

Seattle City Light



FINAL SUMMARY INVESTIGATION REPORT

CONFIDENTIAL

Toni Gamble v. Subject 1 and Jon Trout

First Report May 13, 2013; Revised December 8, 2013

I. INTRODUCTION

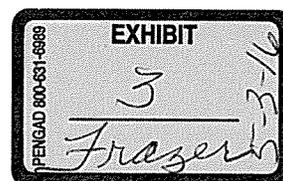
Toni Gamble, Supervising Electrical Service Representative, alleges that Subject 1, Manager of Customer Engineering, and Jon Trout, Customer Electrical Service Manager, have discriminated against her due to age, gender, disability, and Family Medical Leave (FML) and/or leave taken due to industrial injury (“I&I Leave”). As set forth below, the investigator finds that Ms. Gamble’s complaint cannot be substantiated by a preponderance of the evidence. However, the investigator finds that one of Mr. Trout’s comments regarding Ms. Gamble violated SCL’s Workplace Expectations (WE).

II. BACKGROUND

A. Procedural History

On January 11, 2013, Ms. Gamble contacted Employee Relations to file a complaint against Subject 1 for allegedly interfering with the hiring process for an Electrical Service Engineer (ESE) position. Employee Relations Advisor Meghan Frazer was selected to investigate. However, when Ms. Gamble met with the investigator on February 11, 2013, Ms. Gamble also stated that she believed that Mr. Trout was discriminating against her. Pursuant to the investigator’s request, Ms. Gamble filed an Equal Employment Opportunity Complaint with Employee Relations on February 15, 2013. Ms. Gamble’s complaints were combined because the complaints involved overlapping allegations.

After the initial report was sent, the investigator held debriefings with the involved parties. During the debriefing with Ms. Gamble on July 13, 2013 and August 18, 2013, Ms. Gamble suggested amendments to some of the facts, objected to some of the findings, and provided additional information regarding the investigation. The investigator conducted further review of the matter and has revised the report herein.



B. Investigative Process

This investigator interviewed thirteen individuals, including the subject, complainant, and potential witnesses. All represented employees were advised that they could bring a shop steward or union representative to the interview. The following individuals were interviewed:

Interviewee	Date	Shop Steward/Union Rep
Toni Gamble	2/11/13	Declined
Subject 1	5/1/13	N/A
Heather Hartley	5/2/13	N/A
Ian Cooper	5/2/13	Declined
Cindy Reside-Hensel	5/2/13	Declined
Gerard Legall	5/2/13	Declined
Kelly Enright	5/3/13	N/A
Jon Trout	5/3/13, 5/9/13	Declined
Melissa Pickens	5/8/13, 5/9/13	Declined
Alan Yamaguchi	5/9/13	Declined
Max Castillo	5/10/13	Declined
Ann Albertson	5/10/13	Declined
Brittney Kent	5/10/13	Declined
Minh Ta	7/22/13	Declined

This investigator also reviewed documentation relating to the hiring files for the OOC ESE position and permanent ESE position, Ms. Gamble's personnel file, Ms. Gamble's time entries, email correspondence provided by the subjects and complainant, and Ms. Gamble's emails objecting the current report.

C. Work History of Parties and Key Witnesses

1. Toni Gamble, Electrical Service Representative Supervisor, is the complainant. She is a member of Local 17 and organizational unit 352. She was hired by SCL on October 19, 1987. She reports to Jon Trout, Customer Electrical Service Manager, who reports to Subject 1, Manager of Customer Engineering. Subject 1 reports to Kelly Enright, Director of Customer Engineering. Director Enright reports to Phil West, Officer of Customer Service and Energy Delivery.

2. Jon Trout, Manager of Customer Care, is a subject in this matter. He was hired by SCL on August 29, 2012. He is a member of Local 21 (c) and organizational unit 352. He reports to Subject 1, whose chain of command is previously described.

3. Subject 1, Manager of Customer Engineering, is a subject in this matter. He was hired by SCL on March 28, 2012. He is a member of Local 21(c) organizational unit 352. His chain of command is previously described.

III. ALLEGATIONS, AUTHORITY, AND ANALYSIS

A. Facts

1. General background.

Subject 1 was hired by SCL on March 28, 2012 as the Manager of Customer Engineering. On August 29, 2012, Mr. Trout was hired as the Manager of Customer Care, a direct report to Subject 1. Mr. Trout supervises the Electrical Service Representative (ESR) group. The ESR group has seven supervisors, one of whom is Ms. Gamble.

2. Hiring Process for Out of Class and Permanent Electrical Service Engineer.

Ms. Gamble alleges that Subject 1 interfered with two hiring process for positions to which she applied: (1) an Out of Class (OOC) ESE position and, later, (2) the permanent ESE position.¹ Ben Rushwald was selected for both positions.

The OOC ESE hiring process commenced in April 2012. Out of four applicants, only two were selected for interview. On April 20, 2012, Ms. Gamble (age 53) and Mr. Rushwald (age 31) were interviewed by a panel composed of Subject 1, Abdi Yussuf, an ESE, and Ms. Enright. All interview panelists rated Ms. Gamble and Mr. Rushwald “high.” The Talent Acquisition Specialist notes regarding the debriefing state, “The two candidates were rated “H” with different distinguishing strengths. One has years of practical experience, the other has the technical knowledge.” Ultimately, Mr. Rushwald was selected.

Ms. Gamble sets forth several allegations to support her belief that Subject 1 inappropriately influenced the hiring process for the OOC position. She states that Mr. Rushwald did not have the experience required for the position. Mr. Rushwald’s resume establishes he has a bachelor’s degree in engineering, a master’s degree in mechanical engineering, and six years of general engineering experience. Ms. Gamble also states that, after the interview process, Mr. Yussuf told her, “I can’t talk about the hiring process, but...” He then shook his head, implying that something inappropriate had occurred. She contends Mr. Yussuf’s rating of her may have been altered. (Mr. Yussuf’s rating for her was recorded as “high.”) Also, she states that Minh Ta, Senior Electrical Engineer Specialist, said that Mr. Rushwald was a “political hire.” Last, she states that Ian Cooper, ESE, stated that it was going to take Mr. Rushwald years to be trained and that he believed Ms. Gamble would have been more helpful to the workgroup.

Ms. Enright states that she, in consultation with the hiring panel, made the final decision that Mr. Rushwald was the best candidate. Ms. Enright states that there was a lengthy discussion about which candidate was a better fit. She states that Ms. Gamble had positive attributes; for instance, one panel member believed that Ms. Gamble would be able to jump right into the position, with less “lag” time than Mr. Rushwald. However, Ms. Enright states they ultimately

¹ Although Ms. Gamble did not discuss this as a concern with the investigator, she provided an email which she had previously sent to Human Resources expressing concern relating to Subject 1’s participation in a hiring panel in January 2013 for an OOC Meter Reading Manager. The investigator reviewed the hiring file; all normal processes were undertaken. All three members of the panel ranked Ms. Gamble last out of the applicants.

selected Mr. Rushwald because he had the strongest technical skills. She states that the ESE group felt somewhat “down-trodden” and that she believed that Mr. Rushwald’s master’s degree in engineering would help elevate the entire group. Ms. Gamble does not have an engineering degree. Ms. Enright states that it is rare to have an ESE without an engineering degree and that she believes that a good educational background gives an ESE a “leg up.”

In December 2012, Human Resources initiated the hiring process for the permanent ESE position. Ms. Gamble applied for the position. Heather Hartley, Talent Acquisition Specialist, conducted the hiring process. The resume review panel was composed of Mr. Trout and Mr. Cooper. Their ratings are as follows:

Applicant	Jon Trout Rating	Ian Cooper Rating
39 year old Male	Medium	Medium
53 year old Female (Gamble)	High	High
48 year old Male	Medium	Medium
Unknown age, Male	Medium	Medium
31 year old Male	High	High
48 year old Male	High	High

As set forth above, Mr. Trout and Mr. Cooper rated Ms. Gamble high. Ms. Gamble was selected for a first interview.

The interview panel was composed of Gerard Legall, ESE, Cindy Hensel, ESE, and Subject 1. The interview panel rated the applicants as follows:

Applicant Age	Subject 1 Rating	Gerard Legall Rating	Cindy Hensel Rating
39 year old Male	Low	Low	Medium
53 year old Gamble	Medium	Medium	Medium
48 year old Male	Medium	Medium	Medium
Unknown age, Male	Low	Low	Low
31 year old Male	High	High	High
48 year old Male	Medium	Medium	Medium

Mr. Rushwald was unanimously rated “high” by the panel and Ms. Gamble was unanimously rated medium.

Ms. Gamble believes that Mr. Trout may have fed Subject 1 negative information about her or that Mr. Rushwald’s participation in a baseball league with Ms. Enright and Subject 1 influenced the process.

Ms. Hartley states that, to the best of her knowledge, the process was fair and impartial. She states that she recalls the interview panel “loved” Mr. Rushwald’s interview performance. Ms. Hartley believes the panel selected Mr. Rushwald because he was well-credentialed, had strong soft skills, and answered the technical questions well.

The interview panel members state that they have no concerns regarding the fairness of

the process and that they all agreed on the best candidate. They state that Mr. Rushwald had a strong technical background from his master's in engineering and, when answering questions in the interview, was articulate, hit all the benchmarks, and "left no stone unturned." They also state that Ms. Gamble's interview was "fine" but, compared to Mr. Rushwald, Ms. Gamble's answers were simply not as clear or direct.

Mr. Cooper states that he may have told Ms. Gamble that he thought Mr. Rushwald was the candidate Management hoped would get the position. He states that he got the feeling that Ms. Gamble would not really have a chance of obtaining the permanent position because Mr. Rushwald was performing so strongly in the OOC position. He does think any inappropriate factors, such as age, gender, or FML leave, were considered in the hiring process.

Mr. Ta acknowledges making the "political hire" comment. He explains that by "political hire," he meant that management selected Mr. Rushwald to be in the out of class position, which meant they wanted him to obtain the permanent position. He also believes that Ms. Gamble was more qualified for the job based on her experience than Mr. Rushwald. However, states he does not have any "theories" as to why management preferred Mr. Rushwald to the other candidates.

3. Ms. Gamble's Job Duties as Training Supervisor.

Ms. Gamble alleges that Mr. Trout and/or Mr. Wernli negatively affected her working conditions by "constantly changing" her work assignments and work station location. She alleges that Mr. Trout and Subject 1 have "set her up for failure" by doing so. Allan Yamaguchi, ESR Supervisor, also stated that by changing Ms. Gamble's job duties frequently, she had difficulty performing her job. However, Mr. Yamaguchi states he does not believe that Subject 1 or Mr. Trout was intentionally trying to make her fail.

When Mr. Trout started, Ms. Gamble was located at the South Service Center (SSC). On September 12, 2012, Mr. Trout sent her an email and requested that she train ESRs Chris Raines and Jeff Gilfoy, for Thursday and Friday of that week. Both of these individuals happen to be located at North Service Center (NSC). Ms. Gamble states Mr. Trout told her to expect to spend more time at the NSC, so she began to pack up her desk items at the SSC. Subject 1 states that Ms. Gamble was directed to "shadow" these individuals to try to get them up to speed on their job duties.

Then, according to Ms. Gamble, sometime later in September, Mr. Trout directed Ms. Gamble to set up "ride-alongs" with the other ESRs to determine the ESR training needs. Ms. Gamble attended a meeting with the North ESRs to set up the ride-alongs. However, sometime later, Mr. Trout directed her to cancel her ride-alongs. Mr. Trout explains that he saw a lack of productivity in Ms. Gamble's efforts and so he felt like he needed to be more direct in setting her expectations. When Mr. Trout cancelled the ride-alongs, Ms. Gamble requested he send an email to the other ESRs to inform them of her different training direction, so it did not appear that she did not care about their opinions. Because Mr. Trout did not send an email, she sent an email to the other ESRs explaining the new training course.

Ms. Gamble states that just two days after Mr. Trout informed her she would be spending

more time in the NSC, he next directed her to work from the SSC to focus on creating small training modules for ESRs. Mr. Trout states that he developed a training plan and wanted Ms. Gamble to set up training modules. He created the first two modules for her to review as an example of what he was expecting of her. On September 20, 2012, Mr. Trout sent to the entire ESR group an email that described the training modules and requested each ESR supervisor to partner with Ms. Gamble to deliver training to the people in each respective group.

Subject 1 and Mr. Trout both state that they did not perceive that Ms. Gamble was performing a lot of training for the ESRs and they continued to receive feedback that training was necessary. Subject 1 states he advised Mr. Trout to document and clearly set forth Mr. Trout's expectations for Ms. Gamble's training responsibilities.

Ms. Gamble also states that, on October 9, 2012, Mr. Trout scheduled a training session for a time which was inconvenient to her and other ESRs and then set up several training sessions that he would be leading himself, without regard for her schedule. Mr. Trout states that Ms. Gamble asked him to set up the training meetings for her because she thought it would be more effective to have a manager set the meeting schedule. He states he wanted to conduct several initial trainings, with her in attendance, to show Ms. Gamble what type of training he expected her to develop.

On October 11, 2012, Ms. Gamble had a verbal and email discussion with Mr. Trout regarding his scheduling her for meetings without sufficient notice. At that time, Mr. Trout had a conversation told her to focus solely on producing two training modules a week – and not on other efforts that Ms. Gamble saw as within her supervisory duties (such as commenting on new street light DPP's, etc.).

On October 12, 2012, Ms. Gamble completed the training module #3 for ArcFM Viewer. Ms. Gamble conducted four training sessions of ArcFM Viewer Training in November 2012.

On December 17, 2012, Ms. Gamble began working at the NSC in Allan Yamaguchi's commercial group. Subject 1 explains that there was an economic boom and Mr. Yamaguchi's group needed additional assistance. Subject 1 also states that it seemed like a good fit because Ms. Gamble did not seem motivated to provide trainings. Ms. Gamble states that Mr. Trout and Mr. Yamaguchi requested her assistance due to the group's heavy workload. Mr. Trout states that they discussed the potential move during a supervisors' meeting, and Ms. Gamble did not object to going to the NSC.

Ms. Gamble also states that Mr. Trout informed her he expected her to work as an ESR in the field, continue training, and provide great customer service. Ms. Gamble and Mr. Trout had several verbal conversations regarding her work load and her difficulty in keeping up with work because of the amount of "damage-control" she was performing. Mr. Trout acknowledges these conversations and states that he expected her work with customers to be the priority.

On December 20, 2012, Mr. Trout requested her weekly supervisor report. Although Ms. Gamble was working the field at the time and not providing any training, her title was still "supervisor." However, because Ms. Gamble does not have any time to conduct training, she

states that she has not sent any weekly reports to Mr. Trout. She also requested more clear work expectations for her time handling the service area at the NSC. Mr. Trout replied that he expected her to make customer needs her highest priority and pay secondary attention to planning and organizing training modules. He also requested she continue sending weekly supervisor reports because she was a supervisor. Ms. Gamble has not provided any weekly supervisory reports.

4. *The Monitoring of Ms. Gamble's Schedule (including Attendance, Requests to Work From Home, FML Usage, and Use of Flex Time).*

Ms. Gamble states that Mr. Trout and/or Subject 1 have monitored Ms. Gamble's attendance and denied her requests for flexibility in her schedule, while treating other employees differently.

On September 11, 2012, Ms. Gamble emailed Mr. Trout to update him of her vacation plans and to discuss telecommuting opportunities. She states that, when she chose to become the training supervisor, her former manager advised her that there would be an opportunity for telecommuting. The investigator located no documentary or testimonial evidence to support that claim. In any case, Mr. Trout responded on September 17, 2012 that he did not think telecommuting made sense for any of the work activities in the customer care group because everyone needed to be present to optimize communication with each other and customers. He also stated that training was most effective when delivered in person.

On Tuesday, October 2, 2012, Ms. Gamble, who was on sick leave at the time, sent an email to Mr. Trout requesting to switch her flex day from Wednesday to Friday because she had two scheduled appointments on Friday. Mr. Trout responded as follows:

Toni, I received your message that you were ill on Monday, but since I didn't hear from you regarding Tuesday, I expected to see you at the training event that we had scheduled at the SSC this morning. I went ahead and lead the training today at the SSC, and I scheduled myself to lead another training event tomorrow morning at the NSC. We also have scheduled training events at the SSC on Thursday and the NSC on Friday.

As our training supervisor, your team is relying on you to be available and prepared to deliver scheduled training events. The consistency of your work schedule is critical to the success of our training program. Please keep your flex day to Wednesday....

In response, Ms. Gamble replied, "Jon, Perhaps you should become familiar with our Sick Leave Policy before making these accusations. I am under the care of my physician for my illness and I will be contacting our HR Department regarding your treatment and accusations."

On October 2, 2011, Ms. Gamble wrote Employee Relations to request FML beginning on October 1, 2012. On October 3, 2012, Ms. Gamble received a provisional FML approval,

effective as of October 1, 2012.

Ms. Gamble states that on October 9, 2012 she received an email from Mr. Trout regarding the consistency of her work schedule. In the email, Mr. Trout states that he does not understand why she coded her time on Thursday, September 27, 2012 as working ten hours because she was one hour late that day. He also questioned whether she coded her time correctly as general sick leave for her leave between October 1 to October 5. He states it was his understanding she was taking FML and so it should be recorded as such. She replied that the time was coded correctly and that she had stayed an hour late to make up the time the same day, "as we discussed that day." Mr. Trout does not recall such a discussion. Ms. Gamble states that after having this issue with him, she decided to get her FML certified.

At some point after this email, Ms. Gamble's time for October 1, 2, 4, and 5 was retroactively coded as FML-sick leave.

On October 11, 2012, Ms. Gamble was approved for FML leave from October 1, 2012 through September 30, 2013 for Condition One (allowing three appointments a year and periods of incapacity of three times a year, up to five days total for the year) and from October 4, 2012 to October 3, 2013 for Condition Two (allowing two appointments a month and periods of incapacity up to two days, twice a month).

On October 19, 2012, Ms. Gamble asked Mr. Trout to allow her to change her flex day from Wednesday to Friday because she had an interview scheduled for Wednesday. Mr. Trout approved her request.

On December 17, 2012, Ms. Gamble's obtained FML for Condition Three from October 10, 2012 to December 10, 2013 (allowing her attendance at two appointments a month for a family member).

On January 31, 2013, Ms. Gamble states that she had an unexpected emergency at home regarding her need to care for an ill mule. She stated, "I doubt that I will be able to be at work today or tomorrow, given the circumstances." She asked Mr. Trout if she could work a few hours from home to advise customers that she would not be able to make meetings and to try to catch up on answering some emails. Mr. Trout denied her request and stated that he believed it would be better for her to work where she would have all the resources she needed. She states that she knows he had approved other supervisors to work from home and it demonstrated "favoritism." She also informed him that she had already worked two hours from home.

On February 1 2013, Ms. Gamble sent Mr. Trout an email which simply said in the subject line "sick today FML #2." Mr. Trout emailed Stefani Coverson, EEO Coordinator, and stated that he needed her guidance. He informed Ms. Coverson that, because her prior email said she would likely be out that day because of her mule and Ms. Gamble did not explain the reason for her absence on the February 1, 2013, he believed she was attempting to use FML to care for her mule. Ms. Coverson advised Mr. Trout to talk with Ms. Gamble to ensure there was no miscommunication; Ms. Coverson advised him that he could ask Ms. Gamble for clarifying information, but she also warned him not to make accusations. Ms. Coverson also informed Mr.

Trout that he could request Ms. Gamble to provide prior notice for foreseeable FML absences.

On February 13, 2013, Mr. Trout sent Ms. Gamble an email with the subject line “please explain your time sheet.” The email stated as follows:

Please help me understand your timesheet entries for 2/1 and 2/4. On 2/1 you sent an email titled “Sick today fml #3” and you’ve entered 10 hrs. Comp. Time – FML? On 2/4 you sent an email titled “FML condition 3 off today” and you’ve entered 8 hrs. Floating Holiday-FML and 2 hrs. Vacation-FML? In the future please give me a reasonable amount of advanced notice before your FML events so we can make better preparations to cover your work area and please provide me enough information about your FML absences so that I can understand how these events correlate to your timesheet coding. Also you’ll need to change your entry for 1/31 to 10 hrs. Float Holiday or Vacation as you were absent all day and did not have authorization to work from home.

In response, Ms. Gamble replied that she was following the FML coding requirements provided to her for HR. She also states that with regard to the two hours she reported for work from home on January 31, 2013, that she had performed the work prior to Mr. Trout stating that she could not work from home. She states that her former supervisor had approved her to do so. The investigator located no documentary or testimonial evidence to support that claim.

On February 15, 2013, Mr. Trout responded to her email and stated that he still did not feel like she had answered his questions regarding her FML events. He states: “On 2/1 you sent an email titled “Sick today fml#2” with nothing in the body of the email and you’ve entered 10 hours Comp Time –FML. On 2/4 you sent an email titled “FML condition 3 off today” again with nothing in the body of the email and you’ve entered 9 hrs. Floating Holiday-FML and 2 hrs. Vacation –FML. The only explanation you’ve shared with me regarding the days you were absent is ‘my emergency absence due to the illness and eventual death of your mule.’ How does this related to FML condition 2 and 3?”

To the investigator’s knowledge, Ms. Gamble did not respond to Mr. Trout’s email. Ms. Gamble also did not change her time sheet. She coded eight hours floating holiday on 1/31/13; 10 hours comp time-FML on 2/1; and 8 hours floating holiday – FML and two hours vacation – FML on her time sheet. Her management chain did not change her timesheet either.

On February 22, 2013, Heather Proudfoot, ER Manager, met with Subject 1, Mr. Trout, and Ms. Gamble to discuss time-keeping, FML requirements, and better communication.

On February 22, 2013, Mr. Trout emailed Ms. Gamble, copying Subject 1:

Hi Toni, I’ve found an error in your time sheet for 1/1/13. You’ve entered 2 hours of general supervision time AA. Since this was a holiday, we’ll need to make a correction for that day. What did you

intend to code those 2 hours as?

According to Subject 1, he discovered the above time coding when he was experimenting with running reports on WAMS. He states he was trying to learn the WAMS system and playing with the web tools the system has to see each employee's accumulated leave amounts.

In response, Ms. Gamble replied that she often will make up two hours during a holiday pay period. Because Ms. Gamble works a flex schedule, she works 10 hours a day, four days a week. However, when her regular work day falls on a holiday, such as it did on New Years Day, she could only record the standard 8 hours of holiday pay for that day, leaving a 2 hour deficit. To compensate, she recorded 2 hours of regular pay on New Years Day, and states that she worked an additional 2 hours on another day (making the total hours worked that day 12 hours). In her email, she states that she has been allowed to either make up the time, use un-paid or paid leave, or change their schedule to a 5/8 schedule for the week that the holiday falls in.

Subject 1 replied to Ms. Gamble's email and clarified that he asked Mr. Trout about the time recording. Subject 1 informed Ms. Gamble that the ESR general rule is to not allow remote working or make up time (unauthorized comp time) without preauthorization.

Ms. Gamble then replied, "No, I worked the time, with authorization, at the SCL office." Mr. Trout emailed that he did not recall giving her authorization to work on New Year's Day. Ms. Gamble then states that she did not work on New Year's Day, rather she made up the two hours for it on another day. She states that this had been authorized in the past and no one ever informed her that it was not allowed.

Subject 1 then replies that he is usually "cc'd" on pre-authorization and he could not find a record of it her authorization. Ms. Gamble then replies "This was a verbal conversation about this subject, and I was not aware that we had the rules that you stated below."

On February 26, 2013, Ms. Proudfoot emailed Ms. Gamble and Mr. Trout regarding the time-coding issue regarding New Year's Day time. Ms. Proudfoot advised that any flex-time needs to be by mutual agreement and pre-arranged. Ms. Proudfoot stated that when flex-time is used, timesheets should still accurately reflect what time was actually worked each day. Therefore, Ms. Gamble should have only recorded 8 hours on New Years Day and then 12 hours for the day she made up the "2 hour deficit."

Ms. Gamble did not change her time entry; neither did her management chain.

5. Ms. Gamble's Performance Evaluation.

Mr. Trout drafted Ms. Gamble's performance evaluation, with the review and assistance of Subject 1 and Ms. Enright. All parties state that the evaluation was "toned down" from its original draft. Subject 1 states that he reviewed Ms. Gamble's performance review to ensure that Mr. Trout had documentation to support his comments. Subject 1 states that he and Mr. Trout had "frank" conversations about Ms. Gamble and that there was no discussion of Ms. Gamble's age or gender in those conversations. Ms. Enright also reviewed Mr. Gamble's performance

review before it was issued. Ms. Enright states that she did not see anything in the performance review that concerned her and she agreed with Mr. Trout's comments.

Ms. Gamble's performance review rates her at "meets expectations." However, many of Mr. Trout's comments regarding her performance are somewhat negative. Mr. Trout explains in the review that many of his comments do not merit a "meets expectations" rating, but because his expectations were not identified to her until after his hire date in late August 2012, he provided her "meet expectations" ratings out of fairness. He states to the investigator that it is very important to be honest in performance evaluations because such evaluations give employees the opportunity to improve.

In the performance review comments, Mr. Trout stated that Ms. Gamble failed to report many of the details of her work activities to him and struggles with adequately documenting her activities. He also states as follows:

Toni's reliability and productivity is hindered by extraordinarily large number of hours she is not at work. Based on the review of historical attendance records, over the past three years Toni has been absent from work a total of 3,682 hours, that's 59% of a normal full time work schedule of 6,420. When Toni is present, she spends a significant amount of time applying and interviewing for other jobs which further limits her time and productivity in her current job.

On February 26, 2013, Ms. Gamble emailed ER as follows:

As I expected, my performance evaluation mentions not only my current FML absences but also any time I was off over the last three years! This is outrageous, he has no idea what my past absences have been for! There are more 'observations' that he has made about me that are un-true. I believe that this performance evaluation is written to show negativity about me, due to our working relationship.

On March 1, 2013, Ms. Gamble also emailed Ms. Enright. In this email, Ms. Gamble reiterates that Mr. Trout's comments are not true and against the Personnel Rules.

Reviewing other 2012 performance reviews, Mr. Trout rated one other female ESR supervisor and one other male ESR supervisor as "meets expectations." These evaluations contained the same caveat that while some of Mr. Trout's comments did not justify a "meets expectations" rating, Mr. Trout did not think it was fair to provide a rating lower than that. With regard to another female ESR supervisor, he rated her performance as "exceeds expectations" in most categories.

6. *Ms. Gamble's time records.*

Subject 1 states that he and Mr. Trout are concerned about Ms. Gamble's absences because they make it difficult for the ESR group to meet their customers' demands. Correspondence from Ms. Enright shows that she is concerned regarding this issue as well. Mr. Trout explains that the ESR group is very busy and so it is difficult when there is a full-time pocket filled by a person who does not typically work full-time. Correspondence between Subject 1, Ms. Enright, and Mr. Trout discusses the difficulty of having a full-time pocket which is not filled with a full-time employee and concerns regarding whether Ms. Gamble's use of sick leave is legitimate.

Reviewing Ms. Gamble's attendance records from 2010 – 2011, a good portion of Ms. Gamble's absences were coded as either I&I Leave or unpaid FML. Ms. Gamble was out, either full time or half time, on I&I or FML from March 2, 2010 – July 29, 2011. During such time period, Ms. Gamble's leave was categorized as follows:

- full time leave under worker's compensation from March 2, 2010 - December 14, 2010
- part time leave under workers' compensation from December 16, 2010 - January 17, 2011
- full time leave under workers' compensation January 18, 2011 - April 26, 2011; and
- full time leave under unpaid FML from April 28, 2011 - July 5, 2011
- part time leave under unpaid FML between July 7, 2011 - July 29, 2011.

After Ms. Gamble returned full-time in July 2011, she was present regularly throughout the remainder 2011.

In 2012, Ms. Gamble took approximately 574 hours of leave (including holidays). She took approximately 343 hours of leave before Mr. Trout was hired (August 29, 2012) and 232 hours after Mr. Trout was hired. Of those 232 hours of leave under Mr. Trout's management, 74 hours were FML, 5 hours were regular sick leave, and 113 hours were vacation.

Reviewing Ms. Gamble's attendance beginning at the end of 2011, it does appear that she does have a pattern of using sick leave around other leave. Examples of this timing are as follows:

- In October 2011, she recorded six hours of "sick leave family" on October 13, 2011; flex day on October 14, 2011; floating holiday/vacation on October 17, 2011; floating holiday/vacation on October 18, 2011; vacation on October 19, 2011, October 20, 2011; and flex day 10/21/11 (10 and 1/2 consecutive days without work).
- In December 2011, she took her flex day on December 23, 2011; holiday on December 26, 2011 (she took 2 hours vacation because of her 4 – 40 schedule); sick leave from December 27 - December 29, 2011; flex day on December 30, 2011; and the holiday on January 2, 2012 (and 2 hours vacation) (11 consecutive days without work)
- In April 2012, she took a floating holiday on April 2 – April 4, 2012; funeral leave

from April 5, 2012 – April 9, 2012; and sick leave 4/10/12 (11 consecutive days without work)

- In May 2012, she had a flex day on 5/11/12; took vacation from May 14 – May 15, 2012; took sick leave from May 16 – May 17, 2012; had her flex day May 18, 2012; and took sick leave May 21, 2012 (11 consecutive days without work)
- In July 2012, she took eight hours of holiday on July 4, 2012 (with two hours of work presumably not from the office); vacation on July 5, 2012; and sick leave on July 9, 2012 (taking 6 days, except for the 2 hours, of consecutive days without work)
- In December 2012, she took a FML - sick leave day on December 21, 2012; vacation on December 24, 2012; holiday on December 25, 2012; and her flex day on December 26, 2012 (6 consecutive days without work).²

In 2013, Ms. Gamble has been out on worker's compensation from February 27, 2013 through the date of the first investigation report. Ms. Gamble also still has 199 hours of vacation and 58 hours of sick leave available to use in 2013.

7. *The ESR Work from Home Policy.*

Subject 1 states that work from home requests are rarely approved. Likewise, Mr. Trout states that an ESR can only work from home if the ESR has a project with tangible and measurable results and if that ESR has demonstrated reliability.

Both Subject 1 and Mr. Trout state that Ms. Albertson is the only individual who has been permitted to work from home since Subject 1 joined SCL in March 2012. Ms. Albertson states that she worked approximately sixteen hours in six weeks of leave. Ms. Enright states that Ms. Albertson was allowed to work from home because she had project that she could do from home; Ms. Albertson cleaned up and revised the Residential Electrical Service Code.

Except for Ms. Gamble, all witnesses who were questioned regarding whether ESRs can work from home state that it would be very difficult to do so. Daily ESR work entails dealing directly with customers over the phone, conducting site visits, speaking with engineers in the office, and coordinating meetings between engineers and customers. Because of this, witnesses state that there is a limited amount of work an ESR can do from home.

Mr. Trout states that he has not allowed Ms. Gamble to work from home because her projects are not tangible and measurable.

8. *The ESR Flex Schedule Policy.*

Mr. Trout states that he allows ESRs to change their flex schedule as long as the change meets business needs. He does not recall denying Ms. Gamble's request to switch her flex day to go to personal appointments; however, he states that he would only deny such a request if the change did not accommodate business needs.

Max Castillo, ESR Supervisor, states that he has been permitted to change his flex day at

² The investigator does not make any findings regarding the legitimacy of such leave.

least once a month. However, he states that he has only done so for business purposes – for example, to be able to attend a meeting on day he is normally scheduled to be off work.

9. Jeff Jones's Attendance Issues.

Ms. Gamble states that Jeff Jones frequently shows up to work late and that Mr. Trout and Subject 1 seem to overlook his attendance issues.

Mr. Trout acknowledges that Mr. Jones shows up to work late from time to time due to an alleged medical issue. Mr. Trout keeps a word document with notes regarding Mr. Jones's attendance. Mr. Trout keeps a similar word document regarding Ms. Gamble's attendance. Mr. Trout states that he is actively dealing with Mr. Jones's attendance issues and he has given him verbal warnings. In Mr. Jones's performance review, Mr. Trout expressed concern regarding Mr. Jones's attendance issues.

Reviewing Mr. Trout's notes, it appears that he has allowed Mr. Jones to work later from time to time to make up for his late arrival to work. However, Mr. Trout's notes show that Mr. Jones has done so after conversations with Mr. Trout.

10. Mr. Trout's Alleged Failure to Accommodate Ms. Gamble.

Ms. Gamble also states that she has been discriminated on the basis of disability and also that SCL failed to accommodate her. However, Ms. Gamble did not provide any supporting information with regard to this claim. She did not suggest or provide any information establishing that she had requested an accommodation on the basis of disability from Human Resources or Mr. Trout or Subject 1. However, reviewing her file, it appears that she has been through the accommodation in the past and presumably would know how to initiate it, if desired. Additionally, on February 28, 2013, Larry Johnson, ADA Coordinator, sent Ms. Gamble a letter to provide Ms. Gamble an overview of the ADA process and ensure that Ms. Gamble knew about all leave options possibly available to her.

11. Other General Comments Regarding Mr. Trout.

Ms. Gamble also states that Mr. Trout inconsistently responds to email and does not engage in discussions with female supervisors. She states that Mr. Trout does not solicit the opinions of female supervisors. She states that she frequently walks by his office and he seems to always have only men in his office.

Ms. Enright states that she "has the general feeling that Jon cares about his people and gets stuff done." Ms. Enright states she has no concerns regarding him and she cannot figure out what is at the root of Mr. Trout's problems with Ms. Gamble.

Ann Albertson, ESR Supervisor, states that she does not have any concerns regarding Mr. Trout. She states that she feels like he is receptive to her ideas and has not noticed him soliciting more input from male supervisors than the female supervisors.

Melissa Pickens, ESR Supervisor, states she feels that Mr. Trout does not treat women the same way he treats men. Ms. Pickens has filed a complaint with Employee Relations that is currently being investigated by Ms. Coverson. Ms. Pickens contends Mr. Trout does not solicit input from women and ignores women.

One male ESR Supervisor states that his relationship with Mr. Trout has been good. He states that he has had “differences” with Mr. Trout over time. He explains that Mr. Trout sometimes has a fragmented communication style in which he will not communicate with all supervisors or obtain the input necessary to make decisions. This supervisor states that he does think that Mr. Trout treats Ms. Pickens differently, but that he seems to avoid her. He states that he has not seen Mr. Trout “ignore” Ms. Gamble, like Ms. Pickens.

Another male ESR states that recently he has begun to have concerns regarding Mr. Trout and whether he respects the ESRs generally. He states that he does not believe that Mr. Trout is taking any ESR’s input. The investigator notes that, shortly before his interview, the ESR Supervisors and Mr. Trout had a particularly spirited meeting regarding several topics, one of which was ending the flex 4 – 40 schedule. This ESR does not express concern regarding Mr. Trout’s conduct with regard to Ms. Gamble specifically. He expresses concern that Mr. Trout tended to treat differently people who disagree with him. He also states that many people are suspicious regarding whether Ms. Gamble uses leave appropriately.

Brittney Kent, a Cashier and Ms. Gamble’s daughter, states that she has seen Mr. Trout speaking with and being friendlier with the male ESR supervisors than with the female ESR supervisors. She was not sure why and speculated that Mr. Trout may be more comfortable with men than women. She also stated that, in the past, he did not acknowledge her very often; however, he seems to be friendlier now.

Mr. Trout states that he truly believes in the value of diversity in the workplace. He states that diversity makes a group stronger, as it allows you to see things from different perspectives and allows employees to relate with diverse customers. He states he does not judge people by who or what they are; he judges them based on what they do. He believes this complaint was brought to distract from the real issue- Mr. Trout and Subject 1 expect Ms. Gamble to put in a full day of honest work.

Mr. Trout states that he does not believe he treats Ms. Gamble differently than other employees. However, he notes that her absences are really painful to the group because they are so short staffed. He expresses concern that she is abusing the system.

With regard to Ms. Picken, Mr. Trout acknowledges that he has had conflict with Ms. Picken in the past. He states that she is disrespectful and negative in her communication with him. He states that initially he tried to avoid her because the relationship was so uncomfortable; however, he states he has shifted to spending more time at the NSC and is trying to have regular communication with her.

During the first week of May, Mr. Trout had a supervisor meeting with his group. According to two witnesses, Mr. Trout said that Ms. Gamble has “a perpetual excuse for not

coming in to work” and “keeps sending in doctor’s notes that she needs to stay home.” Mr. Trout denies saying this, but admits that he informed the group that Ms. Gamble is sending doctor’s notes that say she is unable to come to work.

12. *General Comments Regarding Subject 1.*

None of the interviewed witnesses expressed any concerns regarding Subject 1’s treatment of employees. This investigator got the impression from these discussions that most of the ESR supervisors do not have much interaction with Subject 1 on a day-to-day basis.

A. Findings and Analysis

1. *Was the ESE Hiring Process inappropriate or discriminatory?*

Ms. Gamble alleges that Subject 1 and/or Mr. Trout interfered with the hiring process for an OOC ESE position and, later, for the permanent ESE position. She states that the hiring process was discriminatory – due to Ms. Gamble’s age, gender, disability, FML or I&I Leave. Ms. Gamble does not provide any concrete evidence to support such claims, other than that she was not successful in her application and a younger man was successful.

The Washington Law Against Discrimination, Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act protect employees from discrimination on the basis of age, gender, and disability. RCW 49.60 *et seq.*, 42 U.S.C. 2000 *et seq.*; 29 U.S.C. 621 *et seq.*; 42 U.S.C. 12101 *et seq.* Likewise, discrimination violates the City’s Personnel Rules, the Seattle Municipal Code, the City Light Departmental Policies and Procedures, and the WE. P.R. 1.1.2; SMC 14.04.040; DPP 500 P II 233; WE, Teamwork, Mutual Respect.

Generally, to establish a case of discrimination, courts utilize the *McDonnell Douglas Corp. v. Green* burden shifting evidentiary framework. 411 U.S. 792 (1973). First, the employee must establish a *prima facie* case of discrimination by establishing that the employee is a member of a protected class, the employee applied for and was qualified for a job, and the employee was not selected for the job. Once the employee establishes a *prima facie* case, the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for the employment decision. Once the employer meets the burden of showing a nondiscriminatory basis for its decision, the burden shifts back to the employee to establish that the reason given is merely pretext for intentional discrimination. *Id.* To demonstrate that the reason set forth by the employer is pretext, the plaintiff must show that his membership in the protected class was a “substantial factor” in taking the adverse employment action. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138 (2004).

Here, Ms. Gamble’s complaint likely establishes a *prima facie* case, at least with respect to her claim under the ADEA. With respect to her claim based on the ADEA, Ms. Gamble is 53 years old, applied for and was qualified for the OOC and permanent ESE position, was not offered the position, and the position went to a 31 year old.

However, the investigator finds that there was a legitimate, nondiscriminatory reason for Ms. Gamble not being selected for the OOC position. Ms. Enright and Subject 1 explain that Mr. Rushwald's education made him a superior candidate; whereas Ms. Gamble does not have a college degree, Mr. Rushwald has a master's in engineering. Additionally, Mr. Legall and Ms. Hensel indicated that they believed educational background is an important qualification for an ESE. Moreover, the standard hiring processes were used.

The investigator also finds that there was a legitimate, nondiscriminatory reason for Ms. Gamble not being selected for the permanent position. Ms. Gamble's claim that Mr. Trout interfered is not supported. While he was on the resume review panel, he rated Ms. Gamble as "high." Thus, Ms. Gamble's claim that Mr. Trout influenced Subject 1 to rate Ms. Gamble low is unlikely. As for the interview, all panelists unanimously rated Ms. Gamble "medium" and Mr. Rushwald "high." Again, panelists consistently stated that Mr. Rushwald's presentation in the interview was superior to all other applicants; he provided clear and articulate answers and also had the technical background to support the ESE position. Panelists also stated that Ms. Gamble's answers were not as clear or direct as Mr. Rushwald's answers.

Ms. Gamble does not submit any evidence suggesting that such reasons are "pre-text." Ms. Hartley states that all standard hiring processes were followed. Witnesses denied relying on or discussing any inappropriate factors when rating candidates. Witnesses stated that no panel members influenced the panel more than others as they discussed candidates.

Ms. Gamble also claims that another factor that could have influenced the hiring panel was Mr. Rushwald's participation on a baseball team with Ms. Enright and Subject 1. The investigator finds the connection between Mr. Rushwald's participation on a baseball team with Ms. Enright and Subject 1 and his selection for the ESES positions too weak to constitute a conflict of interest. Additionally, both panelists signed a conflict of interest waiver stating that they did not have a personal relationship which would hinder their ability to make fair and impartial decisions

Based on the above analysis, the investigator finds that OOC and permanent ESE hiring processes were proper.

2. *Did Mr. Trout discriminate against Ms. Gamble on the basis of age, gender, disability, FML, or I&I?*

Ms. Gamble alleges that Mr. Trout discriminated against her on the basis of age, gender, disability, FML, or I&I. Ms. Gamble states that Mr. Trout (a) altered her working assignments to cause her to fail, (b) denied her requests to work from home, (c) denied one of her requests to change her flex day, (d) monitored her time, (e) provided her a negative performance review, and (f) was generally less friendly to her and other female supervisors due to discrimination. As set forth above, if true, such conduct would violate the both state and federal anti-discrimination laws, in addition to City and SCL policies. However, as set forth below, the investigator finds that Ms. Gamble's complaints cannot be substantiated by a preponderance of the evidence.

(a) Mr. Trout's alteration of Ms. Gamble's working assignments.

Ms. Gamble alleges that Mr. Trout altered Ms. Gamble's working assignments in order to cause her to fail. The investigator finds this allegation unsubstantiated. Mr. Trout credibly explained to the investigator the reasoning behind each of his decisions regarding Mr. Gamble's training. Subject 1 was often consulted in such decisions and provided additional support to Mr. Trout's explanations that such changes were made to meet the business needs of the group and to address the perception that Ms. Gamble was not productive in her training efforts. The investigator finds that Mr. Trout's decisions to have Ms. Gamble shadow ESRs that need help, then conduct ride-alongs with ESRs, then create training modules for training ESRs were all appropriate tasks for a training supervisor. Additionally, by all accounts, Ms. Gamble willingly moved to assist Mr. Yamaguchi's group. Although Mr. Trout hoped that Ms. Gamble would still be able to assist in training efforts, it does not appear that completion of training modules was an expectation after Ms. Gamble's move. The investigator understands the changes in directions may have been frustrating to Ms. Gamble; however, she does not find that such actions demonstrate a discriminatory intent.

(b) Mr. Trout's denial of Ms. Gamble's request to work from home.

Mr. Trout denied all of Ms. Gamble's requests to work from home. Ms. Gamble states that because he has permitted other ESR supervisors to work from home, this shows discriminatory intent. However, Mr. Trout, Subject 1, and Ms. Enright all state that ESR's typically are not permitted to work from home because there is only a limited amount of work which can be done from home. The interviewed ESR supervisors all confirmed this belief.

Mr. Trout has only permitted one ESR supervisor, Ms. Albertson, to work from home. This decision was made in collaboration with Ms. Enright and Subject 1. Ms. Albertson, a female, was permitted to work from home for less than three hours a week during a six week leave to revise the Electrical Service Code. This project was tangible and measurable as opposed to Ms. Gamble's requests to perform work supporting her field work from home.

Because ESR's are generally not allowed to work from home, and because the one ESR who was allowed to work from home was working on an assignment which could easily be performed from home, the investigator finds that Mr. Trout's denial of Ms. Gamble's request was appropriate and not discriminatory.

(c) Mr. Trout's denial of one of Ms. Gamble's requests to alter her flex day.

Employees are only allowed to use flex time and temporarily alter their daily work schedule with prior supervisory approval. P.R. 9.1.1(E). In October 2012, Mr. Trout denied Ms. Gamble's request to alter her flex day from Wednesday to Friday in order to attend "scheduled appointments." However, Mr. Trout did permit Ms. Gamble to alter her flex day in October 19, 2012 to accommodate her participation in SCL interviews.

Mr. Trout states that he always approves the switching of flex time when it meets business needs. Although, when speaking with the investigator, he did not specifically recall

denying Ms. Gamble's flex time, he did send her an email at the time of the request somewhat explaining his denial. In his email denying the request, Mr. Trout informed Ms. Gamble that she had a training event on Friday and that the team was relying on her to deliver the training. Ms. Gamble had been absent on Monday and Tuesday of that same week.

The investigator finds that Mr. Trout's denial was reasonable. Ms. Gamble's request to switch her flex day was related to personal, versus SCL business, needs. Further, Ms. Gamble did not provide any additional information as to why her "scheduled appointments" needed to be on Friday. The investigator located no information suggesting that Mr. Trout has allowed similarly situated individuals to change their flex days for personal reasons. Thus, there is no evidence of discrimination.

(d) Mr. Trout's monitoring of Ms. Gamble's time.

Ms. Gamble also expresses concern that Mr. Trout has monitored her time more than other ESRs' time. However, the investigator finds Mr. Trout's questions to her regarding her time reasonable and in furtherance of his supervisory duties.

Mr. Trout questioned Ms. Gamble regarding the coding of her time for September 27, 2012 (when she was one hour late and recorded her time as a full day), October 1-5 (when she recorded her time as general sick leave and, after he asked her about it, she revised her time to be recorded as FML), February 1, 2013 and February 4, 2013 (where, after informing Mr. Trout of her sick mule, she sent an email to him simply stating that she was taking FML in the subject line). With regard to Subject 1's question to Ms. Gamble regarding her time on January 1, 2013, Subject 1 explains that he was reviewing all his employees' time in WAMS. Moreover, Ms. Gamble's time was wrong in that instance.

Supervisors are responsible for monitoring leave usage of employees and for communicating to employees the procedures for requesting time off from work in advance, providing notice of absences, and deviating from the employee's established work schedule. Supervisors are also obligated to only approve the time sheet of a direct report if they believe the time sheet is accurate. Due to this, supervisors should require employees to specify how absences are to be coded, designate the purpose of the absences, and monitor use of leave to ensure absences are consistent with any applicable policies or authorizations. Moreover, while investigator emphasizes that she makes no finding regarding whether Ms. Gamble's use of leave is appropriate, the investigator finds that Mr. Trout has a reasonable basis to monitor Ms. Gamble's use of leave. It appears Ms. Gamble has a pattern of using sick leave in conjunction with other leave (and while she has a large vacation time balance), especially around holidays. .

Further, Ms. Gamble also states that Mr. Trout treats Mr. Jones more favorably than her, even though he is frequently late. However, the investigator finds that Mr. Trout has similarly monitored both Mr. Jones and Ms. Gamble's attendance issues. Mr. Trout records both Mr. Jones and Ms. Gamble's attendance and documents his conversations with both of them regarding attendance. Mr. Trout has provided Mr. Jones's verbal warnings and also expressed concern regarding Mr. Jones's attendance in his respective performance reviews.

(e) Ms. Gamble's performance review.

Ms. Gamble also states that Mr. Trout's performance review "was written to show negativity about me, due to our working relationship." In the review, Mr. Trout provides blunt commentary about Ms. Gamble's performance, however he does not rate her below "meets expectations." Mr. Trout's decision to not rate Ms. Gamble below "meets expectations" provides support to his claim that he was not trying to set Ms. Gamble up to fail. Rather, the investigator finds that Mr. Trout was trying to further his duty under the accountability section of the WE. (generally requiring employees to establish goals and measure our performance in achieving those goals).

Ms. Gamble claims Mr. Trout discusses her FML and I&I absences in the review. In a written complaint to Ms. Proudfoot she wrote, "This PE is a lie, contradiction, immature, and breaches Personnel Rules regarding FML and I & I injury." Notably, that claim was belied by the content of the report. At no point in the evaluation does Mr. Trout expressly reference Ms. Gamble's FML usage or I&I leave. Rather, at most indirectly touches upon because the same when he comments on her substantial absences in the last three years, some of which her timesheets reveal to be FML or I&I related. The investigator notes that Mr. Trout's commentary regarding the amount of leave Ms. Gamble took in 2009, 2010, and 2011 is not directly relevant to the amount of leave she took in 2012 or her performance in 2012, although it does substantiate his concerns that she has a significant history of absenteeism. In any case, the investigator does not find Mr. Trout's observation to demonstrate discriminatory intent or otherwise violate laws against discrimination.

(f) Mr. Trout's general conduct towards female supervisors.

Ms. Gamble, Ms. Picken, and Ms. Kent all state that they have observed Mr. Trout be more friendly towards and solicit more input from men. However, Ms. Albertson states that she has not experienced this and has no concerns regarding Mr. Trout's treatment of men versus women. Additionally, other male witnesses have stated that they have observed Mr. Trout ignoring input from men and women alike.

The investigator cannot substantiate that Mr. Trout treats women differently than men. Unfortunately, the investigator notes that there is an opportunity for bias as to Ms. Gamble, Ms. Picken, and Ms. Kent. There are performance management issues concerning Ms. Gamble and Ms. Picken, which could influence their perceptions. Ms. Kent is Ms. Gamble's daughter. Moreover, there is no documentary evidence or corroborating evidence to support any finding that a preponderance of the evidence establishes disparate treatment. The investigator finds it more probable, as several witnesses suggested, that there may be a personality conflict between Mr. Trout and Ms. Gamble and Ms. Picken.

3. *Did Mr. Trout monitor Ms. Gamble's FMLA leave properly?*

The Family Medical Leave Act provides employees protected leave for certain qualifying conditions. SCL's FML leave is administered under City of Seattle Personnel Rule (PR) 7.1. Under these provisions, a SCL employee is guaranteed up to 520 hours of unpaid leave in a

rolling year for care of the employee's own or employee's family member's serious health condition. The 520 hour limitation reflects all FML conditions collectively; the employee does not received 520 per qualifying condition. An employee may take intermittent leave when medically necessary and for planned medical treatments.

Some of Ms. Gamble's concerns seem related to whether it was appropriate for Mr. Trout to track and request information regarding Ms. Gamble's use of FML leave. The FMLA, PR 7.1, and Ms. Gamble's FML Authorization Letters obligate both Ms. Gamble and Mr. Trout to communicate regarding Ms. Gamble's attendance and FMLA-related absences. Under the FMLA, an employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. 29 CFR 825.302(d). Further, when planning medical treatment, an employee is required to consult with the employer and make a reasonable effort to schedule the leave so as to not disrupt the employer's operations. 29 CFR 825.302(e). For intermittent leave, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule of treatment. Employees are required to provide advance notice of the need for leave as soon as practicable. 29 CFR 825.302(a). Further, it is Mr. Trout's duty as Ms. Gamble's manager to ensure she does not exceed the scope of authorized absences as to each qualifying condition.

Based on the law and policy discussed above, Mr. Trout's conduct in tracking Ms. Gamble's absences is consistent with the FMLA and SCL policy and practice. Mr. Trout is tasked by SCL to monitor Ms. Gamble's attendance. To do so, he is permitted to ask clarifying questions to ensure that Ms. Gamble is properly coding her time. Notably, he has not requested information about which he is not entitled to inquire.

4. *Did Mr. Trout interfere with Ms. Gamble's FML or retaliate against her for using it?*

The Family Medical Leave Act prohibits an employer from interfering with, restraining, or denying the exercise of any FMLA rights or discriminating against an individual for opposing any practice made unlawful by FMLA. 29 U.S.C. 2615(a)(1-2). There are two theories upon which an injured party can recover under the FMLA, the interference theory and the retaliation/discrimination theory. *Sanders v. City of Newport*, 657 F.3d 772 (9th Cir. 2011).

To establish a claim of interference with FMLA rights, the employee must establish that the employer has violated the FMLA in some way or otherwise interfered with an employee's rights under the FML. 29 CFR 825.220(b). The employer's intent is irrelevant to a determination of liability. *Sanders v. City of Newport*, 657 F.3d 772 (9th Cir. 2011). To establish a *prima facie* claim of retaliation with FMLA rights, courts generally require an employee to prove that he/she (1) exercised rights protected under the FMLA, (2) was qualified for her position, (3) suffered adverse employment action, and (4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent. Because the investigator finds that no adverse employment action has been imposed against Ms. Gamble, the investigator discusses the interference claim herein.

As set forth above, Mr. Trout's tracking Ms. Gamble's FML usage did not violate the

FMLA. Additionally, the investigator has found that Mr. Trout's conduct towards Ms. Gamble did not differ in any material way from his conduct towards his other subordinates. Ms. Gamble's primary argument is that Mr. Trout, by mentioning Ms. Gamble's attendance record in the past (which has included FML leave) and encouraging her to improve her attendance, has interfered with Ms. Gamble's use of FML leave by discouraging it.

The investigator finds that Mr. Trout's comments in Ms. Gamble's performance review were not intended to address her FML leave and were not so associated with Ms. Gamble's FML leave as to constitute interference with her FML rights. Much of Ms. Gamble's leave in 2012 was for vacation; in fact, only 54 out of Ms. Gamble's 575 hours of leave in 2012 were FML. This statement would be more likely to discourage Ms. Gamble from taking her regular vacation leave, than her FML leave.

However, the investigator strongly cautions Mr. Trout that it is not appropriate to discourage any of his subordinates from taking FML leave and that he should be cautious so as not to be perceived as discouraging such leave. Additionally, Mr. Trout should be cognizant of the fact that Ms. Gamble has accrued and will continue to accrue significant leave benefits due to length of service to SCL and that it should be expected that Ms. Gamble will use such benefits.

5. *Did Mr. Trout discriminate against Ms. Gamble due to her use of I&I?*

Under RCW 51.48.025, an employer is prohibited from discriminating or retaliating against an employee because such employee files a Workers' Compensation claim for compensation. To establish discrimination, the employee must establish that (1) the employee engaged in a protected activity, (2) the employer had knowledge of such activity, (3) the employee's protected activity was a substantial factor in the employer's decision to act, and (4) the employer took a retaliatory action. *Washington State Labor & Industry Operations Manual*, ch. XIX; *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46 (Wash. 1991).

Here, Ms. Gamble is an employee who engaged in a protected activity (taking leave under the Workers' Compensation statute) and Mr. Trout had at least constructive knowledge of such leave. Excluding issues previously addressed and found to show no discriminatory intent, Ms. Gamble's primary argument is that Mr. Trout's comment totaling her absences in the previous three years in her performance review (which included time spent on I&I) establishes discrimination.

The investigator finds that it cannot be established a preponderance of the evidence that Ms. Gamble's I&I leave was a substantial factor in Mr. Trout's decision to place such comment in the review. Rather, Mr. Trout and his management chain were concerned about Ms. Gamble's general attendance and the predictability of her attendance due to the 574 hours of leave Ms. Gamble took in 2012 (which included 74 hours FML and 3 hours I&I-related). Mr. Trout placed the comment to reinforce that concern, which then indirectly referenced her I&I. Such comment does not itself establish discrimination and the comment did not result in any adverse actions (such as discipline or discharge) to Ms. Gamble. Additionally, the total amount of Ms. Gamble's absences can have relevance to Ms. Gamble's work performance. In fact, RCW 50.48.025

specifically allows an employer to address the frequency and nature of a worker's job-related accidents.

6. *Did any of Mr. Trout's comments in the meeting violate Workplace Expectations?*

Two witnesses expressed concern regarding Mr. Trout's alleged comment in a supervisor meeting that Ms. Gamble has "a perpetual excuse for not coming in to work" and "keeps sending in doctor's notes that she needs to stay home." Mr. Trout only recalls stating that Ms. Gamble keeps submitting doctor's notes that say she is unable to come to work.

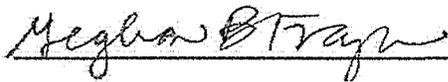
The investigator finds it more likely than not that Mr. Trout commented about Ms. Gamble's absences and doctor's notes. Additionally, the investigator finds that such violates the WE sections of Mutual Respect and Teamwork (requiring all employees to resolve conflict appropriately). Specifically, the Mutual Respect section requires supervisors to praise in public, correct in public, and to protect the confidentiality of those involved in personal issues. Even if Mr. Trout had a reasonable basis to scrutinize Ms. Gamble's use of leave, it was inappropriate for him to mention this issue to his subordinates and Ms. Gamble's colleagues in a supervisor meeting.

IV. CONCLUSION

Based upon a preponderance of the evidence, the investigator concludes that Ms. Gamble's complaint is unsubstantiated. However, the investigator finds that a negative comment Mr. Trout made in a meeting with his subordinates regarding Ms. Gamble violated the WE.

Respectfully submitted this 8th day of December, 2013.

By:



Meghan Frazer
Acting Employee Relations Manager