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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

RHONDA ARNOTH,	)	
	)	
Plaintiff,	)	Case No. CV 09-241-HU
	)	
v.	)	
	)	OPINION AND
DHL EXPRESS (U.S.A.), INC.,	)	ORDER
	)	
Defendant.	)	

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 Attorney for plaintiff

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 Laura P. Jordan  
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 111 S.W. Fifth Avenue, Suite 1250  
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 Attorneys for defendant

HUBEL, Magistrate Judge:

This is an action by Rhonda Arnoth against DHL Express U.S.A., Inc. (DHL), asserting claims for injured worker discrimination and failure to reinstate, in violation of Or. Rev. Stat. §§ 659A.040, 659A.043, and 659A.046; and for disparate treatment sex

1 discrimination under Or. Rev. Stat. 659A.030 (a) and (b). She seeks  
2 damages for past and future lost wages and benefits; compensatory  
3 damages for emotional distress; and reinstatement to her former  
4 position or a comparable one.

5 Arnoth worked for DHL in the Portland station as a Field  
6 Service Supervisor, the only female in that position at the time of  
7 her termination. On December 20, 2007, Arnoth filed a worker's  
8 compensation claim, which DHL accepted on February 19, 2008. On  
9 February 14, 2008, she was released to return to modified work  
10 duty, but DHL terminated her on February 13, 2008, as part of a  
11 reduction in force (RIF). Arnoth alleges that she had more  
12 seniority than other Field Service Supervisors in Portland who were  
13 not laid off, and that none of the male Field Service Supervisors  
14 at the Portland station lost his job when she did.

15 DHL moves for summary judgment on all claims.

#### 16 **Factual Background**

17 Arnoth was hired at the Portland station in May 2006. She was  
18 one of six Field Services Supervisors at the Portland station, the  
19 only female in that position. Two of the Field Services Supervisors  
20 were hired before Arnoth, and three were hired after she was.  
21 Declaration of Stephen Quimby ¶ 4; Declaration of Katelyn Oldham,  
22 ¶ 8, Exhibits 6 and 7. Arnoth reported to District Field Services  
23 Manager (DFSM) Ardeen Porter. Declaration of Laura Jordan Exhibit  
24 1 (Pltf. dep.) 75:23-76:8. During Arnoth's employment, the Portland  
25 station operated Monday through Saturday. Quimby Declaration ¶ 5.  
26 There were three supervisor shifts on weekdays: an opening shift,  
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1 a midday shift, and a closing shift. Id. During weekday shifts,  
2 each supervisor was responsible for supervising particular aspects  
3 of the operation, including the inbound and outbound sort, the  
4 ramp, the drivers, and the agents. Id. Supervisors were also  
5 expected to fill in as needed, depending on the needs of the  
6 station. Id.

7 The Saturday shift had only one shift with one supervisor,  
8 because fewer employees worked on Saturdays and fewer packages  
9 moved through the facility, compared to weekdays. Pltf. dep. 80:7-  
10 13; 81:2-4. The supervisor assigned to the Saturday shift worked  
11 Tuesday through Saturday, while the other supervisors worked Monday  
12 through Friday. Quimby Declaration ¶ 6. Supervisors' pay did not  
13 vary on the basis of their shifts, nor did assignment to the  
14 Saturday shift affect a supervisor's opportunities for advancement  
15 within the company. Quimby Declaration ¶ 6. However, Arnoth asserts  
16 that the Saturday supervisor job was less desirable because the  
17 Saturday supervisor operated alone, had no support, and did not  
18 interact with other supervisors or the DFSM. Quimby Declaration ¶  
19 6; Pltf. dep. 8:18-9:9; 160:12-14.

20 The duties of Field Services Supervisors changed depending on  
21 the needs of the station. At various times, Arnoth was in charge of  
22 inbound operations, outbound operations, check ride supervision,  
23 and supervision of the Saturday shift. Quimby Declaration ¶ 5;  
24 pltfs. dep. 70:10-17; 79:20-80:6.

25 In July 2007 Porter transferred to another station.  
26 Declaration of David Grudin ¶ 4. In late September or October 2007,  
27

1 Stephen Quimby became the new DFSM for the Portland station.  
2 Quimby Declaration ¶ 2; pltfs. dep. 77:25-78:3. During the interval  
3 between Porter's transfer and Quimby's arrival, station manager  
4 Chris Rooney supervised the Field Services Supervisors. Pltfs. dep.  
5 77:25-78:3.

6 Rooney assigned Arnoth to the Saturday shift, telling her he  
7 needed someone with her experience for that shift. Pltfs. dep.  
8 11:24-12:1; 12:14-19. Arnoth has testified that "past practice"  
9 dictated that the least senior supervisor assume Saturday shift  
10 duties. Id. at 13:22-14:3. During Arnoth's tenure at DHL, the  
11 Saturday shift position was occupied by Arnoth, two other women,  
12 and one man. Pltf. dep. 14:4-18:6.

13 Quimby supervised Arnoth for approximately three months,  
14 October, November, and December 2007 prior to her injury on  
15 December 20, 2007. When Quimby became DFSM, he did not change the  
16 schedules of the Field Services Supervisors. Quimby Declaration ¶7.  
17 Accordingly, Arnoth continued to work Tuesday through Saturday. Id.

18 Arnoth has testified that in October 2007, Quimby assigned her  
19 to dispatch duties, which "made for 12 hour days." Pltf. dep.  
20 10:14-24. According to Arnoth, Quimby's stated reason for assigning  
21 her to dispatch was to cover for the regular dispatcher while she  
22 was out on maternity leave. Arnoth Declaration ¶ 4. Arnoth states  
23 that she believes other administrative staff could have performed  
24 these duties, and that by the time of her injury, December 20,  
25 2007, and even by the time of her termination in February 2007, the  
26 regular dispatcher had still not gone on maternity leave. Id.

1 Arnoth states that none of the male supervisors was assigned to  
2 dispatch. Id. Arnoth also states that to her knowledge, none of  
3 the male supervisors was required to dispatch on Monday, her day  
4 off. Id.

5 Arnoth has testified that in October 2007, Quimby yelled at  
6 her in front of staff, see Arnoth Declaration ¶ 7,<sup>1</sup> and during  
7 supervisors' meetings, and that he began to exclude her from  
8 supervisors' meetings, the frequency of which declined from weekly  
9 to "maybe once a month." Id. 23:15-21; 26:1-8.<sup>2</sup> However, Arnoth  
10 made no complaints to management about Quimby's treatment of her.  
11 Quimby Declaration ¶ 8; Grudin declaration ¶ 5.

12 Arnoth states in her declaration that when she was assigned  
13 dispatch duties, she told Quimby it would be difficult to reconcile  
14 dispatching with her other job duties requiring that she be in the  
15 field for periods of three to eight hours at a time. Arnoth  
16 Declaration ¶ 5. Arnoth states that other supervisors were not  
17 required to spend as much time in the field, and could more easily  
18 have handled dispatching. Id. Quimby refused her request to assign  
19 some of her duties to other supervisors. Id.

20 In November 2007, DHL announced elimination of its domestic  
21 express service and ground services, which were phased out in 2008

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22  
23 <sup>1</sup> Arnoth also states in her declaration that she saw Quimby  
24 yell at Porter during a meeting, and that drivers frequently  
25 complained to her about Quimby's "communication style." Id. at ¶  
26 7.

27 <sup>2</sup> Arnoth has testified that meetings usually occurred once a  
28 week, but that they were held only about once a month during  
DHL's busy season, November and December. Pltf. dep. 26:4-8;  
50:7-9.

1 and discontinued entirely by January 2009. Declaration of Kelly  
2 Aguilar ¶¶ 3, 4.

3 On December 15, 2007, Arnoth was given an oral warning for  
4 failure to ensure delivery of Saturday Nordstrom shipments in  
5 October 2007 and December 2007. The warning was documented as a  
6 "Corrective Action." Quimby Declaration ¶ 10, Exhibit 3; Oldham  
7 Declaration, Exhibit 3. Arnoth has testified that Quimby did not  
8 discipline male supervisors who were responsible for failed  
9 Nordstrom deliveries. Pltf. dep. 24:22-25:25.

10 On December 20, 2007, Arnoth injured her hip and wrist when  
11 she tripped and fell over a box at work. Pltf. dep. 36:16-37:16;  
12 38:2. She sought medical treatment the following day and was taken  
13 off work for right wrist strain and contusion of the right hip, see  
14 Mantilla Declaration, Exhibit 1, because Arnoth's commute was long  
15 enough to cause her leg to go numb. Pltf's dep. 39:3-6, 16-24;  
16 43:7-13. Arnoth was off work on medical leave from December 21,  
17 2007 to February 14, 2008. Declaration of Lucia Mantilla ¶ 4,  
18 Exhibit 2.

19 Mantilla states that based on her experience as a claims  
20 specialist, she thought Arnoth's claim involved a relatively light  
21 incident that should not have resulted in such an extended period  
22 of time off work. Id. She states further that orthopedic guidelines  
23 for treatment of injuries such as Arnoth's contemplate that the  
24 patient will be medically stationary within 30 days of the injury.  
25 Id. See also Exhibit 3, p. 7 (opinion of neurosurgeon Paul Williams  
26 that "[t]reatment or four weeks after the injury is appropriate,  
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1 reasonable, and necessary for a right wrist strain and a contusion  
2 of the right hip and leg"). Mantilla investigated Arnoth's claim,  
3 including arranging for an independent medical examination (IME),  
4 a procedure Mantilla ordered in the majority of the claims she  
5 handled for DHL. Id.

6 The physician who performed the IME, Paul Williams, M.D.,  
7 concluded that Arnoth was medically stationary and immediately  
8 capable of performing her job without restriction as of the date of  
9 her examination, January 29, 2008. Id. at ¶ 6. Mantilla states that  
10 she sent Dr. Williams's report to Arnoth's attending physician, who  
11 concurred with Dr. Williams, but did not send in the concurrence  
12 until March 7, 2008. Id. at Exhibit 3.

13 After receiving the attending physician's concurrence,  
14 Mantilla proceeded to close Arnoth's worker's compensation claim.  
15 Id. at ¶ 7. On March 11, 2008, Mantilla mailed Arnoth a notice of  
16 claim closure via certified mail, which confirmed that Arnoth was  
17 released to work with no restrictions. Id.; Exhibit 4.

18 Meanwhile, in January 2008, David Grudin in HR received word  
19 from the corporate office that DHL was beginning the process of  
20 making significant labor reductions, with the first round of  
21 layoffs to occur on February 12 and 13, 2008. Grudin Declaration ¶  
22 6. The decision about how many employees would be laid off from  
23 each station, and what type of employee, was made on a corporate  
24 level outside Portland, not at the station level. Id. The corporate  
25 directive required the Portland station to eliminate one Field  
26 Services Supervisor. Id. Grudin states that as part of the process,

1 he was provided with characteristics to be assessed in determining  
2 which employees would be selected for the first round of layoffs.

3 Id.

4 Grudin worked with regional managers and District Field  
5 Services managers, including Quimby from the Portland station, to  
6 obtain information about the employees, which included categories  
7 of past performance, current performance, critical skills, and  
8 competencies. Id. at ¶ 7. Critical skills that were assessed  
9 included an employee's leadership abilities, job knowledge, and  
10 ability to achieve service goals and maintain productivity  
11 standards. Id. Competencies that were assessed included, among  
12 other things, an employee's skills and abilities in the areas of  
13 communication, organization, and management. Id. Seniority was not  
14 a consideration. Id. The scoring criteria were primarily  
15 subjective, with employees being rated on a scale of zero to three.  
16 Oldham Declaration, Exhibit 9.

17 Quimby rated his subordinates and gave his ratings to Grudin.  
18 Quimby Declaration ¶ 12. Quimby gave Arnoth the lowest rating among  
19 the Field Services Supervisors. Id.<sup>3</sup> Grudin entered data from  
20 Quimby onto a spreadsheet, which generated an overall rating for  
21 each employee. Grudin Declaration ¶ 8. Out of a possible 21 total  
22 points, Arnoth was given eight points. All of the male Field  
23 Services Supervisors were ranked higher, with four receiving 11 out

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25 <sup>3</sup> Arnoth's 2006 Performance Evaluation, completed by Porter  
26 and signed by Arnoth in March 2007, gives her an overall  
27 performance rating of "fully meets," but with scores in some  
28 areas of "partially meets." Jordan Declaration, Exhibit 3, p. 2.



1 of 21 points, and another receiving 13 points. Id.

2 The first round of layoffs was February 12-13, 2008. According  
3 to Grudin's Declaration, during this first round, approximately 25  
4 supervisors and managers in DHL's western area were laid off,  
5 including 19 male supervisors and managers, six of whom were male  
6 Field Services Supervisors. Id. at ¶ 10. On February, 13, 2008,  
7 Quimby and Grudin called Arnoth to inform her that her position was  
8 being eliminated. It is not disputed that Arnoth was the only Field  
9 Services Supervisor at the Portland station laid off in this round.  
10 Arnoth received three weeks of severance pay, based on her length  
11 of service (two years) with DHL. Id. According to Quimby, in  
12 subsequent rounds of layoffs, three more Field Services Supervisors  
13 lost their jobs at the Portland station: Ryan Cook, laid off in  
14 October 2008, Corey Hester, laid off in February 2009, and Trent  
15 Larsen, laid off in March 2009. Quimby states that when he left DHL  
16 in March 2009, only two Field Services Supervisors remained at the  
17 Portland station. Quimby Declaration ¶ 13. The number of employees  
18 at the Portland station eventually declined from 114 on January 1,  
19 2006, to 33 as of November 2009. Aguilar Declaration ¶ 4.

20 **Discussion**

21 1. Sex discrimination disparate treatment claim

22 a. Prima facie case

23 A prima facie case of disparate treatment under Oregon's  
24 discrimination statutes is the same as that for Title VII.  
25 Henderson v. Jantzen, 79 Or. App. 654, 657 (1986). The prima facie  
26 elements of the disparate treatment case are, first, that plaintiff  
27

1 is a member of a protected class; second, that she was meeting the  
2 employer's legitimate expectations; third, that she experienced an  
3 adverse employment action; and fourth, that similarly situated  
4 individuals outside her protected class were treated more  
5 favorably, or other circumstances surrounding the adverse action  
6 give rise to an inference of discrimination. Godwin v. Hunt Wesson,  
7 Inc., 150 F.3d 1217, 1220 (9<sup>th</sup> Cir. 1998). DHL asserts that Arnoth  
8 has not shown that she experienced an adverse employment action or  
9 that similarly situated males were treated more favorably.

10 In the context of a discrimination claim, adverse employment  
11 action is construed more narrowly than in the context of a  
12 retaliation claim, and is limited to "actions that affect  
13 employment or alter the conditions of the workplace." Burlington N.  
14 & Santa Fe Rwy. Co. v. White, 126 S.Ct. 2405, 2411 (2006); Kang v.  
15 U. Lim Am., Inc., 296 F.3d 810, 818-19 (9<sup>th</sup> Cir. 2002). DHL asserts  
16 that none of the circumstances complained of by Arnoth constituted  
17 an adverse employment action.

18 The areas in which Arnoth asserts she was treated differently  
19 from the male Field Services Supervisors are 1) exclusion from  
20 supervisory meetings; 2) assignment to dispatch duties; 3) being  
21 given no assistance with the safety manager aspects of her job; 4)  
22 continual assignment to the Saturday shift; 5) being disciplined  
23 for minor issues when other male supervisors were not disciplined  
24 for more serious issues; 6) receiving a lower rating than male  
25 comparators who were less experienced and or had more performance  
26 deficiencies; and 7) being selected for termination based on that

1 lower rating.

2 Arnoth asserts that shortly after Quimby arrived, he began  
3 excluding her from supervisory meetings, on the ground that he  
4 wanted her to dispatch. Arnoth Declaration ¶ 3. Arnoth states that  
5 Quimby's exclusion of her from supervisory meetings was detrimental  
6 to her ability to perform her job because crucial information was  
7 exchanged, and the meetings provided an opportunity to speak with  
8 and listen to peers and upper level management. Arnoth Declaration  
9 ¶¶ 2-3. DHL challenges this testimony, pointing out that Arnoth  
10 acknowledges supervisors' meetings were held only about once a  
11 month during the busy season, between November and January. Arnoth  
12 Declaration ¶ 2. Thus, for two of the three months Quimby  
13 supervised Arnoth (November and December), meetings occurred only  
14 once a month. DHL also points to the absence of evidence that  
15 Arnoth's absence from the meetings had any effect on her pay,  
16 benefits, or opportunities for advancement. Quimby Declaration ¶ 6.

17 With respect to the assignment of dispatch duties, Arnoth  
18 contends that dispatch could have been performed by another  
19 nonsupervisory employee. Quimby's stated reason for assigning  
20 dispatch to Arnoth was that the regular dispatcher was expected to  
21 be out on scheduled maternity leave, but Arnoth states that the  
22 dispatcher had still not taken her leave when Arnoth was injured in  
23 December 2007. Arnoth also asserts that on Mondays, her day off,  
24 Quimby did not assign any of the male supervisors to dispatch.  
25 Arnoth has stated that dispatch was a hardship for her, because it  
26 conflicted with other job duties requiring her to be out in the

1 field, and "made for 12 hour days."

2 DHL counters that Arnoth has produced no evidence that the  
3 dispatch assignment affected the terms and conditions of her  
4 employment including pay, benefits, or opportunities for  
5 advancement, nor any evidence that Arnoth's pay was docked or that  
6 she was disciplined for not being in the field. DHL also points to  
7 evidence from Quimby that Field Services Supervisors typically  
8 worked 12 hour days, so Arnoth's statement that dispatch duties  
9 "made for 12 hour days" does not distinguish her from her male  
10 comparators. Quimby Declaration ¶ 6. Arnoth herself testified that  
11 other supervisors worked similarly long days (11 hours). Pltf. dep.  
12 9:8-24. I find no evidence in the record that Arnoth worked more  
13 hours than any male Field Services Supervisor.

14 Arnoth asserts that Quimby denied her request for assistance  
15 with the safety manager aspects of her job. Arnoth Declaration ¶  
16 5. Arnoth does not specify what her specific request was. DHL  
17 points to evidence that supervisors often asked for assistance with  
18 one aspect or another of their jobs. Jordan Reply Declaration  
19 Exhibit 2 (Quimby dep.) 73:10-13. Quimby also testified that he  
20 supplied Arnoth with contact information for experts within DHL who  
21 could assist her, Quimby dep. 72:19-73:3, and that Arnoth  
22 participated in a weekly 90-minute conference call facilitated by  
23 regional safety manager Kelly Tatum, in which safety supervisors  
24 from each station in Ms. Tatum's region would call in to discuss  
25 pending worker's compensation claims. Jordan Reply Declaration,  
26 Exhibit 3 (Tatum dep.) 41:1-17; 42:6-19. DHL points to the absence

1 of any evidence that a failure to provide Arnoth assistance with  
2 her safety duties adversely affected Arnoth's pay, benefits or  
3 opportunities for advancement.

4 Arnoth contends that she was treated unfairly when she  
5 requested relief from the Saturday shift. Arnoth states in her  
6 declaration that when Porter had been DFSM, she had rotated this  
7 shift. Arnoth Declaration ¶ 6. Arnoth states that she told Rooney  
8 she would rather not work the Saturday shift so that she could  
9 attend her son's sporting events, which typically occurred on  
10 Saturdays. Id. In support of her assertion that Saturday shifts  
11 constituted treatment unfair to her, she points to evidence that  
12 after her termination, the Saturday shift was not reassigned to one  
13 of the five remaining male supervisors, but became rotational.  
14 Oldham Declaration, Exhibits 23 and 24.

15 DHL challenges Arnoth's assertion that working the Saturday  
16 shift was an adverse employment action that required Arnoth to  
17 assume additional responsibilities not borne by the other  
18 supervisors and affected her opportunity for promotion because her  
19 manager was not at work on Saturdays. DHL asserts that it  
20 necessarily follows from Arnoth's assertions that assigning anyone  
21 to the Saturday shift would constitute an adverse employment  
22 action. DHL also argues that Arnoth has overlooked her other four  
23 workdays, which were weekdays, a difference of only one day in  
24 comparison to her male comparators. But DHL's arguments fail to  
25 address Arnoth's assertion that the Saturday supervisor shift was  
26 not rotated among the other supervisors when she had it.

1 Arnoth asserts that during her employment she was subjected to  
2 yelling and profane language from Quimby, and states that while she  
3 does not assert a claim of hostile work environment, Quimby yelled  
4 at Arnoth and other women, including Porter, but did not treat male  
5 employees the same way. Pltf. dep. 23:15-24:25. DHL does not  
6 dispute this assertion, but counters that yelling does not rise to  
7 the level of an adverse employment action. Nunez v. City of Los  
8 Angeles, 147 F.3d 867, 875 (9<sup>th</sup> Cir. 1998) (threats and harsh words  
9 insufficient to constitute adverse employment action).

10 Arnoth asserts that she was disciplined by Quimby for conduct  
11 that would not have been disciplined when engaged in by male  
12 employees. Arnoth refers to the oral warning she was given about  
13 the Nordstrom packages in October and December 2007, and asserts  
14 that the first of these errors was caused by a driver's error.  
15 Quimby Declaration, Exhibit 1. Arnoth acknowledges that the missed  
16 Nordstrom shipment in December was her responsibility, but has  
17 testified that there were "issues" with Nordstrom shipments that  
18 the Portland station was "working on," and that e-mails from  
19 executives throughout the company indicated that DHL and Nordstrom  
20 were working together on these "issues." Pltf. dep. 92:12-93:2;  
21 158:3-18. DHL asserts that the oral warning is the lowest level of  
22 corrective action, see Quimby dep. 71:2-10, and did not constitute  
23 an adverse employment action.

24 When the evidence pertaining to Arnoth's assignment to  
25 dispatch duties and the Saturday shift on a non-rotational basis,  
26 Quimby's yelling at her, her exclusion from meetings apparently in  
27

1 part because of being required to do dispatch, and receiving the  
2 lowest rating on the RIF matrix, is considered along with the fact  
3 that the Field Services Supervisor selected for layoff at the  
4 Portland station was its only female Field Services Supervisor,  
5 while three males with less experience remained, it is sufficient  
6 to satisfy Arnoth's burden of showing that she was treated  
7 differently from similarly situated male Field Services  
8 Supervisors. Her termination was unquestionably an adverse  
9 employment action. I conclude that Arnoth has made out a prima  
10 facie case of sex discrimination.

11 b. Nondiscriminatory explanation

12 DHL can rebut Arnoth's prima facie case by producing a  
13 legitimate, nondiscriminatory explanation for Arnoth's termination.  
14 St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993). DHL  
15 must produce evidence, not merely express an argument. Rodriguez v.  
16 GMC, 904 F.2d 531, 533 (9<sup>th</sup> Cir. 1990). DHL contends that Arnoth was  
17 terminated for a non-discriminatory reason, i.e., the company-wide  
18 RIF of which Arnoth was a part. It has produced evidence of the  
19 RIF.

20 c. Pretext

21 DHL has produced a legitimate, nondiscriminatory explanation  
22 for Arnoth's termination; the burden shifts back to her to produce  
23 evidence that the DHL's proffered nondiscriminatory reason is  
24 pretextual. On summary judgment, Arnoth's burden is only to produce  
25 enough evidence to allow a reasonable factfinder to conclude that  
26 her termination was motivated by discrimination. Peterson v.

1 Hewlett Packard Co., 358 F.3d 599, 603 (9<sup>th</sup> Cir. 2004); Warren v.  
2 City of Carlsbad, 58 F.3d 439, 443 (9<sup>th</sup> Cir. 1995). This may be  
3 accomplished "either directly by persuading the court that a  
4 discriminatory reason more likely motivated the employer or  
5 indirectly by showing that the employer's proffered explanation is  
6 unworthy of credence." Texas Dep't of Community Affairs v. Burdine,  
7 450 U.S. 248, 256 (1981).

8 The mere fact that she was terminated as part of a RIF does  
9 not foreclose Arnoth's claims. Circumstantial evidence can show  
10 that a supervisor's RIF scores were pretextual, particularly for  
11 evaluations in "soft-skill" categories such as "communication/  
12 leadership." EEOC v. Boeing Company, 577 F.3d 1044, 1052 (9<sup>th</sup> Cir.  
13 2009). Arnoth's own testimony about why her low scores were wrong,  
14 mistaken, or unworthy of credence is also evidence. Id.

15 As discussed, Arnoth has produced evidence that she was  
16 treated differently from the male supervisors in several respects,  
17 particularly by Quimby. Quimby's ratings of Arnoth, assessed after  
18 less than three months as her superior, were almost entirely based  
19 on "soft-skill" categories, including the possession of unspecified  
20 "unique skills;" "leadership," including "[m]aintain[ing] the  
21 "self-confidence and self-esteem of others;" "customer service  
22 orientation;" "teamwork and collaboration;" "initiative and  
23 adaptability;" and "communication," including "nonverbal  
24 communication." These qualities were rated on a scale defined by  
25 other soft criteria, such as "less than fully competent in some or  
26 most skills and abilities," (zero) and "currently less than fully



1 competent in some skills and abilities [but]... is able to meet  
2 most aspects of the job requirements and with additional training  
3 and/or experience can meet the expectations of the job" (one). See  
4 Oldham Declaration Exhibit 9.

5 Arnoth has produced sufficient evidence to allow a reasonable  
6 factfinder to conclude that her termination was motivated by sex  
7 discrimination. DHL's motion for summary judgment on this claim is  
8 denied.

9 2. Injured worker discrimination claim

10 A prima facie case of unlawful termination based on injured or  
11 status requires the following: 1) that plaintiff invoked the  
12 workers compensation system; 2) that she experienced an adverse  
13 employment action; and 3) a causal link exists between the two. See  
14 Williams v. Freightliner, LLC, 196 Or. App 83, 90 (2004). The  
15 McDonnell Douglas framework applies to such claims. Scott v. Sears,  
16 Roebuck & Co., 395 F.Supp.2d 961, 981 (D. Or. 2005).

17 To satisfy the causal element, Arnoth must show that  
18 invocation of the workers compensation system was a "factor that  
19 made a difference" in DHL's decision to terminate her employment.  
20 Dickison v. Wal-Mart Stores, Inc., 2007 WL 1959287 \*3 (D. Or. July  
21 2, 2007). Temporal proximity between the filing of a worker's  
22 compensation claim and a subsequent adverse employment action,  
23 without more, does not establish the required causal connection  
24 between the two events. Hardie v. Legacy Health System, 167 Or.  
25 App. 425, 433 (2000); Kotelnikov v. Portland Habilitation Center,  
26 545 F. Supp. 2d 1137 (D. Or. 2008).

1 Arnoth asserts that Mantilla's investigation into her worker's  
2 compensation claim is sufficient to demonstrate discriminatory  
3 animus. DHL counters with Mantilla's testimony that she  
4 investigated numerous claims in the same manner as Arnoth's,  
5 ordering an IME in 90% of the claims she handled for DHL. Jordan  
6 Reply Declaration, exhibit 4 (Mantilla dep.) 132: 23-25; 133:7-9,  
7 13-15. DHL also points out that Arnoth's worker's compensation  
8 claim was accepted, and closed only after Arnoth's physician  
9 concurred in the opinion of the IME doctor.

10 Arnoth also relies on the timing between her injury and her  
11 termination date to create an inference of discrimination. See  
12 Coszalter v. City of Salem, 320 F.3d 968, 978 (9<sup>th</sup> Cir. 2003)  
13 (timing alone does not support inference of discrimination;  
14 additional evidence of surrounding circumstances must support such  
15 an inference). DHL argues that Arnoth has not produced additional  
16 evidence of supporting circumstances that support an inference of  
17 discrimination, and that it has produced evidence that neither  
18 Quimby, nor Grudin chose the layoff date, and that many DHL  
19 employees, including males, were laid off the same day as Arnoth.  
20 I conclude that Arnoth has no evidence to support worker's  
21 compensation discrimination except for timing, which is  
22 insufficient. DHL is entitled to summary judgment on this claim.

### 23 3. Failure to Reinstate or Reemploy

24 Under Oregon law, reinstatement rights do not arise if the  
25 employer establishes that the worker was discharged from her pre-  
26 injury position for reasons unrelated to the injury or her worker's  
27

1 compensation claim. Lane County v. State, 104 Or. App. 372, 377  
2 (1990); see also OAR 839-006-0131(1)(g), OAR 839-006-0136(7).

3 DHL argues that Arnoth's status as an injured worker did not  
4 preclude DHL from considering her for the 2008 layoffs. The  
5 regulations implementing Or. Rev. Stat. §659A.043 state that an  
6 injured worker has "has no greater right to a position or other  
7 employment benefit than if the worker had not been injured." OAR  
8 839-006-0130(10); 839-006-0135(12). Arnoth has not responded to  
9 this argument in her papers.

10 Additionally, DHL argues that Arnoth failed to preserve her  
11 right to reinstatement by making a timely demand on the employer,  
12 as required under OAR 839-006-0130(d) and 839-006-0135(b). Arnoth  
13 counters that any such demand would have been futile under OAR 839-  
14 006-0130(7) and OAR 839-006-0135(10), which exempt a timely demand  
15 if "the employer has made it known" that reinstatement or re-  
16 employment will not be considered. However, DHL points to testimony  
17 from Arnoth that during her conversation with Quimby and Grudin on  
18 February 13, 2008, she was told she was "more than rehireable."  
19 Pltf. dep. 66:9-16. In addition, DHL points out, the written  
20 severance package Arnoth received clearly stated that she was  
21 eligible for rehire. Grudin Declaration, Exhibit 2. I find it  
22 unnecessary to reach this argument because I conclude that DHL has  
23 met its burden of showing that Arnoth was terminated for reasons  
24 unrelated to her injury or her worker's compensation claim. The  
25 survival of Arnoth's sex discrimination claim cannot save the  
26 worker's compensation discrimination and failure to reinstate

1 claims. DHL's motion for summary judgment on this claim is granted.

2 **Conclusion**

3 DHL's motion for summary judgment (doc. # 36) is GRANTED with  
4 respect to Arnoth's claims for injured worker discrimination and  
5 failure to reinstate, in violation of Or. Rev. Stat. §§ 659A.040,  
6 659A.043, and 659A.046; DHL's motion for summary judgment is DENIED  
7 with respect to Arnoth's claim for disparate treatment sex  
8 discrimination under Or. Rev. Stat. 659A.030 (a) and (b).

9 IT IS SO ORDERED.

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11 Dated this 2<sup>ND</sup> day of March, 2010.

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14 Dennis James Hubel  
15 United States Magistrate Judge  
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