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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROBIN FORD, Plaintiff and Appellant, v. CHEVRON CORPORATION et al., Defendants and Respondents.	B278989 (Los Angeles County Super. Ct. No. BC598764)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Calderone Law Firm, Vincent Calderone and Ivan Perkins for Plaintiff and Appellant.

Jones Day, Craig E. Stewart, Aaron L. Agenbroad and Liat L. Yamini for Defendants and Respondents.

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In this employment case, plaintiff Robin Ford appeals the grant of summary judgment to defendants Chevron Corporation and Chevron U.S.A., Inc. (together Chevron), on her single claim for age discrimination after she was not hired for either one of two work control specialist (WCS) positions or three administrative positions at Chevron's El Segundo refinery. Having worked for a decade as a contractor for Chevron, including four years in a similar WCS role, she believed she was the most qualified applicant for the WCS positions and had an unblemished work record, so the only conceivable reason she was passed over in favor of two less qualified younger candidates was because she was 57 years old. Chevron claimed that, at the time it hired the two candidates, Ford was not selected because she was ranked last after interviews with potential candidates and she had "behavioral issues." Because Chevron's undisputed evidence supported this assessment and Ford failed to raise a triable issue of pretext, summary judgment was proper. As for the three administrative positions, Ford's only evidence of intentional discrimination was that the three candidates selected were significantly younger than her. That was insufficient to establish a prima facie case of intentional discrimination and summary judgment was proper on these claims as well. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Chevron engaged Ford as a contractor in various roles for approximately 10 years, starting in 2005. In January 2010, Chevron discontinued her service as part of a reduction in force, but requested she return approximately a year and a half later in July 2011. At the time Chevron invited her back, she was 53 years old.

In September 2011, Chevron began developing the WCS position, and over time Ford's job scope changed into a WCS. During that period she was supervised by Joe Caravello and Larry Laye, among others. Three other contract workers were also performing WCS functions in other departments: Elva Cervantes, Jennifer Craig, and Maria Hoffer. Ford trained Craig and Hoffer in their positions. Also, she gave Cervantes some instruction in the position. Ford worked as a contractor until June 2015, when she was let go after she was not selected for the permanent WCS positions and the administrative positions at issue.

During Ford's tenure in the WCS role, she received positive performance evaluations and e-mails praising her work. She denied ever receiving any counseling, reprimands, or discipline for her performance or behavior.

While Ford claims she was not aware of any issues, Chevron presented three contemporaneously documented instances of either poor job performance or behavioral issues, two of which Ford acknowledged. First, in a January 2014 e-mail, someone wrote to her, "What prevented you from getting this done yesterday? This is also not the first time this has happened." When asked about this e-mail at her deposition, Ford recognized it but did not understand it to be a concern about getting her work timely completed. Instead, she "didn't really pay a lot of attention to it" because the sender was not her supervisor. She understood the e-mail to be a "nuisance."

Second, Ford admitted she rushed out of a meeting with her supervisor Laye and another supervisor in August 2014. At her deposition, she said she "felt myself getting very stressed out and I was going to cry. And I didn't want to cry in front of our

new supervisor. So I went outside." She returned and apologized, explaining to them she was "under a very stressful time in my life, that I had some really important, significant things going on and that I would not do that again." She admitted Laye told her the behavior was unprofessional and they "discussed it at length, not once, but probably three times. . . . [S]o he told me he understood my stress and coached me on that."

Laye documented this incident shortly after it happened. He wrote when she was questioned about information she had provided, she "began to get a bit flustered and gave some reason why it may not be correct, due to having to do others['] work that is not really her job, so insinuated that she was somewhat over whelmed." He and the other supervisor present asked her more questions, and Ford "got angry and said, 'Rafael, I know you are going to throw me under the bus so I am leaving[,]' and stormed out." Laye asked the other supervisor if that had ever happened in the past, and the supervisor said, "She does this sometimes." According to Laye's deposition testimony, Ford returned to the meeting 10 minutes later and eventually apologized.

Laye documented a third incident in April 2015, when he spoke to Ford about reassigning some of her work to Cervantes, who was also performing WCS functions at the time. Cervantes told him Ford "came to her desk immediately after talking to me and said, [Laye] is going to ask you if you can take on more work and [Ford] demanded that she decline and say she could not and that her plate was too full." At his deposition, Laye further explained Ford told Cervantes "you tell him, no, you do not have additional bandwidth, and you tell him no, no." Laye felt "that was a tough pill to swallow. It's not Chevron-conducive behavior." Laye reported this incident to maintenance

department manager Erin Jolly, who believed it was intimidation and did not show a "great deal of integrity" from Ford. When asked about this incident at her deposition, Ford did not recall it ever occurring.

Other managers testified to Ford's performance and behavioral issues, although they were not contemporaneously documented and Ford refuted their testimony. For example, Jolly testified she was told Ford's notes during meetings were inaccurate, so the format of the meetings had to be changed to enable real-time review of her notes.

Ford's former supervisor Caravello praised her work on occasion and even recommended her for a pay raise at one point. But he testified he received negative feedback about her from "many people" and he spoke with her multiple times about "[h]ow she treated other people, how she responded to their requests, not to snap at them, not to become frustrated, stay calm." He noted one incident when she had a "big blow-up" with a maintenance supervisor and noted she did not get along with another work control administrator and a manager from the central planning group. He was "always having to try to calm down Robin, and I did protect her." He was not involved in any of the hiring decisions at issue in this case and did not communicate any information about Ford to the decision makers.

Chevron posted openings for two permanent WCS positions in April 2015. As early as January 2015, Chevron began discussing internally whether the candidates for these positions should be solely internal, or if it would accept both internal and external applicants. In March 2015, Jolly and manager Tim Sutherland decided to open the positions to both internal and external candidates.

Ford's then-current supervisor Laye was responsible for filling the positions. He believed Ford had strong technical skills and met the minimum requirements for the position, and he told her she should be sure and apply. In all, 200 people applied for the WCS positions, and Chevron selected nine to interview, including Ford, Hoffer, and Cervantes. Five of the applicants were over 40 years old, including Ford (age 57) and Hoffer (age 54).

Four Chevron managers conducted the interviews, including Laye. The panel asked each candidate the same set of questions and then panelists each completed an interview guide and assigned a score for the responses from the candidate. After each interview, the panel would calibrate their scores and discuss the candidate, which included discussing the panel members' experience with the candidate and the candidate's behavior.

After the interviews, the panel ranked the candidates in a scoring matrix and provided a recommendation. Based on raw score alone, Ford ranked seventh. But based on performance and behavioral factors beyond the interview itself, Ford was dropped to ninth (i.e., last) place. On the scoring matrix, it was noted: "Based on historical behaviors, Robin [Ford] is a weaker candidate than [the candidate ranked immediately above her with a lower raw score]. Does not represent Chevron way behaviors. Does not meet minimum qualifications based on behavioral issues."[1]

Laye discussed with the panel his personal experiences with Ford, including specifically the incident when Ford stormed

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[1] The "Chevron Way" was a document created by Chevron setting forth its visions, values, and strategies.

out of the meeting. According to Laye, "the general consensus from the team was that [Ford] did not display appropriate Chevron behaviors based on whatever interaction they had with her over the years that she had—or year or whatever time frame she had been around them, alongside them, or otherwise." Speaking in generalities, Laye said the panel believed she was "difficult to work with, not receptive to feedback, defensive, creates a non-conducive work environment."

According to Laye, the scoring comprised 20 percent of the panel's ranking, while the individual's résumé and behavior comprised 80 percent.

The panel recommended Cervantes and Hoffer for the positions, who ranked first and second respectively in the scoring matrix. Cervantes was 34 years old and Hoffer was 54 years old. Both were external candidates. After receiving the recommendation, Jolly met with Sutherland, who told her there was a business need to fill one WCS position with an internal candidate because an internal position had been eliminated. Therefore, Cervantes was offered one WCS position as the top external candidate, and Je'Nae Lyles was offered the second position over Hoffer as the top internal candidate. Lyles was ranked fourth on the scoring matrix with an identical score to Violet Torres, another internal candidate listed directly above her in the matrix. Lyles was 35 years old and Torres was 46.

According to Jolly, Lyles was selected over Torres for the internal position because she had more experience in the maintenance department and the databases the department used, whereas Torres worked in the human resources department. Consistent with Sutherland's business reason for hiring an internal candidate, when Lyles was selected for the

WCS position, Brandy Taylor was moved into Lyles's old position because Taylor's position was eliminated. As for Cervantes, she had already been performing WCS functions as a contractor, like Ford.

Ford did not personally know the extent of the qualifications of any of these candidates. She nonetheless claimed she was more qualified for the WCS position than either Cervantes or Lyles. She offered no evidence either of these candidates had any behavioral issues.

Ford received no feedback after her interview for the WCS positions, so she felt confident about it. She was "shocked" to learn she was not selected. She was asked to leave the Chevron premises the day she found out, and Laye drove her to the gate. According to Laye's contemporaneous notes, during that drive Ford was disgruntled and told him: "I thought you had my back . . . where is your integrity? That job was mine and I knew it was mine. I am the best fit for it and no-one is better at it. I helped design the job"; "You are not the person I thought you were you have no integrity"; "This is bullshit (several times) you fucked me . . . this is bullshit!" Laye noted, "I told her that I do have integrity and i[t] coincides with doing the right thing and following protocol which is exactly what I did. I also stated that there were others that the team felt were better equipped for the role who will be offered the position." At her deposition, Ford remembered saying, "This is bullshit" and "How am I going to pay my fucking rent?"

Dianna Day was a supervisor at Chevron. She did not supervise Ford, but she was her "best friend." She had worked "side by side" with Ford, she was aware of the requirements for the WCS position, and she believed Ford was qualified. She was

not involved in the selection process for the WCS positions, but she encouraged Ford to apply. When shown the comments about Ford's behavioral issues in the scoring matrix, Day testified she was "shock[ed]" and "[d]ismay[ed]." She believed the idea that Ford did not meet minimum qualifications for the WCS position was "ridiculous." She had never seen any behavioral issues from Ford and "assume[d]" those issues would be documented if they existed, although she did not know. She believed Ford "deserved" the position. She did not know the qualifications for everyone who applied for the WCS positions and did not know how Ford performed during her interview. She knew some of Cervantes's background because she had previously interviewed her for a WCS contract position in 2014.

At the same time Ford applied for the WCS positions, she also applied for three administrative openings. Those positions went to three other candidates, ages 34, 33, and 32.

Ford filed a complaint in October 2015 alleging a single claim for age discrimination under the California Fair Employment and Housing Act, Government Code section 12940 et seq. Chevron moved for summary judgment, which the trial court granted. It concluded (1) Ford failed to present a prima facie case of age discrimination for the administrative positions, (2) Chevron demonstrated the reasons she was not hired for the WCS positions were her seventh-place ranking after interviews and her behavioral issues and performance, and (3) Ford failed to raise a triable issue that Chevron's reasons were pretextual. The court also ruled on the parties' evidentiary objections, overruling all but one of Ford's 12 objections to Caravello's testimony and sustaining Chevron's four objections to Day's testimony. The court entered judgment for Chevron and Ford appealed.

DISCUSSION

1. Legal Standard

We review de novo the grant of summary judgment, considering all the evidence presented by the parties except evidence for which objections were made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) A court shall grant a motion for summary judgment if all the papers show there is no triable issues as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The moving party may do this by showing either (1) one or more elements of a cause of action cannot be established, or (2) a complete affirmative defense to the cause of action exists. (Code Civ. Proc., § 437c, subds. (*o*), (p)(2).)

Because Ford's case rests entirely on circumstantial evidence, we apply a familiar burden-shifting framework from *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*). (*Guz, supra,* 24 Cal.4th at p. 354.) For the purpose of trial, this requires the employee to first establish a prima facie case of discrimination. (*Ibid.*) In the context of age discrimination, that generally requires the employee to show "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Id.* at p. 355; see *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 142 [setting forth similar requirements under federal law].)

Once the employee sets forth a prima facie case, the burden shifts to the employer to present evidence of a legitimate,

nondiscriminatory reason for the adverse employment action. (*Guz, supra*, 24 Cal.4th at pp. 355-356.) The burden then shifts back to the employee to attack this reason as pretext for discrimination and offer any other evidence of discriminatory motive. (*Id.* at p. 356.)

When an employer moves for summary judgment, it must initially present admissible evidence " ' "either that one or more of the plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors." ' " (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309.) If the employer presents a legitimate nondiscriminatory reason for the adverse action, the burden then shifts to the employee to "offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005 (*Hersant*).)

2. Evidentiary Rulings

Ford challenges the trial court's evidentiary rulings overruling all but one of her objections to portions of Caravello's deposition testimony and sustaining Chevron's objections to several portions of Day's testimony. The standard of review for the trial court's evidentiary rulings at summary judgment is not fully settled. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.) We will follow the "weight of authority" and " 'review the trial court's evidentiary rulings on summary judgment for abuse of discretion. [Citations.] As the part[y] challenging the court's

decision, it is [Ford's] burden to establish such an abuse, which we will find only if the trial court's order exceeds the bounds of reason.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852 (*Serri*); see *Ryder v. Lightstorm Entertainment, Inc.* (2016) 246 Cal.App.4th 1064, 1072 [applying abuse of discretion standard].)

We find the trial court did not abuse its discretion in admitting Caravello's testimony about Ford's behavior, but we find the court did abuse its discretion by excluding most of Day's similar testimony regarding Ford's candidacy and lack of behavioral issues. Reversal is not warranted, however, because Ford suffered no conceivable prejudice.

a. Caravello

Ford primarily objected that Caravello's testimony about her behavioral issues was irrelevant because he was not involved in any of the hiring decisions at issue and he did not communicate with the decision makers. Nonetheless, his testimony *was* relevant because it corroborated the truth of Chevron's legitimate nondiscriminatory reason for not hiring her due to her behavioral issues, critical issues in the case. (Evid. Code, § 210.)

Ford also objected to portions of Caravello's testimony as inadmissible hearsay, including that he received "negative feedback from many people" about her; he "understood [her] idiosyncrasies and how she interacted"; he "doubt[ed]" anyone other than him would have called her "sweet" or "best" as he did in an e-mail to her; and his description of the "big blow-up" with the maintenance supervisor. None of this testimony was inadmissible hearsay because it was based on his personal

experiences and did not convey the substance of any out-of-court statements offered for their truth.

Finally, Ford objected that Caravello lacked personal knowledge and foundation to say he "doubt[ed]" anyone other than him would have called Ford "sweet" or "best," and Ford was "kind of over the top in what she thought and what she would ask for." These were Caravello's personal views of Ford based on his interactions with her, so he had more than sufficient foundation and personal knowledge to give this testimony.

b. Day

The trial court sustained Chevron's relevance, personal knowledge, and foundational objections to four portions of Day's testimony:[2] (1) she was "[d]ismay[ed]" and "shock[ed]" when shown the scoring matrix after the interviews for the WCS positions; (2) she believed Ford was one of the most qualified candidates and met all the requirements for the positions; (3) she believed Ford had no behavioral issues and the notation about her "behavioral issues" on the scoring matrix was "ridiculous"; and (4) if Ford had behavioral issues, Day "assume[d]" they would be documented.

The court properly sustained Chevron's objections to the fourth statement about Day's knowledge of Chevron's procedure for documenting Ford's behavioral problems. In response to the question about whether Chevron would document Ford's behavioral issues, Day's exact testimony was: "I would *assume* it would be documented. I don't know that for a fact, but that's

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[2] Chevron also objected that this testimony was more prejudicial than probative pursuant to Evidence Code section 352, but does not defend that ground on appeal. We therefore decline to address it.

what we would do with a Chevron employee. I would *assume* it would be documented, and I would *assume* that she would not continue to be called back for 10 years." (Italics added.) Day's assumptions about Chevron's actions related to Ford's behavioral issues amounted to speculation and were properly excluded.

The trial court abused its discretion in excluding the other portions of Day's testimony, however. Day was Ford's best friend and testified she worked "side by side" with Ford, knew her qualifications, and understood the requirements of the WCS position. She also knew some of Cervantes's qualifications. That knowledge gave her at least a basic foundation to express her subjective personal opinions about Ford's candidacy and fit for the position. And similar to Caravello, Day was not involved in the WCS selection process, but her knowledge that she was unaware of any behavioral issues was at least somewhat probative of the truth of Chevron's reason for not hiring Ford.

Nonetheless, Ford was not prejudiced by the erroneous exclusion of Day's testimony because it was not reasonably probable Ford would have obtained a more favorable result in the absence of the error. (Evid. Code, § 353; *Serri, supra*, 226 Cal.App.4th at p. 857.) As we will explain in detail below, undisputed evidence showed Ford ranked last due to her history of behavioral issues, two of which she acknowledged occurred and a third she did not recall. Day's personal opinions about Ford's qualifications would not create a triable issue of fact that Chevron's reasons for not hiring Ford were pretext.

3. WCS Positions

For the WCS positions, Chevron did not challenge Ford's prima facie case and instead presented facially credible evidence of legitimate, nondiscriminatory reasons for not selecting her.

(See *Guz, supra,* 24 Cal.4th at p. 357 [at summary judgment, employer may proceed directly to the second step in the *McDonnell Douglas* framework].) As an external candidate, Ford was ineligible for the internal position that went to Lyles (although Ford disputes the motive behind the internal/external decision, as we discuss below). For both positions, the interview panel ranked Ford last due to her "historical behaviors," which made her "a weaker candidate" than the candidate ranked immediately above her. It noted she did not "represent Chevron way behaviors," and she did "not meet minimum qualifications based on behavioral issues."

That assessment was corroborated by contemporaneous documentation of several behavioral incidents and Ford's own deposition testimony admitting at least two of these incidents occurred. A member of the interview panel as well as Ford's supervisor, Laye had specific personal experience with two instances of Ford's behavioral problems, which he contemporaneously documented—when she stormed out of a meeting and when she told Cervantes not to take additional work. Chevron also presented a January 2014 e-mail, which questioned Ford completing a task on time. Caravello and Jolly corroborated her performance and behavior issues. Jolly became aware of problems with Ford's note-taking during meetings that prompted changing the format of the meetings. Ford's former supervisor Caravello received negative feedback about her from "many people" and spoke with her multiple times about "[h]ow she treated other people, how she responded to their requests, not to snap at them, not to become frustrated, stay calm." He noted one incident when she had a "big blow-up" with a maintenance supervisor and noted she did not get along with another work

control administrator and a manager from the central planning group.

In the face of this evidence, Ford was required to present "evidence which nonetheless raises a rational inference that intentional discrimination occurred." (*Guz, supra,* 24 Cal.4th at p. 357.) In demonstrating pretext, she must " 'produce "substantial responsive evidence" that the employer's showing was untrue or pretextual.' " (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.) She cannot "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee ' "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.' " ' " (*Ibid.*, quoting *Hersant, supra*, 57 Cal.App.4th at p. 1005.)

Ford relies on several categories of circumstantial evidence to show Chevron's decision not to hire her for the WCS positions was so unworthy of belief that age discrimination must have been its motive.[3] As our detailed discussion will explain, these

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[3] Ford spends a significant portion of her briefs attacking the trial court's reasoning. Given our review is de novo, we need not address these points. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140 ["[I]t is well settled that on appeal following summary judgment the trial court's reasoning is irrelevant, and the matter is reviewed on appeal de novo. [Citations.] We exercise our independent judgment as to the legal effect of the undisputed facts [citation] and must affirm on any ground supported by the record."].)

categories do not create a triable issue of fact regarding pretext. Apart from the specific weaknesses with this evidence, none of it rebuts the undisputed evidence she *did* have at least three contemporaneously documented behavioral and professionalism incidents, two of which she admitted actually happened—the January 2014 untimely work e-mail and the storming out of the meeting—and one of which she could not recall—telling Cervantes not to take more work. She downplays their seriousness, calling the January 2014 e-mail about her untimely work a "nuisance" and describing the occasion when she stormed out of the meeting as a result of stress. But she cannot deny they occurred. She even *admitted* in her deposition Laye told her walking out of the meeting was unprofessional and they discussed the incident three times. Laye also contemporaneously documented two of the incidents and spoke with the interview panel about her walking out of the meeting. There was no evidence either Cervantes or Lyles had any similar incidents in their background. Thus, even if Chevron placed outsized emphasis on Ford's behavioral history, it does not create a triable issue of fact that Chevron's reasons for not hiring her were *false*, let alone so "unworthy of credence" as to give rise to a reasonable inference of discriminatory motive.

a. Work Experience

Ford cites evidence she "pioneered" the WCS role, held it for over four years, trained employees in the role, and worked for different supervisors at Chevron over the course of 10 years. Assuming that is all true, her experience and tenure do not rebut the undisputed evidence of her history of behavioral incidents. The mere fact that she continued to work for Chevron after these incidents at best suggests they were not serious enough for

disciplinary action or termination. But they certainly could have disqualified her from the WCS positions when considered alongside other candidates who were qualified for the WCS position but did not have behavioral issues.

b. Selection for Interview

Ford contends her selection as one of nine candidates to interview out of 200 applicants indicates she was "highly qualified," a "desired candidate," and a "top applicant," and she did not have disqualifying behavioral issues. At best, a jury could infer she was *more* qualified than the 191 other applicants who were not selected to be interviewed, but that says nothing about her qualifications compared to the other eight candidates interviewed. It also says nothing about pretext—it defies logic that Chevron would select her for an interview ahead of 95 percent of the other applicants but then refuse to hire her because of her age rather than her interview performance and behavioral issues. The inference of discrimination becomes even more irrational because five of the nine candidates selected for interviews were over 40 years old; the second- and third-highest ranked interviewees—Hoffer and Torres—were over 40; and the interview panel actually recommended Hoffer for one of the WCS positions.

Ford's selection for an interview also does not rebut the undisputed evidence of her behavioral issues. Laye testified he recommended Ford and Cervantes among others to be interviewed because he "wasn't sure what the initial screening process was going to take out or let through, but I did want to make sure that there was an equal opportunity specifically for those that were working the job at the time . . . ." He believed Ford had "strong technical skills" and met the "minimum

requirements" for the positions. None of that suggests Ford was interviewed because she had no behavioral issues; it simply suggests her behavioral problems were not so serious that she should not be interviewed. But when compared to the other candidates, those same behaviors could have readily cost her the position.

c. "Minimum Qualifications"

Ford points out the scoring matrix noted she did not meet "minimum qualifications," whereas Laye and Jolly both testified she actually did meet the "minimum qualifications" and "minimum requirements" for the position; Laye even recommended she be interviewed. Yet, Ford ignores the scoring matrix actually said she did not "meet minimum qualifications *based on behavioral issues*." (Italics added.) There was nothing inconsistent with both Jolly and Laye believing she met the minimum *technical* qualifications for the position, only to then disqualify her after the interview process due to her undisputed behavioral issues when considered alongside other candidates who did *not* have behavioral problems.

d. "Exceptional" Performance Ratings

Ford cites her "exceptional" ratings on a performance review and praise from supervisors, arguing a jury could infer she was a "top performer, in both technical skills and in behaviors and demeanor." But a single positive performance review and occasional praise do not undercut the evidence of her behavioral problems or the undisputed fact that neither Cervantes nor Lyles had similar problems.

Caravello completed the performance review in September 2013, two years before the interviews for the WCS position. It included categories for "Routine Work Control," "Metrics and

Reporting," and "Contracts and Expenditures," but contained no feedback on her behavior in the workplace. Caravello recommended she receive a pay raise. At his deposition, Caravello explained he believed Ford was a hard worker and took on a lot of responsibility, but "some of her responsibilities are to interact with other people, and that was one of the things . . . where she did not excel." He recommended the pay raise to do her a "favor"; he "wanted her to be compensated for the hard work she did perform."

The e-mails praising her work showed in certain instances she had done a good job, but none of them purported to be comprehensive performance evaluations directed toward her behavior in the workplace.

e. No Criticism or Discipline

Ford claims she never received any "discipline, criticism, or reprimand for performance or behavioral issues." As our discussion thus far shows, that is simply inaccurate. At her deposition, Ford acknowledged she received the January 2014 e-mail criticizing her for not timely completing an assignment, even though she called it a "nuisance" because the sender was not her supervisor. She also admitted in her deposition Laye told her rushing out of the meeting was unprofessional and they "discussed it at length, not once, but probably three times. . . . [S]o he told me he understood my stress and coached me on that."

Ford's argument on this point boils down to her *own* perception that these incidents did not constitute reprimands or discipline. But her perception cannot create a dispute of fact. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 ["[P]laintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact."].) The

critical issue is whether Chevron's reason for not hiring her was *false*. Her deposition testimony corroborates that, at least from Chevron's perspective, she *did* have behavioral issues. Whether Chevron placed too much emphasis on them at best shows perhaps an unwise decision, but it cannot show pretext for intentional discrimination.

f. No Documentation of Discipline

Similarly, Ford contends Chevron produced no documentation of any discipline. While she is correct there is no formal disciplinary documents in the record, the absence of documentation does not give rise to an inference of pretext. (See *Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1010.) She also fails to acknowledge there *was* documentation of her behavioral issues. The January 2014 e-mail documented her untimely work, and Laye contemporaneously documented Ford storming out of the meeting and Ford telling Cervantes not to take additional work.

g. Comparative Experience and Qualifications

Ford claims a jury could infer pretext because she had "far superior" experience and knowledge than Cervantes and Lyles in the databases and software necessary for the WCS position, and she was the "best-qualified candidate." (Underscoring omitted.) First, her technical experience and qualifications were largely beside the point in light of the undisputed evidence of her behavioral issues. Laye testified each candidate's résumé and behavior comprised 80 percent of the panel's decision, so Ford could have been vastly more technically qualified than any of the candidates and still been passed over because she was not the right behavioral fit. She offered no evidence Cervantes, Lyles, or any other candidate had the same behavioral problems, and

Chevron could have readily decided it would rather train someone with less experience in the technical aspects of the position than risk hiring Ford in light of her behavioral history.

In any event, the evidence did not show Ford was such a better candidate than Cervantes and Lyles that a rational jury could infer pretext. To create an inference of pretext based on her allegedly superior qualifications, she had to show a jury could conclude that a reasonable employer would have found her qualifications were "significantly better" than Cervantes and Lyles. (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674.) From Ford's four years in a WCS position as a contractor and 10 years with Chevron, a jury could reasonably infer she was well-trained and well-experienced in the requirements of the position. But the undisputed evidence showed Cervantes and Lyles both had some relevant experience for the position. Cervantes had been performing WCS functions as a contractor, like Ford. Ford even gave her some instruction in the position. On the scoring matrix, the panel noted Cervantes was "[c]urrently doing the job as a contractor," she had "[s]trong technical abilities," and most importantly, she had "[n]o behavioral issues." Lyles had experience in the maintenance department and the databases the department used, which were similar to the databases for the WCS position. The panel noted on the scoring matrix she was a "[p]ower user in multiple software systems," and was "already in Maintenance org so transition would be easier." She was also an internal candidate, a qualification Ford did not possess.

The objective difference between the candidates was not so significant that no reasonable employer could have passed Ford over unless it did so for a discriminatory reason. Her own

subjective beliefs about her candidacy are irrelevant to whether Chevron's decision not to hire her was pretextual. (See *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 79 ["The relevant question is not whether [the interviewer] correctly evaluated appellant's skills but whether he acted with discriminatory animus. [Citation.] [The candidate's] self-assessment is insufficient to undermine the legitimacy of the reasons given for not offering him these positions."]; see *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1285 [an employee's " 'subjective personal judgments of [his] competence alone do not raise a genuine issue of material fact' "].)

h. Selecting One Internal and One External Candidate

Ford's final points involve Chevron's decision to hire one internal candidate and one external candidate for the two WCS positions. It is undisputed Sutherland made that decision after the nine interviewees were ranked in the scoring matrix, which resulted in hiring the first-ranked Cervantes as the external candidate and the fourth-ranked Lyles as the internal candidate, both of whom were under the age of 40. In hiring Lyles for the internal position, Chevron passed over the second-ranked Hoffer, who was 54 years old but an external candidate.

On a different record, the timing and results of the internal/external decision no doubt could allow a reasonable jury to infer Chevron created a false scheme to cover a motive to discriminate based on age. But the problem here is that Chevron's decision to hire one internal candidate and one external candidate *had no effect whatsoever on Ford*. Ranked seventh in the scoring matrix based on raw score and last based on her behavioral history, Ford would not have gotten a WCS position even if Chevron had selected the top two candidates,

regardless of their internal or external status. In particular, Ford fell behind Hoffer, who was 54 years old and recommended by the interview panel before the internal/external decision was made. No rational jury could infer that Chevron made the internal/external decision in order to exclude *Ford* from the WCS positions based on her age.

To demonstrate Chevron's internal/external decision masked its true discriminatory motive, Ford is left to argue an elaborate chain of speculation. First, a jury would have to infer Sutherland's postinterview internal/external decision was proof of Chevron's *general* motive to discriminate against all older candidates. Next, the jury would have to infer this general discriminatory motive infected the interview process, even though there was no evidence Sutherland was involved in the interview and ranking process prior to making the internal/external decision. Third, if a jury drew those inferences, it would *then* have to conclude the interview panel and Sutherland were both so committed to discriminating against Ford they concocted the *additional* false excuse of her behavioral issues to ensure she got nowhere near the top of the candidate ranking. No rational jury could reach this conclusion based on this record.

Chevron also conclusively rebutted any inference the internal/external decision was pretext for discrimination. It was undisputed Chevron began discussing filling the positions with both internal and external candidates as early as January 2015, and Sutherland and Jolly decided to open the position to both types of candidates in March 2015. When the decision was finally made, Sutherland explained there was a business need for it because an internal position had been eliminated. That reason

turned out to be true because after Lyles was hired, Taylor's position was eliminated and she was moved into Lyles's former position. In the face of this undisputed evidence, the timing of the final internal/external decision alone is far too weak to give rise to a rational inference that Chevron fabricated this entire decisionmaking process as pretext for intentional discrimination. (See *Guz, supra,* 24 Cal.4th at p. 362 [summary judgment appropriate where employee's circumstantial evidence is too weak to raise a rational inference of discrimination in the face of the strength of the employer's innocent reasons for adverse action].)

Ford cites four other bits of evidence related to Chevron's internal/external decision, none of which creates a dispute of fact over Chevron's motive. First, Ford points out the WCS job posting did not specify one internal and one external position, but that carries no weight because it was undisputed Chevron did not make the internal/external decision until after the interviews.

Second, Ford argues Chevron's internal/external decision violated its own equal employment opportunity policy statement to "employ[] the most-qualified employees based on objectively valid factors." For reasons already explained, Ford has not shown Chevron's reliance on a candidate's internal or external status was anything other than an "objectively valid factor[]."

Third, Ford points to an e-mail from Laye to Hoffer informing her she had not been selected, explaining: "The critical selection criteria for this position were: Interpersonal & Teamwork Skills; Communication Skills; Job Knowledge/Computer Skills; Planning and Organization Skills; and Problem Solving/Analytic Skills. The successful candidate demonstrated the greatest breadth of Chevron experience,

teamwork, communication skills and a strong background *related to the open position requirements*." (Italics added.) Ford claims this explanation was inconsistent with Chevron's claim it passed Hoffer over in favor of Lyles because Lyles was an internal candidate. But consistent with the portion of Laye's e-mail we have italicized, the undisputed evidence showed the internal/external decision became one of the requirements for the open positions.

Finally, Ford places significant weight on an e-mail from Chelsie Weathers to Jolly that referred to the internal/external decision as a "strategy." After the interviewees had been ranked, Jolly e-mailed Sutherland and Weathers, "I spoke with Larry [(presumably Laye)] and reviewed the candidate scoring. I don't see anything that would change our discussion from this morning, and ask for OC endorsement on the selection of the top external and top internal person." Weathers responded, "I spoke with Tim [Sutherland] regarding the WCSs. He is not planning on mentioning names . . . strictly get approval on *strategy* for hiring one internal and one external candidate." (Italics added.) Jolly testified the only "strategy" was hiring one internal and one external candidate, which she conceded would have been an endorsement of Cervantes and Lyles. When asked if the panel had already decided on Cervantes and Lyles, Jolly responded, "Yes. Looking at the dates on this email, the meeting where [Sutherland and Weathers] and I discussed the work control specialist selection must have been before this email was sent."

Ford argues a reasonable jury could interpret the word "strategy" to mean a scheme to cover up intentional age discrimination. For the reasons we have already set forth, no reasonable jury could infer pretext from the use of this single

word in one e-mail related to a decision that had no direct impact on her.

4. Administrative Positions

Ford claims she was subject to age discrimination when she was not selected for any of the three other administrative positions and those positions were filled by significantly younger candidates (ages 34, 33, and 32). In her verified complaint, she generally alleged she was qualified for those positions because they were "at a lower level" than the WCS position and she was "better qualified" than the candidates selected. She provided no details of the requirements of the positions, how her experience fit them, or the qualifications of the candidates selected. At her deposition, she conceded she did not know anything about the qualifications of the candidates selected, did not know anything about their performance, did not know if any of them had behavioral issues, and did not know who made the hiring decisions. She believed she was discriminated against solely because they were younger than her.

In moving for summary judgment, Chevron relied on Ford's deposition testimony to argue she lacked evidence to establish a prima facie case of age discrimination for these positions and the fact that younger candidates were selected for the positions was not enough to show a discriminatory motive. In opposition, Ford argued Chevron "misunderstood" its burden of proof in moving for summary judgment and contended Chevron was required to put forth a legitimate nondiscriminatory reason for hiring younger candidates, which it failed to do. She cited the allegations in her complaint to claim she established a prima facie case; she offered no additional evidence. The trial court agreed with Chevron.

On appeal, Ford continues to argue Chevron was required to offer some legitimate nondiscriminatory reason for selecting younger candidates over her for these positions. She is mistaken. In seeking summary judgment, Chevron was free to offer evidence "that *either* negates an element of the employee's prima facie case, or establishes a legitimate nondiscriminatory reason for taking the adverse employment action against the employee." (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 966.) Chevron carried its burden to negate Ford's prima facie case by showing she lacked any evidence to suggest intentional age discrimination.

To show a prima facie case of discriminatory failure to hire, Ford was required to offer evidence that (1) she was over 40 years old; (2) she applied and was qualified for the administrative positions; (3) despite being qualified, she was rejected; and (4) after her rejection, "the position[s] remained open and [Chevron] continued to seek applications from persons of comparable qualifications." (*Levy v. Regents of University of California* (1988) 199 Cal.App.3d 1334, 1343 (*Levy*); see *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 149 [same elements for national origin discrimination in hiring]; *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 663 [same for race discrimination].) At a minimum, she must show " ' "actions taken by [Chevron] from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' " ' " (*Guz, supra,* 24 Cal.4th at p. 355; see *Clark, supra*, at p. 663.)

She attempted to meet her prima facie burden *solely* through the allegations in her verified complaint. Yet, she may not rely on allegations in her complaint, even if verified, to create

a triable issue of fact. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7; *Cornelius v. Los Angeles County etc. Authority* (1996) 49 Cal.App.4th 1761, 1768.) That alone entitled Chevron to summary judgment.

Even if we considered her conclusory allegations, her prima facie case falters on at least the second and fourth elements. Her allegations reveal nothing about the actual requirements of the position or how her qualifications fit them, and she admitted she knew nothing about the qualifications of the candidates selected. (See *Levy, supra*, 199 Cal.App.3d at p. 1347 [plaintiff failed to establish prima facie case of age discrimination absent evidence "(1) that he was, in fact, qualified for the position, and (2) that another person of similar qualifications outside the protected age group received the position"].) Without more, the sole fact that Chevron hired candidates significantly younger than her gives rise only to speculation, not a rational inference of discriminatory motive. We recognize the burden to establish a prima facie case of age discrimination is " 'not onerous.' " (*Guz, supra*, 24 Cal.4th at p. 355.) Yet, when put to her proof, Ford failed to clear even this low hurdle. Summary judgment on these claims was proper.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J. RUBIN, J.