the agreement, and that a Morgan Stanley regional director had authority to "bless" the agreement. Thus, there exists a material dispute regarding Mr. Bui's involvement in the creation of the West-Lucero JPA, and regarding the issue of Morgan Stanley's liability.

The remaining elements of establishing a prima facie have also been met. Morgan Stanley has not challenged the first element; as a woman, Plaintiff belongs to a protected class. The second element is also met, as a dispute exists as to Plaintiff's performance as it relates to the potential for her selection as a partner. Finally, Plaintiff [*27] has satisfied the final element by providing evidence that Mr. Lucero was less senior and less experienced than Plaintiff but was treated more favorably by being selected for the partnership.

Plaintiff has thus established a prima facie case of sex discrimination under Title VII and *RCW 49.60.180*, and the burden shifts to Morgan Stanley to articulate a legitimate, nondiscriminatory reason for its adverse employment decision.

Morgan Stanley's Nondiscriminatory Explanation. Morgan Stanley has offered a legitimate, nondiscriminatory reason for Mr. West's offering of the partnership to Mr. Lucero. Mr. West stated that he selected Mr. Lucero based on his familiarity with Mr. Lucero's work habits. Mr. West regarded Mr. Lucero as diligent, accessible, and knowledgeable about stocks and trading. Mr. West also expressed negative impressions of Plaintiff's work habits, stating that she received poor customer feedback and was working less hours than Mr. Lucero. *See* Dkt. 54-2.

The burden under *McDonnell Douglass* thus shifts back to Plaintiff to demonstrate that Morgan Stanley's alleged reason for the adverse employment decision is a pretext for a discriminatory motive.

Pretext. Plaintiff contends [*28] that Morgan Stanley's explanation is pretext for a discriminatory motive because Morgan Stanley has provided inconsistent explanations for the formation of the West-Lucero JPA, and because evidence suggests that Mr. Bui "suggested and orchestrated" this partnership. Dkt. 51. In its reply, Morgan Stanley contends that (1) whether or not Mr. Bui was involved in the formation of the West-Lucero JPA is not relevant as to pretext, (2) Plaintiff has failed to raise a triable issue of fact regarding the basis for Mr. West's decision to partner with Mr. Lucero, (3) that Mr. West did not consider Plaintiff for the partnership is not evidence of pretext, and (4) Mr. West's alleged failure to communicate Plaintiff's performance issues is not evidence of pretext. Dkt. 59. Morgan Stanley also argues that even if Mr. Bui and/or Mr. West offered the partnership to Mr. Lucero out of favoritism, or because Mr. Bui and Mr. Lucero were "drinking buddies", Plaintiff has provided no evidence that this favoritism was based on gender. Dkt. 43, at 23. Morgan Stanley further argues that Mr. Bui's alleged requests of Plaintiff to set him up with her female friends cannot be shown to be based on gender. *Id.* [*29] Morgan Stanley contends that the favoritism and efforts to arrange relationships with women are "gender-neutral", and do not affect women any differently than men.

A plaintiff may prove pretext by producing evidence demonstrating that the adverse employment actions were motivated in whole or in part by discriminatory intent. *Dominguez-Curry v. Nevada Transp. Dept., 424 F.3d 1027, 1037 (9th Cir. 2005)*. The plaintiff may meet this burden by demonstrating that the proffered explanation is inconsistent or otherwise unbelievable. *Id.* The plaintiff may offer direct or circumstantial evidence of discriminatory animus. *Id. 1038*. Direct evidence is evidence that proves discriminatory animus without the need for inference or presumption. *Id.* Such evidence typically consists of overtly discriminatory comments or actions by the employer and creates a triable issue for the finder of fact, even if the evidence is insubstantial. *Id.* Circumstantial evidence, which relies upon inferences and presumption, must be both specific and substantial in order to withstand summary judgment. *See id.*

Plaintiff has met its burden of providing evidence of pretext. First, Plaintiff has provided evidence that Morgan [*30] Stanley has provided inconsistent statements in support of its reason for not offering the partnership to

Plaintiff. While Mr. West and Mr. Bui have stated that Mr. West decided on his own volition to offer a partnership to Mr. Lucero, Plaintiff has provided statements by two individuals that Mr. Bui suggested the partnership to Mr. West. According to Plaintiff, Mr. West stated that Mr. Bui "had facilitated for [Mr. West] to partner with [Mr. Lucero]." In addition, Jeffrey Snider, a Vice President and Financial Advisor at Morgan Stanley, stated, "[Mr. Bui] finally admitted that he had suggested [Mr. Lucero]." These statements contradict statements made by Mr. West and Mr. Bui.

Second, Plaintiff stated that when asked why Mr. West had entered into the partnership with Mr. Lucero, Mr. West said, "You know Deborah, good old boys network." Plaintiff has also alleged that Mr. Bui "repeatedly asked" Plaintiff to "arrange contacts and relationships between female friends" of Plaintiff and Mr. Bui. Dkt. 1, pp10.

The inconsistent statements, coupled with the "good old boys" statement and allegations of Mr. Bui's requests to be set up with Plaintiff's female friends, present a triable issue of [*31] fact as to the role Plaintiff's gender may have played in the formation of the West-Lucero JPA. Morgan Stanley has not demonstrated that, as a matter of law, gender could not have played a role in the formation of the West-Lucero JPA. A trier of fact can assess the credibility and weight to be given to the evidence offered by Plaintiff and Morgan Stanley, and can determine whether allegations of favoritism or requests to be set up with female friends are gender-neutral or support a finding of sex discrimination.

The Court should deny Morgan Stanley's motion for summary judgment in part as to Plaintiff's disparate treatment discrimination claim.

d. Conclusion

The Court should dismiss Plaintiff's pattern and practice and disparate impact discrimination claims. Plaintiff's disparate treatment discrimination claim should proceed.

4. **Defamation Claim**

Morgan Stanley moves the Court to dismiss Plaintiff's defamation claim because (1) Morgan Stanley is not liable for alleged statements made by Mr. Lucero, (2) no false statements were made, and (3) Plaintiff was not damaged. Dkt. 43. In her response, Plaintiff contends that summary judgment is not appropriate because (1) Mr. Lucero defamed Plaintiff [*32] by telling her clients that Plaintiff had "overcharged" for her services, (2) Morgan Stanley is liable for Mr. Lucero's statements because the statements were made in the course and scope of his employment, and (3) Plaintiff's damages are presumed under Washington law because Mr. Lucero's statements constitute defamation per se. Dkt. 51. In its reply, Morgan Stanley contends that (1) affidavits submitted by Plaintiff in support of her response are not admissible, (2) any alleged defamatory statements were non-actionable opinion, (3) Plaintiff failed to present any evidence that Morgan Stanley is vicariously liable for alleged statements by Mr. Lucero, and (4) Plaintiff has misstated the law regarding damages, and has not demonstrated that she suffered damages as a result of the alleged statements. Dkt. 59.

a. Plaintiff's Affidavits in Support of Defamation Claim.

In support of her defamation claim, Plaintiff included affidavits from two of her clients in her response to Morgan Stanley's motion for summary judgment. Dkt. 51 and Dkt. 55. The affidavits are signed by Mary Elstrom-Hobson and Jimmie Grant. These clients stated that, after Plaintiff's employment with Morgan Stanley was terminated, [*33] Mr. Lucero contacted them and said that Plaintiff had been "overcharging" for her services. Mr. Lucero is alleged to have made these statements in an effort to persuade the clients to keep their business at Morgan Stanley, rather than maintain Plaintiff as their financial advisor.

Morgan Stanley contends that the affidavits are inadmissible because the affidavits contradict statements made by Plaintiff in her deposition and in response to an interrogatory, and because the statements constitute inadmissible hearsay. Dkt. 59. Morgan Stanley argues that Plaintiff was under an obligation to supplement or correct Plaintiff's prior disclosures or discovery responses once she learned "that in some material respect the information disclosed [was] incomplete or incorrect." *Id.*, at 10, *citing Fed. R. Civ. P. 26(e)(1), (2).*

Prior to her filing of these affidavits, Plaintiff had not provided sufficient evidence to defeat a motion for summary judgment. Plaintiff's own statements that clients had told her that Mr. Lucero made the allegedly defamatory statements constitute inadmissible hearsay. Because the Court cannot consider inadmissible hearsay statements when considering a summary judgment motion, [*34] the issue regarding admissibility of the affidavits must be addressed. *See Dunlap v. Wayne, 105 Wn.2d 529, 536, 716 P.2d 842 (1986).*

The Court should consider the affidavits submitted by Plaintiff. First, the affidavits do not contradict Plaintiff's prior disclosures. In a response to an interrogatory, Plaintiff identified Ms. Elstrom as one of the clients to whom Mr. Lucero made statements, and Mr. Grant is identified by Plaintiff during a deposition. Dkt. 44, at 50. Neither affidavit is inconsistent with Plaintiff's allegations. Plaintiff never explicitly stated that Mr. Lucero *had not* told her clients that she was "overcharging."

Rather, Plaintiff previously stated she didn't know whether Mr. Lucero used the specific word "overcharge." Plaintiff has never deviated from her general position -- that Mr. Lucero either made overt statements or other statements which her clients understood to mean that Plaintiff had been overcharging for her services. While Evidence *Rule 26(e)* imposes a duty upon a party to supplement corrective or incomplete information, it does not impose a duty to supplement information that is consistent.

Second, Morgan Stanley has not made a showing that the affidavits constitute [*35] inadmissible hearsay. As discussed below, Morgan Stanley has not shown that, as a matter of law, Mr. Lucero was not acting within his scope of employment when he made the alleged statements. Thus, the admissibility of the evidence in the affidavits may be determined at trial.

b. Morgan Stanley's Liability.

Morgan Stanley contends that it is not liable for Mr. Lucero's alleged statements.

Under Washington law, "the doctrine of respondeat superior provides, generally, that the master is liable for the acts of his servant committed within the scope or course of his employment." *Dickinson v. Edwards, 105 Wn.2d 457, 466, 716 P.2d 814 (1986), citing Nelson v. Broderick & Bascom Rope Co., 53 Wn.2d 239, 241, 332 P.2d 460 (1958)*. The test for determining whether an employee was in the course of employment is "whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, *or* by specific direction of his employer; *or*, as sometimes stated, *whether he was engaged at the time in the furtherance of the employer's interest. Id., citing Elder v. Cisco Constr. Co., 52 Wn.2d 241, 245, 324 P.2d 1082 (1958)* (emphasis in original).

An employer can defeat a claim of vicarious liability by [*36] showing that the employee's conduct was (1) "intentional or criminal" and (2) "outside the scope of employment." *Robel v. Roundup Corp., 148 Wn.2d 35, 52-53, 59 P.3d 611 (2002), citing Niece v. Elmview Group Home, 131 Wn.2d 39, 56, 929 P.2d 420 (2001)*. An employer may be liable for the negligent acts of his employee, even if such acts may be contrary to an employer's instructions. *Dickinson, 105 Wn.2d at 470*. "Whether an employee was acting within the scope of his employment is an issue of fact which should be considered under the principles of summary judgment." *Id. at 467*.

Morgan Stanley first contends that Plaintiff has failed to present evidence that the statements were made within Mr. Lucero's course of employment. Morgan Stanley further argues that such comments would have been made outside Mr. Lucero's scope of employment because the statements were not authorized by Morgan Stanley. These arguments are unconvincing. Contacting potential clients is within the scope of Mr. Lucero's employment. Mr. Lucero allegedly made these statements, to borrow a description from Morgan Stanley's own brief, "in the context of soliciting potential clients." *See* Dkt. 59, at 11. Morgan Stanley has described one of the duties [*37] of a financial advisor as "increas[ing]...business opportunities...through engaging in proactive and extensive client prospecting of potential consumers...". Dkt. 43, at 8. That Mr. Lucero may have violated company policy by making these statements does not absolve Morgan Stanley from liability as a matter of law.

c. Alleged Defamatory Statements.

Plaintiff contends that Mr. Lucero's alleged statements that Plaintiff "overcharged" clients was defamatory. As a result, Plaintiff maintains that many of her clients did not follow her in her subsequent work as a financial consultant and broker, resulting in lost income and business opportunity and damage to her reputation.

A defamatory statement injures reputation by causing the defamed person to be shunned by others or hurt in business relations. *See Right-Price Recreation, L.L.C. v. Connells Prairie Community Council, 146 Wn.2d 370, 382, 46 P.3d 789 (2002), citing Restatement (Second) Torts, § 559* (1977). "When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a prima facie case on all four elements of defamation: falsity, an unprivileged communication, fault, and damages." *LaMon v. Butler, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989)* [*38] (citations omitted). The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element exists. *Id.*

Morgan Stanley is challenging the falsity, fault, and damages elements.

Falsity. Morgan Stanley contends that Plaintiff's defamation claim fails because Plaintiff has not established that the alleged statements were false. First, in its motion for summary judgment, Morgan Stanley argues that Plaintiff did not have knowledge that Mr. Lucero's comments were untrue because she had not recalled whether Mr. Lucero had actually used the word "overcharge." Morgan Stanley argues that Mr. Lucero merely told clients that he would conduct business differently than Plaintiff, and Plaintiff has offered no evidence that such a statement is untrue. Dkt. 43, at 26. Second, in its reply, Morgan Stanley argues that Plaintiff cannot establish falsity because the alleged statements are non-actionable opinion, rather than false statements of fact. Dkt. 59, at 10.

"Before the truth or falsity of an allegedly defamatory statement can be assessed, a plaintiff must prove that the words constituted a statement of fact, not an opinion." [*39] *Robel v. Roundup Corp., 148 Wn.2d 35, 55, 59 P.3d 611 (2002)*. Defamatory statements concerning facts are actionable, but expressions of opinion are protected under the *First Amendment*, and are not actionable. *See id.* (citations omitted). Whether the allegedly defamatory words were intended as a statement of fact or as an expression of opinion is a threshold question of law for the court. *Id.* The court determines whether a statement was capable of a defamatory meaning, and the jury determines "whether a communication, capable of defamatory meaning, was so understood by its recipient." *Amsbury v. Cowles Pub. Co., 76 Wn.2d 733, 738 (1969)*, citing Restatement Torts § 614.

"To determine whether a statement is actionable, a court should consider at least (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts." *See id. at 56*, citing *Dunlap v. Wayne, 105 Wn.2d 529, 539, 716 P.2d 842 (1986)*. A court should also consider "the degree to which the truth or falsity of a statement can be objectively determined without resort to speculation", and "whether ordinary persons...would perceive the statement as an expression [*40] of opinion rather than a statement of fact." *Benjamin v. Cowles Pub. Co., 37 Wn.App. 916, 923, 684 P.2d 739 (1984)* (citations omitted).

Placing the burden on the plaintiff to prove the falsity of a defamatory statement can create difficulties, however, when "the defamatory charge is not specific in its terms but quite general in nature." *Restatement (Second) Torts, § 613, comment j*. [1]

> 1 Washington courts have cited the Restatement of Torts in several defamation cases. *See e.g., Schmalenberg v. Tacoma News, Inc., 87 Wn.App. 579, 589, 943 P.2d 350 (1997)* (citing *Restatement (Second) Torts § 613(2), comment g*).

Plaintiff has demonstrated falsity for the purpose of establishing a prima facie case of defamation. First, Plaintiff has alleged a statement that is capable of a defamatory meaning. While Morgan Stanley has characterized the alleged "overcharging" statement as a "sales pitch", there is a triable issue of fact as to how Mr. Lucero's statements would be perceived by an ordinary client. Mr. Lucero's statement could be reasonably interpreted as signifying simply that he planned to charge clients less than Plaintiff, but the statement could just as reasonably be interpreted as implying that Plaintiff's charging [*41] practices were improper, and possibly in violation of Morgan Stanley's policies or even applicable law.

Second, Plaintiff has alleged a statement that may be based on facts. Morgan Stanley compares Mr. Lucero's alleged statements to cases where spoken words such as "idiot" or "liar" were found to be abusive opinion that were not actionable as defamatory. Dkt. 59, at 10. Mr. Lucero's statements differ, however, because Mr. Lucero referred to the specific charging practices of Plaintiff, rather than merely characterizing her business practice in general terms.

Finally, Plaintiff has met her burden in establishing a prima facie case that the overcharging statement is false. While Plaintiff has not provided evidence of her charging practices demonstrating that she had never overcharged clients, the evidence in the record nonetheless creates an issue of fact. First, Morgan Stanley has not argued that Plaintiff had been overcharging customers. None of the complaints in the record concerning Plaintiff's work performance suggested that she was charging clients improperly. Second, the statements alleging that Plaintiff was "overcharging for her services" is general in nature because it is not [*42] clear what Mr. Lucero may have meant by stating that Plaintiff was "overcharging." At this stage of the litigation, it would be unfair to require Plaintiff to prove that she never overcharged any client, without any specific incidents identified by Mr. Lucero. *See Restatement (Second) Torts, § 613, comment j* ("Suppose, for example, that a newspaper publishes a charge that a storekeeper short-changes customers...[how is the storekeeper] expected to prove that he has not short-changed customers?")

Fault and Damages. In its motion for summary judgment, Morgan Stanley contends that summary judgment is appropriate because Plaintiff has not demonstrated that she suffered any damages as a result of Mr. Lucero's alleged statements. Plaintiff contends that Mr. Lucero's statements constitute defamation per se, and damages are therefore presumed under Washington law. In its reply, Morgan Stanley contends that Plaintiff has "resorted to misstating the law" concerning defamation per se, and argues that absent a showing of actual malice, Plaintiff was required to show actual injury.

The standard of fault in a defamation case depends on the nature of the plaintiff. If the plaintiff is a public figure [*43] or official, the plaintiff must show actual malice. *LaMon, 112 Wn.2d at 197*. If the plaintiff is a private figure, the plaintiff need only show negligence. *Id.* A defamatory statement is defamatory per se if it injures the plaintiff in his or her business, trade, profession, or office. *See Maison de France, L.T.D. v. Mais Oui!, Inc., 126 Wn.App. 34, 44-45, 108 P.3d 787 (2005), citing*

Caruso v. Local Union No. 690 of Int'l Brotherhood of Teamsters, 100 Wn.2d 343, 670 P.2d 240 (1983).

A statement alleging that a plaintiff committed a criminal offense involving moral turpitude has been held to be "clearly" defamatory per se. *See Caruso, 100 Wn.2d at 353*. But when the definition of what is defamatory per se "goes far beyond the specifics of a charge of a crime, or of unchastity in a woman, into the more nebulous area of what...deprives a plaintiff of social intercourse...the matter of what constitutes libel per se becomes, in many instances, a question of fact for the jury." *See id. at 354*.

Prior to 1974, Washington courts permitted presumed damages when defamation per se had been shown. *See Maison de France, 126 Wn. App. at 54* (citations omitted). In 1974, the United States Supreme Court held that the *First Amendment* restricted [*44] the damages that a private individual could obtain from a publisher for libel that involved a matter of public concern. *Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)*. In this situation, presumed damages was ruled to be impermissible unless the plaintiff could show "actual malice." *Id.* Relying on *Gertz*, the Washington Supreme Court in 1983 held that a jury instruction that allowed a jury to presume damages when a plaintiff has not shown actual malice violated the *First Amendment*. *See Caruso, 100 Wn.2d at 354*.

Shortly after *Caruso*, the United States Supreme Court narrowed the *Gertz* rule, holding that in matters that do not involve matters of public concern, and where the state interest adequately supports awards of presumed damages, the *First Amendment* does not require a plaintiff to show actual malice. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985)*. In 2005, the Washington Court of Appeals held that "where no matters of public concern are involved, presumed damages to a private plaintiff for defamation without proof of actual malice may be available" and stated that it "believ[ed] that the [Washington] Supreme Court will agree with [its] adoption of *Dun* [*45] *& Bradstreet." Maison de France, 126 Wn. App. at 54. See also Demopolis v. Peoples Nat. Bank of Washington, 59 Wn.App. 105, 116, 796 P.2d 426 (1990)* ("The lessened protection *Dun & Bradstreet* affords defamatory communications made in private disputes has been recognized by Washington courts, but not expressly adopted").

This Court adopts the holding of *Maison de France*. Mr. Lucero's statements do not involve a matter of public concern, so damages may be presumed under Washington law if Plaintiff can demonstrate that the statements constitute defamation per se. The defamation claim should proceed because there exists a triable issue of fact as to whether Mr. Lucero's alleged statement that Plaintiff overcharged clients constitutes defamation per se. Plaintiff has alleged that Mr. Lucero's statements may have induced at least some of her clients to remain with Morgan Stanley, which may support her argument that her business was injured as a result of the statements. While this Court is skeptical about Plaintiff's ability to demonstrate that Mr. Lucero's statements are defamatory per se, or that damages in this case would be proper absent a showing of actual damages, Plaintiff's defamation per se claim [*46] may proceed.

Thus, the Court should deny Morgan Stanley's motion for summary judgment as to Plaintiff's defamation claim.

PARTIES' BRIEFING

The parties should limit their briefs to factual and legal arguments. The Court is not interested in characterizations of the either party's arguments as "desperate", "absurd", or the like.

ORDER

Therefore, it is hereby

ORDERED that Defendant's Motion for Summary Judgment (Dkt. 43) is **GRANTED IN PART AND DENIED IN PART,** as follows: (1) Plaintiff's promissory estoppel claim is **DISMISSED WITH PREJUDICE;** (2) Plaintiff's claim for interference with business expectancy is **DISMISSED WITH PREJUDICE;** (3) Plaintiff's claim alleging pattern and practice discrimination under Title VII and *RCW 49.60.180* is **DISMISSED WITH PREJUDICE;** (4) Plaintiff's claim alleging disparate impact discrimination under Title VII and *RCW 49.60.180* is **DISMISSED WITH PREJUDICE;** (5) Plaintiff's claim alleging disparate treatment discrimination under Title VII and *RCW 49.60.180* may proceed; and (6) plaintiff's claims alleging defamation may proceed.

The Clerk of the Court is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said [*47] party's last known address.

DATED this 8th day of November, 2007.

/s/ Robert J. Bryan

ROBERT J. BRYAN

United States District Judge