No. 09-35422

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANNETTE GONZALEZ,

Plaintiff-Appellant,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Defendant-Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BRIEF OF DEFENDANT-APPELLEE NATIONAL RAILROAD PASSENGER CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Amtrak declares no parent corporations. No publicly traded companies own more than ten percent of Amtrak.

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STATEMENT OF JURISDICTION

Amtrak agrees with Gonzalez's Statement of Jurisdiction.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Should the appellate court affirm the trial court's dismissal of Gonzalez's retaliation claims where none of the alleged retaliatory actions can support a prima facie claim of retaliation?

STATEMENT OF THE CASE

On January 18, 2008, Gonzalez filed suit in the Western District of Washington alleging in part that Amtrak engaged in retaliation in violation of Title VII of the Civil Rights Act of 1964 and corresponding provisions of the Washington Law Against Discrimination, RCW §49.60 et seq. [1] After discovery, Amtrak moved for summary judgment against all claims, including the retaliation claims on the basis that Ragle's comment was not materially adverse.

Gonzalez's Response brief listed eight additional allegations of retaliatory conduct by Amtrak. The allegations included the following: (1) Foreman Ragle refused to talk to Gonzalez for several weeks, (2) unnamed co-workers refused to talk to Gonzalez, (3) co-worker machinist Johnson yelled at Gonzalez during a safety meeting, (4) Superintendent Duncan charged at Gonzalez and yelled at her, (5) Foreman Lane unfairly disciplined Gonzalez, (6) problems with Gonzalez's workload "persisted", (7) no one responded to Gonzalez's complaints to

[1] Gonzalez also claimed hostile environment sexual harassment, sex discrimination and intentional infliction of emotional distress, but she abandons those claims on appeal. *See Brief of Appellant, p. 1, n. 1*: ("Plaintiff Gonzalez appeals only the dismissal of the retaliation claim under Title VII and the WLAD.").

management, and (8) co-workers accused Gonzalez of trying to get Ngo fired.[2]

Amtrak's Reply brief responded that the eight additional retaliatory actions could not support the retaliation claims because of lack of employer action or lack of sufficient evidence of a causal connection.[3] The trial court summarily dismissed the state and federal retaliation claims considering only Ragle's statement.[4] Gonzalez timely filed a notice of appeal.[5]

STATEMENT OF THE RELEVANT FACTS

A. Amtrak's Seattle Facility and the People Involved

1. Amtrak's 16-Acre Facility

Amtrak's Seattle facility is approximately 698,000 square feet (or 16 acres) and is located on the north and south sides of South Holgate Street, between South Occidental and Third Avenue in Seattle, Washington.[6] The massive facility is comprised of the train yard where locomotive engines and cars are stopped and maintained, several buildings, "pit" areas to maintain and service engines from underneath the train, an engine-wash Repair In Place area (aka the "RIP"), a garage and several hundred yards of track. *Id.* Because of the immensity of the facility, workers at the various workstations are not within sight of each other, except for adjacent workers at the RIP and the South Holgate track.[7] Superintendent Mr. Jeff Duncan and various foremen, including Mr. Thomas Walker, Mr. Joon An, Mr. Mike Mullins, Mr. John Lane and Mr. Mark Ragle supervised the

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[2] *See* Plaintiff's Response to Amtrak's Motion for Summary Judgment, Supplemental Excerpts of Record ("SER") 3.1-3.3.

[3] *See* Amtrak's Summary Judgment Reply Brief, SER 2.1-2.3.

[4] ER 129-130.

[5] ER 133-134.

[6] *See* Declaration of Jeff Duncan In Support of Summary Judgment ("Duncan Decl."), ¶ 3, SER 4.1-4.2.

[7] *See* Gonzalez TR at 145:22 - 146:21 & 175:1-25, Exh. A to Declaration of David Black In Support of Summary Judgment, SER 5.1, 5.2, and 5.3.

classified/unionized workers at the facility during the relevant time period.[8]

2. Plaintiff Dannette Gonzalez

In March 2005, Ms. Dannette Gonzalez was hired at the Amtrak Seattle facility as a part-time Coach Cleaner.[9] On June 28, 2006, she was promoted to one of the four full-time Laborer positions and worked on day shift.[10] At all times relevant to this lawsuit, Gonzalez's terms and conditions of employment were subject to the Collective Bargaining Agreement ("CBA") between Amtrak and the relevant union.[11]

3. Co-Workers: Minh Ngo, Christopher Terry, Ron Cabiles and Larry Johnson

When Gonzalez began working as a Laborer in August 2006, her co-workers on the day shift were Laborers Mr. Minh Ngo, Mr. Christopher Terry and Mr. Ron Cabiles.[12] With the exception of Ngo, Terry and Gonzalez, other Laborers came and left during the relevant period of August 2006 to December 2007. *Id.* However, there were always three or four Laborers assigned to the day shift at any given time. *Id.* Mr. Larry Johnson was a mechanical worker (machinist) at the Seattle terminal and also one of Gonzalez's peers. *Id.*

B. Amtrak's Anti-Harassment Policies

Amtrak maintains Anti-harassment, Anti-discrimination and Dispute Resolution policies.[13] Under the policies, complaints of discrimination and/or harassment are processed by Amtrak's Business Diversity Department Dispute

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[8] Duncan Decl., ¶4, SER 4.2 and Gonzalez TR at 44:20 – 45:20, ER 27.
[9] Duncan Decl., ¶5, SER 4.2.
[10] Duncan Decl., ¶6, SER 4.2.
[11] Duncan Decl., ¶7, SER 4.2.
[12] Duncan Decl., ¶8, SER 4.2-4.3 and ER 120-121.
[13] Duncan Decl., ¶9, SER 4.3.

Resolution Office in Los Angeles, California (the department responsible for processing internal employee disputes, hereinafter the "DRO"). *Id.*

C. February 11, 2007: Johnson Informed Gonzalez of Ngo's Comment

On Friday, February 9, Gonzalez had a dispute directly with co-worker Minh Ngo about the work load and spoke to Foreman Ragle about it.[14] Ragle suggested that Ms. Gonzalez call Ms. Rickie Donofrio at DRO. *Id.*

On Sunday, February 11, 2007, at the end of the day shift, Larry Johnson, a machinist at the Seattle facility and Gonzalez's co-worker, told Gonzalez that Ngo told Johnson that Gonzalez sat in the ladies locker room complaining about her menstrual cycle, did not want to do hard work, and just wanted to pick up trash all day.[15] Ngo did not make the comment directly to Ms. Gonzalez. Rather she heard about the comment secondhand, from Larry Johnson.[16] Upon hearing the comment, Gonzalez stated that Minh Ngo "can kiss my butt" and then went to the office to get Donofrio's number because she had left the number Ragle gave her at home.[17] Gonzalez understood that Ngo was a co-worker and not her boss.[18] At the office, Gonzalez told the secretary and Foreman Tom Walker about Ngo's comment she had heard from Johnson.[19] Walker encouraged Gonzalez to tell the superintendent Jeff Duncan and to call Rickie Donofrio. *Id.* Donofrio investigated Gonzalez's sexual harassment complaint and admonished Ngo.[20]

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[14] *See* Gonzalez's Typed Notes, attached to Black Decl. as Exhibit F at 00002, SER 2.74.
[15] Gonzalez TR at 226:13 – 228:12, ER 59.
[16] Gonzalez TR at 230:11-16, ER 60.
[17] Gonzalez TR at 397:7-10, SER 5.4 and Black Decl. as Exhibit D, SER 5.5.
[18] Gonzalez TR at 397:3-17, SER 5.4.
[19] *See* Black Decl. as Exhibit D, SER 5.5.
[20] SER 4.3, ¶ 12.

D. October 2007: Ragle's Comment

On October 25, 2007, Gonzalez went to Mark Ragle and stated she felt there was a "double standard" in how much work she was given.[21] According to Gonzalez, Ragle replied, "Here we go again" and "You are going to call diversity." *Id*. Duncan learned about the comment from Ragle and referred it to DRO.[22]

E. December 2007: Johnson Yells At Gonzalez

The record contains evidence that at a December 2007 safety meeting, Johnson yelled at Gonzalez that it was not his fault that Gonzalez and Ngo did not get along.[23] There is no evidence in the record of who attended the safety meeting other than Johnson and Gonzalez. There is no evidence in the record that Gonzalez complained to management about Johnson's alleged yelling.

F. January 2008: Lane Disciplines Gonzalez; Duncan Altercation

In January 2008, Lane issued Gonzalez and Ngo discipline for violation of a safety rule – not using the warning lights on a vehicle.[24] There is no evidence in the record that Lane had knowledge of Gonzalez's October 25 complaint to Ragle or knowledge of any other protected conduct.

On January 25, Duncan allegedly charged at Gonzalez and yelled at her in reference to a discussion about her safety violation.[25]

G. February 2008: Amtrak Served With Complaint

On February 5, 2008, Amtrak was served with Gonzalez's complaint. It is undisputed in the record that Duncan did not learn of the complaint until after it

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[21] *See*, Complaint and Answer, ¶ 3.23, ER 4 and ER 10.
[22] ER 97.
[23] ER 113, ¶34.
[24] *See*, ER 66. *See, also,* Appellant's Brief, n. 2 at 13.
[25] ER 11.4

was served on Amtrak.[26] It is also undisputed in the record that Duncan did not learn of any of Gonzalez's EEOC charges until his deposition in January 2009.[27] There is no evidence in the record that any of Gonzalez's foremen or co-workers had knowledge of Gonzalez's EEOC charges.

SUMMARY OF ARGUMENT

Regardless of the trial court's decision to consider only whether Ragle's comment constituted retaliation under Title VII and the WLAD, summary judgment dismissing the state and federal retaliation claims was appropriate. None of the nine alleged retaliatory actions presented to the trial court can support a retaliation claim where (1) the alleged action was not materially adverse, or (2) there was no evidence submitted in the record to support a causal link between Gonzalez's protected conduct and the alleged subsequent retaliatory action.

ARGUMENT

I. Standard of Review

Appellate courts review a district court's grant of summary judgment under a *de novo* standard. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). The reviewing court must "determine whether the evidence, viewed in a light most favorable to the nonmoving party, presents any genuine issues of material fact and whether the district court correctly applied the law." *Id.* "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. Thus, regardless of the trial court's decision to consider only the Ragle statement, if summary judgment was proper on other grounds, the trial court's decision should be affirmed.

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[26] SER 1.2
[27] SER 1.1

II. Summary Judgment Was Proper Because None of the Nine Alleged Retaliatory Actions Can Support a Prima Facie Retaliation Claim Where (1) the Alleged Action Was Not Materially Adverse, and/or (2) There Was No Evidence Submitted in the Record to Support a Causal Link Between the Protected Conduct and the Alleged Subsequent Retaliatory Action.

Gonzalez identified nine alleged retaliatory actions in the trial court. (1) Ragle's lone snide comment – "Here we go again. You are going to go to diversity."; (2) Ragle's refusal to talk to Gonzalez for several weeks; (3) unnamed co-workers' refusal to talk to Gonzalez for several weeks; (4) Johnson's yelling at Gonzalez during a safety meeting; (5) Duncan's charging at Gonzalez and yelling at her; (6) Lane's discipline of Gonzalez; (7) Gonzalez's workload; (8) Amtrak's failure to respond to Gonzalez's complaints to management; and (9) unnamed Co-workers accusing Gonzalez of trying to get Ngo fired. None are sufficient to support a prima facie case of retaliation under Title VII or the WLAD because they are trivial and/or because there is no evidence of a causal link. As such, summary judgment was proper.

A. Foreman Ragle's Lone Snide Comment Was Not Materially Adverse.

The trial court correctly applied the law in reference to Ragle's lone snide comment to Gonzalez. To make out a prima facie case of retaliation under Title VII and the Washington Law Against Discrimination, a plaintiff must demonstrate the exact same elements: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal link between her activity and the employment decision. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065-66 (9th Cir. 2003); *Hollenback v. Shriners Hosps. for Children*, 149 Wn. App. 810, 821 (2009). To satisfy the adverse action requirement, an employee must demonstrate "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006) (emphasis added). The Supreme Court in *Burlington Northern* made it clear that trivial comments and slights — even by supervisors — are legally insufficient to constitute retaliation:

> The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. * * * We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); see *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (judicial standards for sexual harassment must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the **sporadic use of abusive language**, gender-related jokes, and occasional teasing'"). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'**snubbing**' **by supervisors** and co-workers" are not actionable under *§ 704(a)*). The antiretaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson, 519 U.S., at 346, 117 S. Ct. 843, 136 L. Ed. 2d 808*. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. *Ibid.* **And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence**. *See* 2 EEOC 1998 Manual § 8, p 8-13.

Burlington Northern v. White, supra, at 67-68 (emphasis added). It is clear the Ninth Circuit agrees. *See, Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1189 (9th Cir. Wash. 2005) (supervisor's "**snide**" remarks and threats, such as "your number's up" and "don't forget who got you where you are" are insufficient to

amount to retaliation), *amended on other grounds by* 436 F.3d 1050, 2006 U.S. App. LEXIS 3009 (9th Cir. Wash. 2006), *cert den. by* 127 S. Ct. 55, 166 L. Ed. 2d 22, 2006 U.S. LEXIS 5729, 75 U.S.L.W. 3164 (U.S. 2006). *See, also, Kortan v. California Youth Authority*, 217 F.3d 1104, 1112 (9th Cir. 2000) (Supervisor's laughing and stating that the plaintiff "got him on sexual harassment charges," the supervisor's hostile stares, and increased criticism were insufficient to preclude summary judgment dismissing the plaintiff's retaliation claim).

Here, Ragle's solitary snide comment: "Here we go again. You're going to call Diversity" is an "isolated" "petty slight" and "lack of good manners" more akin to snubbing and minor annoyances unlikely to deter a victim of discrimination from complaining to the EEOC, the courts or their employer. This is especially true in Gonzalez's case, where she (1) was previously encouraged to file formal complaints by the same person and other members of management (Walker and Ragle), (2) works for an employer who maintains anti-harassment and anti-retaliation procedures, and (3) is a member of a union subject to a collective bargaining agreement with contractually protected grievances procedures and for cause employment. Indeed, Gonzalez proved she was undeterred in fact when she followed up by filing her retaliation charge with the EEOC on November 9, 2007.[28]

B. Ragle's Alleged Refusal To Talk To Gonzalez For Several Weeks Was Not Materially Adverse.

Likewise, Ragle's alleged refusal to talk to Gonzalez for several weeks after the October 25, 2007 complaint to him is by definition supervisory "snubbing" and insufficiently materially adverse to constitute actionable retaliation. *See, Burlington Northern v. White, supra*. *See, also, Steele v. Kroenke Sports Enters.*,

[28] ER 8.

L.L.C., 264 Fed. Appx. 735, 746, 2008 U.S. App. LEXIS 3091,102 Fair Empl. Prac. Cas. (BNA) 1291 (10th Cir. 2008) (Supervisor snubbing, personality conflict, and instruction to co-worker not to join plaintiff on smoking breaks not materially adverse). Surely if the *Burlington Northern* court noted that the sporadic use of abusive statements and bad manners are not materially adverse[29], then silence -- a lesser form of petty annoyance -- is not.

C. Unnamed Co-Workers Alleged Refusal to Talk to Gonzalez Was Neither Materially Adverse nor Causally Connected to Any Protected Conduct.

Ostracism from unnamed co-workers is also a petty work annoyance and not actionable retaliation. *Weger v. City of Ladue*, 500 F.3d 710, 728 (8th Cir. 2007) (failure to invite plaintiff to co-worker happy hours not materially adverse); *Dauer v. Verizon Communs. Inc.*, 613 F. Supp. 2d 446, 467 (S.D.N.Y. 2009) (co-worker hostility is not materially adverse); *Adams Ctr., Inc., v. Upper Chesapeake Med*., 2009 U.S. Dist. LEXIS 31425 (D. Md. 2009) (being ignored or avoided by other employees does not rise to the level of a materially adverse employment action); *Bentley v. Allbritton Communs. Co*., 2008 U.S. Dist. LEXIS 93237, 104 Fair Empl. Prac. Cas. (BNA) 1663 (M.D. Pa., 2008) (co-workers' unfriendliness, refusal to speak with plaintiff, and refusal to sign plaintiff's birthday card not materially adverse); *Jones v. Wichita State Univ.*, 528 F. Supp. 2d 1182, 1193 (D. Kan. 2007) (co-worker "cold shoulder treatment which plaintiff alleges is not materially adverse."); *Martin v. Merck & Co.*, 446 F. Supp.2d 615, 639 (W.D. Va. 2006) (while being avoided and ignored by fellow employees is undoubtedly uncomfortable, it is within category of "petty slights and minor annoyances" and not materially adverse job action).

An additional hurdle this allegation faces is that there is no evidence in the

[29] *Burlington Northern v. White, supra*, at 67-68 (emphasis added).

record to show that Amtrak knew of the co-worker(s) ostracism of Gonzalez or that once Amtrak acquired such knowledge, it failed to stop the occurrence of future conduct *because* of Gonzalez's October 25 complaint to Ragle or any other protected conduct. *See, Swenson v. Potter,* 271 F.3d 1184, 1192 (9th Cir. 2001) (Employer's liability for co-worker misconduct runs from the time that management knew or should have known about offending conduct and failed to stop future conduct); *Carpenter v. Con-Way Central Express, Inc.*, 481 F.3d 611, 619 (8th Cir. 2007) (Alleged co-worker retaliation was not actionable since there was no evidence that employer failed to correct co-worker behavior *because* of Carpenter's protected conduct).

Finally, there is also no evidence in the record that any of the unnamed co-workers had any knowledge that Gonzalez complained to Ragle or otherwise engaged in any protected activity. The absence of any record evidence of co-worker knowledge of Gonzalez's alleged protected activity precludes Gonzalez from establishing a causal connection and her prima facie case based on this theory is not viable.

D. Johnson's Alleged Yelling at Gonzalez During a Safety Meeting Was Neither Materially Adverse nor Causally Connected.

Gonzalez also claims that in December 2007, co-worker Machinist Larry Johnson yelled at her during a safety meeting stating that it was not his fault that Gonzalez and Minh Ngo did not get along. Johnson's outburst is not actionable retaliation because it is more akin to sporadic use of abusive language and trivial harms that the *Burlington Northern* court said was not materially adverse. *Burlington Northern v. White, supra,* at 67-68 (judicial standards for sexual harassment must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'") (emphasis added). Indeed, even a few profanity-laden

yelling episodes connected to other conduct are not sufficiently materially adverse to rise to the level of actionable retaliation. *Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (Sporadic verbal altercations or disagreements do not qualify as adverse actions for purposes of retaliation claims: Title VII, does not set forth "a general civility code for the American workplace.") In *Baloch*, the profanity-laden altercations in February, March, August, and October 2003 between Baloch and supervisor Loman did not meet the requisite level of regularity or severity to constitute material adversity for purposes of a retaliation claim. *Id.*

Additionally, as with the allegations of co-worker silence, Johnson's yelling does not support a prima facie case of retaliation for the reason that there is no evidence in the record to show that Amtrak knew about the yelling or failed to take any action to stop future yelling *because* of Gonzalez's protected conduct. *See, Swenson* and *Carpenter, supra.*

E. Duncan's Alleged Charging at Gonzalez and Yelling at Her Was Not Causally Connected.

Duncan's alleged charging at Gonzalez and yelling at her on January 25, 2008 cannot support a retaliation claim because there is no evidence of a causal link between any protected conduct and Duncan's actions. In the trial court, Gonzalez identified two instances of potential protected conduct: (1) the October 25, 2007 complaint to Ragle about unequal work assignments and (2) the filing of the Complaint in January 2008.[30] However, there is no evidence in the record that either is causally linked to Duncan's alleged behavior on January 25, 2008.

The October 25, 2007 complaint to Ragle – three months prior -- is too far removed in time for a reasonable juror to infer a causal link to Duncan's behavior on January 25, 2008 based on temporal proximity alone. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (stating,

[30] ER 113, ¶35.

"to establish a prima facie case . . . the temporal proximity must be 'very close,'" and citing with approval case holding three month interval is, as a matter of law, not close enough). *See, also Taylor v. Solis*, 571 F.3d 1313, 1322 (D.C. Cir. 2009) (2½ months insufficient for jury to infer causation based on timing alone); *Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002) (holding employee failed to make out "causal link" required for prima facie case of retaliation because two months between protected activity and challenged action could not, as a matter of law, "justify a finding in [her] favor").

The filing of the Complaint on January 18 is obviously close enough in time to Duncan's January 25 outburst, but Gonzalez cannot dispute that Duncan lacked knowledge of the Complaint until February 2008 – after Amtrak was served.[31] Duncan's February 2008 knowledge of the Gonzalez's Complaint clearly could not have motivated his prior conduct on January 25, 2008.

F. Lane's Alleged Unfair Discipline of Gonzalez Was Not Causally Connected.

Lane's alleged unfair discipline of Gonzalez in January 2008 has the same problems as the Duncan allegation and more. It is too far removed in time from the October 25, 2007 complaint to Ragle and, further, there is no evidence in the record that Lane had any knowledge whatsoever that Gonzalez engaged in any protected conduct.

G. Alleged Continuing Problems With Gonzalez's Workload Was Not Causally Connected.

Gonzalez's allegation that problems with her work load "persisted"[32] after her complaint to Ragle also fails to support a prima facie case of retaliation due to a lack of causal nexus evidence. Gonzalez testified at her deposition that she was

[31] See Duncan Dec., SER 1.2, ¶4.
[32] See Plaintiff's Response to Amtrak's Motion for Summary Judgment, p.15, line 10, SER 3.3.

assigned a disproportionate amount of the work duties due to her gender beginning in "August 2006."[33] The District Court dismissed Gonzalez's excessive workload theory as part of her gender discrimination claim[34], which is not contested on appeal. Gonzalez's failed gender discrimination theory works no better as a retaliation theory mostly because there is no evidence in the record that Ragle continued to assign Gonzalez a disproportionate amount of work duties after her October 2007 complaint and/or *because* of her complaint. *See, Carpenter, supra.*

On the contrary, when asked at her deposition what the basis of her retaliation claim against Amtrak was, Gonzalez testified that it was Ragle's comment "Here we go again . . . "– nothing was said about an alleged disproportionate assignment of work.[35] When asked if there was any other conduct by Ragle, Gonzalez identified none and the record contains none.[36]

When asked if there were any other retaliatory actions by any other Amtrak employees, Gonzalez identified the workload issue.[37] The record also shows that in addition to Ragle, other foreman supervised Gonzalez including Joon An, Tom Walker, Mike Mullins, and John Lane and that these other foremen assigned Gonzalez work.[38] Thus, based on this record, a reasonable juror could only infer that the workload retaliation claim is based on the alleged disproportionate work assigned to Gonzalez by An, Walker, Mullins or Lane after Gonzalez's protected complaint to Ragle or some other protected conduct. The problem Gonzalez has in

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[33] See Gonzalez Deposition Transcript at 111:18-21, ER 41.
[34] The District Court dismissed Gonzalez's gender discrimination claim stating that Gonzalez presented no evidence the alleged discriminatory actions affected her terms and conditions of employment and, nonetheless, failed to plead a prima facie case. See Order Granting Defendant's Motion for Summary Judgment at ER 145.
[35] See Gonzalez Dep. at 196:18 – 197:3, ER 58.
[36] See Gonzalez Dep. at 197:4 - 6, ER 58.
[37] See Gonzalez Dep. at 197:7-11, ER 58.
[38] See Gonzalez Dep. at 44:20 – 45:20, ER 27, and at 81-82, ER 33-34.

establishing a prima facie case under this theory is the complete lack of record evidence showing that An, Walker, Mullins or Lane had knowledge of any complaint and that they made a subsequent disproportionate job assignment *because* of the protected conduct. There is no direct evidence such as statements that provide the linkage. Proximity in time evidence is not available to Gonzalez because the record lacks evidence of the timing of any of the allegedly disproportionate work assignments in reference to any prior protected conduct. Indeed, Gonzalez's workload complaint goes back to 2006. On this record, Gonzalez cannot establish a causal link between any alleged protected conduct (complaint) and any subsequent or prior disproportionate work assignment. As such, summary judgment as to this allegation is warranted.

H. Amtrak's Alleged Failure to Respond to Gonzalez's Complaints to Management Was Not Causally Connected.

Other than her alleged complaint about steam cleaning engines to Duncan in Spring 2008 (a date that was never raised before the trial court and which is not supported by her record citation on appeal), Gonzalez does not specify the dates, months, or years of her alleged post-protected conduct complaints or to whom they were made. Without record evidence of dates, neither proximity to the alleged protected conduct nor temporal order can be determined. Gonzalez offers no other evidence of causation and summary judgment on this allegation – like the others – is appropriate because she has failed to carry her burden to establish a prima facie case.

I. Unnamed Co-Workers Alleged Accusation of Gonzalez of Trying to Get Ngo Fired Was Not Causally Connected.

Finally, Gonzalez's allegation that unnamed co-workers accused her of trying to get Ngo fired also cannot support a prima facie retaliation claim because there is no evidence in the record that Amtrak knew about the co-worker accusations or that once Amtrak acquired such knowledge, it failed to stop the

occurrence of future conduct *because* of Gonzalez's October 25 complaint to Ragle or any other protected conduct. *See, Swenson* and *Carpenter, supra.*

CONCLUSION

For these reasons, Amtrak requests the appellate court to affirm the trial court's dismissal of both Gonzalez's state and federal retaliation claims.

STATEMENT OF RELATED CASES

Amtrak knows of no related cases.

RESPECTFULLY SUBMITTED this 21st day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have caused the foregoing document to be hand delivered this date to the following non-CM/ECF participants:

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DATED this 22nd day of September, 2009.

s/ Debra Turner
Debra Turner