

**Case No. A-25-477
IN THE NEBRASKA COURT OF APPEALS**

**REYMITA WALLS,
APPELLANT,
VS.
METROPOLITAN UTILITIES DISTRICT,
APPELLEE**

**APPEAL FROM THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA
Honorable Tressa Alioth, District Court Judge**

**Brief of Appellee and Brief on Cross-Appeal
METROPOLITAN UTILITIES DISTRICT OF OMAHA**

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TABLE OF CONTENTS

STATEMENT OF THE BASIS OF JURISDICTION.....	5
STATEMENT OF THE CASE.....	5
1. Nature of the case	5
2. Issues tried in the court below.....	6
3. How the issues were decided and what judgment was entered by the trial court.....	6
4. The scope of appellate court review	6
PROPOSITIONS OF LAW	6
STATEMENT OF THE FACTS.....	9
ARGUMENT	13
I. APPELLANT FAILS TO IDENTIFY WHAT EVIDENCE WAS DISREGARDED BY THE TRIAL COURT OR TO SHOW HOW SHE WAS PREJUDICED	13
II. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT WHETHER APPELLANT WAS DISCRIMINATED AGAINST ON THE BASIS OF HER RACE, GENDER, AND/OR AGE	16
III. APPELLANT FAILS TO IDENTIFY WHAT EVIDENCE THE TRIAL COURT FAILED TO VIEW IN HER FAVOR OR SHOW HOW SHE WAS PREJUDICED	23
IV. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THERE WAS NO EVIDENCE THAT THE APPELLEE'S ARTICULATED REASON FOR HIRING A CANDIDATE OTHER THAN APPELLANT WAS A PRETEXT FOR DISCRIMINATION	27
CONCLUSION	31

TABLE OF AUTHORITIES CITED

Cases

<i>Arens v. NEBCO, Inc.</i> , 291 Neb. 834, 870 N.W.2d 1 (2015) .	7, 15
<i>Blue Cross and Blue Shield v. Dailey</i> , 268 Neb. 733, 687 N.W.2d 689 (2004).....	5
<i>Centurion Stone of Nebraska v. Whelan</i> , 286 Neb. 150, 835 N.W.2d 62 (2013).....	6, 14
<i>Clark v. Scheels All Sports</i> , 314 Neb. 49, 989 N.W.2d 39 (2023).....	8, 25
<i>El Fredo Pizza, Inc. v. Roto-Flex Oven Co.</i> , 199 Neb. 697, 261 N.W.2d 358 (1978).....	7, 16
<i>Emery v. Mangiameli</i> , 218 Neb. 740, 359 N.W.2d 83 (1984).....	7, 15, 16
<i>Fackler v. Genetzky</i> , 257 Neb. 130, 595 N.W.2d 884 (1999).....	26
<i>First Westside Bank v. For-Med, Inc.</i> , 247 Neb. 641, 529 N.W.2d 66 (1995).....	7, 8, 16, 22
<i>Griffith v. City of Des Moines</i> , 387 F.3d 733 (8 th Cir. 2004)	8, 18
<i>Hanzlik v. Paustian</i> , 211 Neb. 322, 318 N.W.2d 712 (1982).....	26
<i>Hartley v. Metro. Utils. Dist. Of Omaha</i> , 294 Neb. 870, 885 N.W. 2d 675 (2016).....	17, 27
<i>Hynes v. Good Samaritan Hosp.</i> , 285 Neb. 985, 830 N.W.2d 499 (2013)	6, 14
<i>In re Estate of Jeffry B.</i> , 268 Neb. 761, 688 N.W.2d 135 (2004).....	7, 8, 16, 22
<i>Insurance Co. of North America v. Hawkins</i> , 197 Neb. 126, 246 N.W.2d 878 (1976).....	7, 15, 16
<i>Kriss v. Sprint Communications Co.</i> , 58 F.3d 1276 (8 th Cir. 1995)	8, 18
<i>McDonnell Douglas Corp. v. Green</i> , 411 US 792 (1973)	17, 18, 22

<i>O'Brien v. Cessna Aircraft Co.</i> , 298 Neb. 109, 903 N.W.2d 432 (2020)	7, 15
<i>Regier v. Nebraska P.P. Dist.</i> , 189 Neb. 56, 199 N.W.2d 742 (1972)	7, 16
<i>Smith v. Colorado Organ Recovery Sys.</i> , 269 Neb. 578, 694 N.W.2d 610 (2005)	7, 8, 16, 22
<i>State v. Lessley</i> , 312 Neb. 316, 948 N.W.2d 620 (2022)	8, 24
<i>State v. Jennings</i> , 312 Neb. 1020, 982 N.W.2d 216 (2022)...	8, 19
<i>Thomas v. First Nat'l Bank of Wynne</i> , 111 F.3d 64 (8 th Cir. 1997)	7, 18
<i>TransCanada Keystone Pipeline, LP v. Tanderup</i> , 305 Neb. 493, 941 N.W.2d 145 (2020)	9, 28
<i>U.S. Specialty Ins. Co. v. D S Avionics Unlimited LLC</i> , 320 Neb. 287 (2025)	6
<i>Williamson v. Bellevue Med. Ctr., LLC</i> , 304 Neb. 312, 934 N.W.2d 186 (2019)	26

Statutes/Rules

Neb. Rev. Stat. §25-1329 (Reissue 2016)	14
Neb. Rev. Stat. §25-1902 (Reissue 2016)	5
Neb. Rev. Stat. §25-1912 (Reissue 2016)	5
Neb. Rev. Stat. §33-103 (Reissue 2016)	5
Neb. Evid. R. 401	28
Neb. Evid. R. 402	28
Neb. Evid. R. 403	28

STATEMENT OF THE BASIS OF JURISDICTION

On May 28, 2025, the District Court entered an “Order Granting Motion for Summary Judgment” dismissing Appellant’s Complaint with prejudice. (T107). This is a final order for purposes of Neb. Rev. Stat. § 25-1902 because it determined the action and adjudicated all claims between the parties. *Blue Cross and Blue Shield v. Dailey*, 268

Neb. 733, 687 N.W.2d 689 (2004). On June 25, 2025, Appellant filed a notice of appeal and, apparently, deposited the docket fee required by Neb. Rev. Stat. § 33-103. Therefore, this Court has jurisdiction under Neb. Rev. Stat. § 25-1912.

STATEMENT OF THE CASE

1. Nature of the Case

In her Complaint, Appellant asserts a claim for failing to promote her due to her age, race, and sex in violation of “the Age Discrimination in Employment Act of 1967 (ADEA), Nebraska Age Discrimination in Employment Act, Title VII Race and Gender discrimination and Fair Employment Practices Act.” (T3, ¶25).

2. Issues Actually Tried in the Court Below

The district court determined whether the pleadings and evidence admitted at the summary judgment hearing showed that there is no genuine dispute as to any material fact and that Appellee is entitled to a judgment as a matter of law.

3. How the Issues Were Decided

The district court granted summary judgment to the Appellee and dismissed the Complaint with prejudice, determining that the pleadings and evidence admitted at the summary judgment hearing showed that there is no genuine dispute as to any material fact and that, accordingly, Appellee was entitled to a judgment as a matter of law.

4. Scope of Appellate Court’s Review

An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *U.S. Specialty Ins. Co. v. D S Avionics Unlimited LLC*, 320 Neb. 287 (2025). An appellate court will affirm a lower court's grant of

summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

PROPOSITIONS OF LAW

1. It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors. *Centurion Stone of Nebraska v. Whelan*, 286 Neb. 150, 152, 835 N.W.2d 62, 65 (2013); *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 989, 830 N.W.2d 499, 503 (2013).
2. A trial court has the discretion to determine the admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 125, 903 N.W.2d 432, 450 (2020).
3. In civil cases, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party and appellate courts review for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds. *Arens v. NEBCO, Inc.*, 291 Neb. 834, 851, 870 N.W.2d 1, 16 (2015).
4. A judgment will not be reversed by reason of any error or defect in the proceedings which does not affect the substantial rights of the adverse party. *Emery v. Mangiameli*, 218 Neb. 740, 743, 359 N.W.2d 83, 86 (1984); *Insurance Co. of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976); *Regier v. Nebraska P.P. Dist.*, 189 Neb. 56, 199 N.W.2d 742 (1972); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

5. It is not the function of an appellate court to scour the record looking for unidentified evidentiary errors. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 590, 694 N.W.2d 610, 622 (2005) (citing *In re Estate of Jeffry B.*, 268 Neb. 761, 688 N.W.2d 135 (2004) and *First Westside Bank v. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995)).
6. Direct evidence is “evidence ‘showing a specific link between the [alleged] discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated’ the decision.” *Thomas v. First Nat’l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997).
7. In order to qualify as direct evidence, there must be “conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude.” *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1282 (8th Cir. 1995).
8. In order to qualify as direct evidence, there must be a causal link between remarks reflecting racial or gender bias and actions taken by the employer.” *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004).
9. The appellate court will not scour the record on appeal to understand unclear arguments or find support for broad conclusions. *State v. Jennings*, 312 Neb. 1020, 1026, 982 N.W.2d 216, 223 (2022).
10. Factual recitations must be annotated to the record, and failure to do so may result in an appellate court’s overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 590, 694 N.W.2d 610, 622 (2005) (citing *In re Estate of Jeffry B.*, 268 Neb. 761, 688 N.W.2d 135 (2004) and *First Westside Bank v. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995)).

11. The appellate court is not obligated to scour the record to find support for vague or unsubstantiated factual claims. *State v. Lessley*, 312 Neb. 316, 327, 948 N.W.2d 620, 633 (2022).
12. Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the non-movant's favor without the fact finder engaging in guesswork. *Clark v. Scheels All Sports*, 314 Neb. 49, 75, 989 N.W.2d 39, 57 (2023).
13. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, *for purposes of that litigation*, all matters ruled upon, either expressly or by necessary implication. *TransCanada Keystone Pipeline, LP v. Tanderup*, 305 Neb. 493, 509, 941 N.W.2d 145, 156 (2020) (*italics added*).

STATEMENT OF FACTS

Background

Metropolitan Utilities District of Omaha (“Appellee” or “MUD”) is a political subdivision created under the laws of the State of Nebraska, with its principal place of business in Omaha, Douglas County, Nebraska. (T1, ¶ 3). Reymita Walls (“Appellant” or “Walls”) is a Black/Latina Female, age 66 at the time of the filing of the Complaint. (T1, ¶2). Appellant has been an employee with MUD since January 24, 1990. (T1, ¶5; T7, ¶5; E4, p. 2, ¶4).

Appellant has been promoted multiple times since beginning employment at MUD: she was a Customer Service Clerk I when she was hired on January 24, 1990 with a starting pay rate of \$8.85 per hour; she was promoted to Customer Service Clerk III on October 16, 1999 and had a beginning pay rate of \$16.68 per hour; she was promoted to Customer Service Clerk IV on August 14, 2004 with a

beginning pay rate of \$21.28 per hour; she was promoted to Assistant Supervisor, Quality Assurance on September 16, 2010 with a beginning salary of \$64,189 per year; a position that later was renamed the Supervisor, Quality Assurance Customer Service (“Supervisor, QA Customer Service”) position and renamed again to the Senior Quality Assurance Specialist (“Sr. QA Specialist”) position. (E5, p. 9-10, ¶15). She currently makes a salary of \$111,419 per year. (E5, p. 9-10, ¶15). Appellant’s job title prior to January 16, 2023 was Supervisor, QA Customer Service. (E4, p. 1, ¶3; T2, ¶6; T7, ¶6).

Appellant’s direct supervisor was Stephanie Mueller (“Mueller”) until June 16, 2019. (E4, p. 2, ¶4; T2, ¶8; T8, ¶8). From June 16, 2019 until February 16, 2023, Appellant’s direct supervisor was Shalon Buffum (“Buffum”). (E4, p. 2, ¶4)

The New Position

On November 8, 2022, Appellant was informed by MUD that a new position of Supervisor, Training and Quality Assurance (“New Position”) was being created and that she was welcome to apply for it. (E4, p. 4, ¶7; T2, ¶9; T8, ¶8). The creation of the New Position was prompted by an organizational change within MUD’s Customer Service division. (E4, p. 2, ¶4; E5, p. 2, ¶4; T2, ¶9; T8, ¶9). The New Position required knowledge and experience in both quality assurance and training. (E4, p. 2, ¶4; E5, p. 2, ¶4; T2, ¶9; T8, ¶9). Quality assurance is the systematic process of monitoring, evaluating, and improving the interactions between call center agents and customers to ensure that service standards are consistently met and improved over time; training, on the other hand, is the process of equipping call center agents with the knowledge, skills, and tools they need to perform their roles effectively. (E4, p. 2-3, ¶5).

Appellant held a “Supervisory, Professional, and Administrative” (“SPA”) position at MUD. (E4, p. 5, ¶9; E5, p. 3, ¶6; T8, ¶9). SPA positions are graded on a scale from SPA-1 (lowest salary

range) to SPA-15 (highest salary range). (E5, p. 3-4, ¶7). The New Position was assigned a salary grade of SPA-4. (E4, p. 5-6, ¶10).

The New Position had six major minimum requirements. (E4, p. 9-11, ¶16). These requirements were: 1) Degree in Business, Analytics, or related field; 2) Minimum three years' experience in training; 3) Minimum three years of quality management experience with proven track record of driving increased quality scores and improved customer satisfaction; 4) Experience analyzing multiple sources of data to provide data-driven recommendations for improved outcomes; 5) Knowledge of business process improvement methods, LSS, or other related methodologies; and 6) Communication skills. (E4, p. 9-11, ¶16; E4, p. 39). A set of uniform interview questions were developed by Buffum, Mueller, and MUD's Human Resources ("HR") Department before any applications were received. (E4, p. 9-11, ¶16; E6, p. 541-543). During the interviews, each candidate was asked the same interview questions from the standardized list, and they were also required to prepare and present a roadmap for success in the New Position. (E4, p. 1, ¶1; E6, p. 541-543).

Hiring for the New Position

Appellant applied for the New Position on November 28, 2022. (E4, p. 7, ¶12; T2, ¶12; T10, ¶12). Appellant indicated in her application that she met all of the minimum job requirements for the position, including the required minimum of three (3) years of training experience. (E4, p. 8-9, ¶15). She cited her experiences working at MUD as a Customer Service Clerk III, Customer Service Clerk IV, and as Supervisor, QA Customer Service as relevant experience for meeting the minimum of three (3) years of training experience. (E4, p. 8-9, ¶15). The Customer Service Clerk III, Customer Service Clerk IV, and Supervisor, QA Customer Service positions cited by Appellant as relevant for training experience, however, did not have training responsibilities. (E4, p. 8-9, ¶15; E6, p. 366-368). Because Appellant indicated that she met the minimum qualifications as part of her

application for the New Position, Appellant was interviewed by Buffum and Mueller on December 16, 2023. (E4, p. 11-13, ¶18; T2, ¶13; T10, ¶13). Buffum and Mueller each attended all of the interviews for the New Position and collaborated on determining the scoring and rankings. (E4, p. 11, ¶17). During the interview, Appellant did not detail any additional work experiences from her past that would have contributed towards the minimum three (3) year of training experience required for the New Position and, therefore, Appellant was scored as “Does Not Meet” for that major minimum requirement. (E4, p. 11-13 and 42; E6, p. 552-553). Appellant was also scored as “Does Not Meet” for two additional major minimum requirements after her interview – “Experience analyzing multiple sources of data to provide data-driven recommendations for improved outcomes” and “Knowledge of business process improvement methods, LSS, or other related methodologies. (E4, p. 11-13 and 42). There is no evidence in the record showing that Appellant met either of these qualifications. Because Appellant did not meet three major minimum requirements, she was not qualified for the New Position. (E4, p. 11-13 and 42). Accordingly, Appellant was ranked sixth out of the six applicants interviewed. (E4, p. 11-13, ¶18).

Following the completion of interviews, Jessica Kneifl (“Kneifl”), a female external candidate, was ranked first out of the six applicants, scoring as “Exceeds” in four of the six major minimum requirements and “Meets” in the remaining two. (E4, p. 11-13 and 45). She was offered the New Position and initially accepted but later withdrew her acceptance. (E4, p. 13, ¶20).

Jeremy Bach (“Bach”) was ranked second out of the six interviewed applicants after scoring as “Exceeds” in three out of the six major minimum requirements and “Meets” in the remaining three. (E4, p. 13, ¶21; E4, p. 43). With regards to training, Bach exceeded the minimum requirements. (E4, p. 43). On February 15, 2023, after Kneifl withdrew her acceptance, Bach was awarded the New Position. (E4, p. 13, ¶21; T2, ¶15; T10-11, ¶15).

Job Title Change

At the time of the creation of the New Position, MUD had been working to remove “Supervisor” or “Manager” from job titles that did not have actual supervisory responsibilities. (E4, p. 5-6, ¶10; E5, p. 2-3, ¶5). Appellant’s position of Supervisor, QA Customer Service did not have supervisory responsibilities. (E4, p. 4-5, ¶8; E5, p. 2-3, ¶5). For that reason, and because Appellant’s position of Supervisor, QA Customer Service would report to the New Position, MUD determined that the title for Appellant’s Supervisor, QA Customer Service position would need to change to avoid having one “Supervisor” position report to another “Supervisor” position. (E4, p. 5-6, ¶10; E5, p. 2-3, ¶5).

Separately, in 2015 MUD performed a company-wide salary review of all SPA positions. (E5, p. 3-4, ¶7). As a result, Appellant’s position of Supervisor, QA Customer Service was graded down from an SPA-4 to an SPA-3. (E5, p. 3-4, ¶7). However, this did not result in a salary change for Appellant; she continued to be paid the salary of an SPA-4 for as long as she remained in her position and, in fact, has continued to be paid as an SPA-4 at all times since. (E4, p. 3-4, ¶6; E5, p. 3-4, ¶7; T2-3, ¶¶9 and 19; T8-12, ¶¶9 and 19).

As a result of the change in job title, Appellant’s job title beginning January 16, 2023, and at all times thereafter, has been Senior Quality Assurance Specialist (“Sr. QA Specialist”). (E4, p. 1, ¶3; T2, ¶14; T10, ¶14). Despite the change in job title, Appellant’s job duties and pay remained the same. (E4, p. 5-14, ¶¶10 and 24).

No Medical Treatment or Missed Work

Appellant did not seek medical or psychological treatment as a result of any discriminatory treatment alleged to be caused by MUD. (E3, p. 6, ¶8). Appellant did not miss any work due to allegations of discriminatory treatment alleged to be caused by MUD. (E3, p. 6-7, ¶9 and 10).

ARGUMENT

I. APPELLANT FAILS TO IDENTIFY WHAT EVIDENCE WAS DISREGARDED BY THE TRIAL COURT OR TO SHOW HOW SHE WAS PREJUDICED

Appellant assigns that the trial court erred by overruling a hearsay objection to a portion of Exhibit 7, while also stating that it would “disregard any portions of Exhibit 7 that fail to comply with the applicable rules of evidence.” (T107). (Brief of Appellant, p. 5, 14). This assigned error is without merit because Appellant fails to identify what evidence was disregarded or how she was prejudiced as a result.

It is Appellant’s burden to identify what evidence was disregarded by the trial court. As a general proposition, it is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors. *Centurion Stone of Nebraska v. Whelan*, 286 Neb. 150, 152, 835 N.W.2d 62, 65 (2013); *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 989, 830 N.W.2d 499, 503 (2013).

Appellant fails to meet her burden because she does not identify any evidence that the trial court actually disregarded. Appellant instead argues that the trial court was obligated to identify the precise statements or evidence it considered inadmissible. (Brief of Appellant, p. 15). However, Appellant fails to identify any authority requiring the trial court to clearly articulate what evidence was disregarded. If the Appellant believed that the trial court’s summary judgment order was unclear as to what evidence had been disregarded, she could have filed a motion to alter or amend the judgment under Neb. Rev. Stat. § 25-1329 requesting that that trial court substantively alter the judgment and identify all evidence that had been disregarded. Appellant did not do so.

Appellant, rather than identifying evidence that was disregarded, admits that “It is unclear what the court may or may not

have disregarded, and to the extent that the court disregarded any part of the evidence offered by the Appellant, such was in error.” (Brief of Appellant, p. 15). This admission confirms the failure to identify evidence that was disregarded to support her assigned error.

In any case, the record affirmatively refutes Appellant’s argument that trial court disregarded evidence adduced by Appellant. When discussing Appellant’s contention that Appellant was the obvious choice for the promotion, the court states “[Appellant] has not offered evidence that supports this position.” (T118). When discussing Appellant’s contention that Bach was not qualified for the position, the court states, “[Appellant] has failed to produce any evidence that Bach was unqualified for the position.” (T118). When discussing Appellant’s contention that Appellee’s reasons for its hiring decision in the promotion was pretextual, the court states, “the Court has not located evidence in the record to support the argument that these reasons are pretextual.” (T120). Finally, when discussing the Appellant’s contention that she was not given fair professional development opportunities, the court states, “The Court has reviewed [Appellant’s] evidence and concludes that it does not establish a genuine issue of material fact as to discriminatory failure to provide professional development.” (T122). These statements by the Court, along with the absence of any statements that the Court disregarded any specific evidence from Appellant, make it clear that the Court considered the Appellant’s offered evidence in its entirety.

A trial court has the discretion to determine the admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *O’Brien v. Cessna Aircraft Co.*, 298 Neb. 109 at 125, 903 N.W.2d 432 at 450 (2020). Appellant produced no evidence to establish such an abuse of discretion. In civil cases, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party and appellate courts review for clear error the factual findings underpinning a trial court’s hearsay ruling and

reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds. *Arens v. NEBCO, Inc.*, 291 Neb. 834 at 851, 870 N.W.2d 1 at 16 (2015).

It is Appellant's burden to show she was prejudiced by the trial court's purported failure to identify evidence it disregarded. The party appealing from the judgment has the burden to show prejudicial error. *Emery v. Mangiameli*, 218 Neb. 740, 743, 359 N.W.2d 83, 86 (1984); *Insurance Co. of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976). Error without prejudice is not a ground for reversal. *Emery, supra*; *Regier v. Nebraska P.P. Dist.*, 189 Neb. 56, 199 N.W.2d 742 (1972). A judgment will not be reversed by reason of any error or defect in the proceedings which does not affect the substantial rights of the adverse party. *Emery, supra*; *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

Appellant fails to meet her burden of showing prejudice. She argues without specificity that the trial court "was in error" by disregarding evidence she offered but does not show how she was prejudiced by this purported error. (Brief of Appellant, p. 15). The court has no obligation to search the record for evidence of prejudice because it is not the function of the appellate court to scour the record looking for unidentified evidentiary errors. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578 at 590, 694 N.W.2d 610 at 622 (2005) citing *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004) and *First Westside Bank. V. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995). Because of her failure to show prejudice, this assigned error is without merit.

Finally, Exhibit 7 was admitted in its entirety and this court's de novo review will allow an opportunity to review the entirety of Exhibit 7, even those portions that may have been disregarded by the trial court. This independent review fully cures Appellant's claimed defect.

II. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT WHETHER APPELLANT WAS DISCRIMINATED AGAINST ON THE BASIS OF HER RACE, GENDER, AND/OR AGE

A prima facie case of discrimination in a failure to promote claim consists of four elements: 1) the employee is a member of a protected group; 2) the employee was qualified and applied for a promotion to an available position; 3) the employee was rejected; and 4) a similarly situated employee, not part of the protected group, was promoted instead. *Hartley v. Metro. Utils. Dist. Of Omaha*, 294 Neb. 870, 893, 885 N.W.2d 675, 693 (2016). Under the *McDonnell Douglas* burden-shifting framework, the employee has the initial burden of proving all four elements of the prima facie case. *McDonnell Douglas Corp., v. Green*, 411 US 792, 802 (1973). If the employee meets its initial prima facie burden, the “burden of production shifts to the employer to rebut the prima facie case by producing ‘clear and reasonably specific’ admissible evidence that would support a finding that unlawful discrimination was not the cause of the employment action.” *Hartley v. Metro. Utils. Dist. Of Omaha*, 294 Neb. 870, 893 N.W.2d 675, 694 (2016). “After the employer has presented a sufficient, neutral explanation for its decision, the question is whether there is sufficient evidence from which a jury could conclude that the employer made its decision based on the employee’s protected characteristic despite the employer’s proffered explanation” *Id* at 894, 694. In other words, the employee must then be given an opportunity to establish that the employer’s proffered explanation was a pretext for discrimination because it is unworthy of credence. *Id.*

Appellant initially argues, without reference to evidence in the record, that Appellant was qualified for the New Position. (Brief of Appellant, p. 17). This is necessary to establish that Appellant met its initial prima facie case of discrimination. The issue of Appellant’s qualifications, however, is irrelevant to this Court’s consideration of

Appellant's assigned errors because the trial court, in granting the motion for summary judgment, assumed without deciding that Appellant's evidence is sufficient to meet the prima facie burden of demonstrating that she was a qualified applicant. (T115). (On the other hand, the issue of Appellant's qualifications is relevant to Appellee's cross-appeal, discussed below, that the district court erred in failing to determine that the evidence does not create a genuine issue of material fact that Appellant was qualified for the New Position).

The Appellant next argues that the district court erroneously applied the *McDonnell Douglas* burden-shifting framework because Appellant adduced direct evidence of discrimination. (Brief of Appellant, p. 17). While it is true that the *McDonnell Douglas* burden-shifting framework is generally not necessary when there is direct evidence of discrimination, Appellant's argument regarding direct evidence is factually and legally flawed.

As for the facts, no direct evidence of discrimination was adduced. Appellant states, without citing to the record, that "In the present case, there is strong evidence that the Appellant's gender, was the primary motivating factor in not hiring her for the position." (Brief of Appellant, p. 18). Appellant makes numerous similar types of general assertions without citation to the record. Such unsupported assertions are not sufficient to establish a genuine issue of material fact. Appellant, not the court, has the burden to identify evidence in the record supporting her claims; the appellate court will not scour the record on appeal to understand unclear arguments or find support for broad conclusions. *State v. Jennings*, 312 Neb. 1020, 1026, 982 N.W.2d 216, 223 (2022).

In addition, the record affirmatively contradicts Appellant's claim of direct evidence of discrimination. For example, the initial choice to fill the position was a female candidate. (E4, p. 13, ¶¶20-21; E4, p. 39 and 46). Appellant states, without citing to the record, that Appellee was notified that Appellant would be applying for the

position. (Brief of Appellant, p. 18). The only evidence in the record establishes that Appellant was told about the New Position and encouraged to apply in a meeting on November 8, 2022. (E4, p. 5-6, ¶10). Appellant then argues, again with no citation to the record, that Appellee changed the requirements to justify choosing Bach over Appellant once they were notified that Appellant would apply. (Brief of Appellant, p. 18). In fact, Appellee finalized the job description on October 27, 2022, –prior to encouraging Appellant to apply–, created the job requisition on November 8, 2022 – the same day Appellant was encouraged to apply–, and the job was posted on November 11, 2022. (E4, p. 7-8, ¶13). The uniform list of interview questions and the six major minimum requirements for the position that would be used to rank candidates after interviews was created on November 9, 2022. (E4, p. 9-10, ¶16). Buffum was not informed by Appellant that she would be applying for the New Position until November 21, 2022 and Appellant’s application was not submitted until November 28, 2022, i.e. *after* the requirements of the New Position had been set. (E4, p. 7, ¶12). Applications from the final two selections for the New Position were not received until sometime after November 16, 2022 (E4, p. 7, ¶12).

Appellant then states, without citing any evidence in the record, that Appellee overlooked Appellant’s QA experience. (Brief of Appellant, p. 18). The record shows that Appellant’s QA experience was considered, and she was scored as meeting that major minimum requirement for the position. (E4, p. 11, ¶17; E4, p. 42). Appellant states, again without citing to the record, that Appellee overlooked Appellant’s training experience. (Brief of Appellant, p. 18). The evidence shows that Appellant had no training experience. (E4, p. 12-13, ¶18; E4, p. 42).

Appellant argues, without citing evidence in the record, that Bach was not qualified for the position because his jobs with Appellee did not include training or quality assurance responsibilities and that Appellee had to reach back to his time as a floor supervisor for a call

center before he was employed by Appellee. (Brief of Appellant, p. 18). First, there is no evidence in the record that there was any kind of procedure or limitation on Appellee looking back to Bach's previous employment when considering him for the New Position. In addition, the record shows that Bach had sufficient quality assurance and training experience in his background, both with Appellee and before he began employment with Appellee. (E4, p. 13, ¶21, E4, p. 43). With regards to training, he "developed communication plans for emergency responses and formalized plans for direction in certain situations" while working as Supervisor, Dispatch Office for Appellee for two years and seven months. (E4, p. 43). In previous employment prior to working for Appellee, he had "call center training experience and was promoted to lead and trained new agents." (E4, p. 43; E6, p. 578). In addition, "he then became a floor supervisor where he created and implemented new training." (E4, p. 43; E6, p. 578). Finally, "he re-created the training material based on three changes in the department over 10 years." (E4, p. 43; E6, p. 578). With regards to quality management experience, "Jeremy was tasked with creating a QA program for the Dispatch department at M.U.D. until new management took over. (E4, p. 43; E6, p. 578-579). In addition, "he did spot checks on the work in Dispatch to relay the importance of effective communication to both internal and external customers." (E4, p. 43; E6, p. 578-579).

Finally, Appellant argues, without citing to the record, that Appellee manipulated the qualifications for the New Position to meet Bach's qualifications and to exclude Appellant. (Brief of Appellant, p. 22). The evidence shows that the qualifications for the New Position were created for legitimate business reasons and involved a nondiscriminatory process. (E4, p. 9-10, ¶16; E5, p. 2, ¶4; E6, p. 541-543). Also, as stated earlier, the evidence in the record establishes that Bach was not the initial choice for the position, thereby undercutting the argument that the qualifications were manipulated to meet his qualifications. (E4, p. 13, ¶¶20-21; E4, p. 39 and 46).

One additional argument that Appellant makes, without citation to the record (and in the Statement of Facts section of her brief), is that Bach's pay is 5% higher than Appellant's despite them both being at the SPA-4 level and that it's 5% higher than Appellant would have received had she been awarded the New Position. (Brief of Appellant, p. 13). This argument is unavailing.

Bach is paid an additional five percent (5%) over Appellant's base annual salary because MUD's Personnel Policy Manual requires a supervisor's salary to be at least five percent (5%) higher than the base annual salary of the highest paid employee that they directly supervise in order to maintain equitable pay differentials between supervisors and the employees they directly supervise. (E5, p. 6, ¶10; E7, p. 49-50; E4, p. 14-15; ¶25). Bach only receives this additional pay because he supervises Appellant, who is also paid at the SPA-4 level. (E5, p. 6, ¶10; E7, p. 49-50; E4, p. 14-15; ¶25). If Appellant voluntarily vacated her position, Bach's pay would be reduced to the standard wage, and he would no longer receive the temporary 5% increase. (E5, p. 6, ¶10; E7, p. 49-50; E4, p. 14-15; ¶25). Likewise, Appellant would not have received a 5% pay increase had she been awarded the New Position because her replacement in her former position would have been paid a lesser amount as an SPA-3 as outlined in the revised job description. (E5, p. 6, ¶10; E7, p. 49-50; E4, p. 14-15; ¶25).

Appellant's burden is to identify evidence in record supporting her assigned errors. Factual recitations must be annotated to the record; failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 590, 694 N.W.2d 610, 622 (2005) citing *In re Estate of Jeffry B.*, 268 Neb. 761, 688 N.W.2d 135 (2004) and *First Westside Bank. V. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995). Appellant's unsupported claims that "there is strong evidence" in the record of direct discrimination may be disregarded without further

inquiry because it is not the duty of an appellate court to scour the record to find evidence supporting the assigned errors.

As for the law regarding direct evidence of discrimination, Appellant refers to two United States Court of Appeals for the Eighth Circuit cases: *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997) and *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004). (Brief of Appellant, p. 18). When referring to *Thomas*, Appellant cites the court's definition of direct evidence which is "evidence showing a specific link between the [alleged] discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the decision." *Thomas*, 111 F.3d at 66. (internal citation omitted). Appellant fails to point out that the *Thomas* court, which affirmed the lower court's decision granting summary judgment to the employer, found that there was no direct evidence of discrimination. The *Thomas* court also references *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1282 (8th Cir. 1995), which requires, in order to qualify as direct evidence, "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude." But here, no such direct evidence is contained in the record.

The other case cited by Appellant, *Griffith v. City of Des Moines*, also failed to find direct evidence of discrimination. The *Griffith* court determined that there was no evidence that any of the decisionmakers "ever uttered a single negative racial remark about Griffith's Hispanic background. Thus, the requisite causal link between remarks reflecting racial or gender bias and actions taken against Griffith is lacking." *Griffith*, 387 F.3d. at 736. These cases, cited by Appellant as support of her claim of direct evidence of discrimination, actually do the exact opposite. They make it clear that direct evidence requires a causal link between remarks or actions by decisionmakers that reflect their discriminatory bias and alleged discriminatory actions taken. Appellant has produced no evidence of any such remarks or actions

that reflect a discriminatory bias nor such a causal link to the alleged discriminatory actions.

In addition, Appellant argues that even if there is no direct evidence of discrimination sufficient to avoid the *McDonnell Douglas* burden-shifting framework, there was sufficient evidence of pretext to create a genuine issue of material fact under the third prong of *McDonnell Douglas*. (Brief of Appellant, p. 19). Of note, Appellant does not argue here that the Appellee failed to meet its burden of production under *McDonnell Douglas* to produce sufficient evidence to support the finding that unlawful discrimination was not the cause of the employment decision. Rather, Appellant focuses on the third prong and attempts to argue pretext. Appellant argues pretext both here and in her last argument. For the sake of clarity and to avoid redundant arguments, Appellee will address Appellant's pretext argument in section IV of this brief below.

III. APPELLANT FAILS TO IDENTIFY WHAT EVIDENCE THE TRIAL COURT FAILED TO VIEW IN HER FAVOR OR SHOW HOW SHE WAS PREJUDICED

The trial court was clear that it viewed the evidence in the light most favorable to Appellant. (T113; T118; T119). Appellant's attempts to show the trial court did not do what it said are unconvincing. First Appellant argues, without citing evidence in the record, that Appellee did not produce any evidence from disinterested witnesses and that Appellant provided substantial evidence from disinterested witnesses. (Brief of Appellant, p. 23). As the record shows, however, Appellee produced evidence from disinterested witnesses, including, but not limited to, the Affidavit of MUD's Vice President of HR Bonnie Savine, the Supervisor's Documentation detailing the decision-making process for the hiring of the New Position, interview notes, the standard list of interview questions, performance appraisals for Appellant, and job descriptions. Conversely, as the trial court points out, the purported evidence relied upon by Appellant was almost exclusively general,

conclusory statements from Appellant or her attorney without any corresponding citation to any evidence in the record. (T118).

Appellant then argues that the general, conclusory statements should have been sufficient to deny the motion for summary judgement because those statements should be categorized as material facts sufficient, in and of themselves, to create a genuine issue of material fact. (Brief of Appellant, p. 23-24). The Appellant, in other words, asks the court to engage in speculation or guesswork based on the general, conclusory statements of one party in order to create a genuine issue of material fact. This Court should decline the invitation because “Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the nonmovant’s favor without the fact finder engaging in guesswork.” *Clark v. Scheels All Sports*, 314 Neb. 49, 75, 989 N.W.2d 39, 57 (2023).

In this case, the evidence relied upon by Appellant to overcome the motion for summary judgement at the trial court was generalized, conclusory assertions of bias and discriminatory motive. Appellant repeats that strategy on appeal. But Appellant failed then, and fails now, to cite any deposition testimony, document or other evidence in the record supporting her assertions. Appellant tries to argue, citing *Fackler v. Genetzky*, 257 Neb. 130 at 136, 595 N.W.2d 884 at 890 (1999), that she was not required to reveal evidence which she expects to produce at trial to prove the allegations contained in her petition. (Brief of Appellant, p. 15-16). However, this case is irrelevant for two reasons. First, Appellee in this case, unlike in *Fackler*, has produced sufficient evidence to establish a prima facie showing that it is entitled to summary judgment. Genetzky was required to offer evidence in support of his motion for summary judgment that establishes the professional standard of care for a veterinarian and that his actions comported with that standard of care. This case does not require Appellee to establish any standard of care. Appellant makes a similar

argument quoting *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982), however that case also required evidence establishing that the procedures followed by the physician met the accepted standards of reasonable medical care. Again, the present case does not require Appellee to establish any standard of care. Once Appellee produced sufficient evidence to establish a prima facie showing that it is entitled to summary judgment, the burden shifted to Appellant to produce evidence showing the existence of a material issue of fact that prevents judgement as a matter of law. *Williamson v. Bellevue Med. Ctr., LLC*, 304 Neb. 312, 319, 934 N.W.2d 186, 192 (2019). Appellant failed to do so. As such, the trial court was correct in granting the motion for summary judgement.

Finally, Appellant argues that the trial court improperly drew inferences in favor of the Appellee as opposed to the Appellant. (Brief of Appellant, p. 24-25). However, Appellant has not identified what evidence the trial court failed to view in her favor, what inferences should have been drawn for Appellant, or what inferences the trial court improperly drew in favor of Appellee. Likewise, Appellant has failed to establish that she was prejudiced even assuming that the trial court did not view the evidence in her favor. These are all Appellant's burden to show, and she has failed.

IV. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THERE WAS NO EVIDENCE THAT THE APPELLEE'S ARTICULATED REASON FOR HIRING A CANDIDATE OTHER THAN APPELLANT WAS A PRETEXT FOR DISCRIMINATION.

The trial court correctly found that Appellee's entire hiring process for the New Position, from the identification of the need for the New Position to the ultimate hiring decision, was done in a legitimate, nondiscriminatory manner and that Appellant failed to produce evidence of pretext. (T116-119). Appellee produced uncontroverted

evidence showing that the entire hiring process was done in a legitimate, nondiscriminatory manner. (E4, p. 3-4, ¶¶6-7). The need for the New Position was based on the legitimate and nondiscriminatory business reason of needing to align the quality assurance function with the training function within Appellee's Customer Service division. (E4, p. 3-4, ¶6). The creation of the New Position was meant to help the organization run more efficiently. (E4, p. 4, ¶7). Appellant herself agreed with this premise when she wrote in her 2019 performance appraisal, "In the future I would like to be over Training and Q.A. and come up with ways to work together to enhance the Quality of our agents and constant training and refresher training throughout the year." (E7, p 56).

Buffum, Appellant's supervisor, consulted with her manager and with Appellee's HR Department to develop the job description, to develop the minimum requirements for the position, to review the submitted applications, to develop a standard list of interview questions, and to make the selection following the interviews. (E4, p. 7-11, ¶¶13 and 16). The interview questions used were created before the position was even posted and were nondiscriminatory. (E4, p. 11, ¶16). Six candidates, including Appellant, were interviewed, all six were asked the same questions and had their responses documented, all were required to present the same roadmap presentation, and all were scored on the six major minimum requirements. (E4, p. 8-11, ¶¶14-17; E4, p. 39-46). Appellant's only evidence, beyond general conclusory statements, to establish her qualifications is performance appraisals. The references to "Training" in those appraisals, emphasized by Appellant, do not establish that Appellant has training experience, but rather that she works with the Training Supervisor. (E4, p. 11-13, ¶18; E7, p.55-71). See also Section I(A), p. 35-38 of Appellee's cross-appeal below further discussing this issue.

In addition, the trial court found that Appellee produced sufficient evidence to establish Bach's qualifications for the New Position (T118). Bach's qualifications were previously detailed in

section II above. To summarize, he had relevant training experience with Appellee as Supervisor, Dispatch Office for two years and seven months. (E4, p. 43; E6, p. 578)). In previous employment prior to working for Appellee, he had over 10 years of relevant training experience. (E4, p. 43; E6, p. 578). Bach also met the minimum requirement for quality management experience as a result of his time spent working as Supervisor, Dispatch Office and his previous employment prior to working for Appellee. (E4, p. 43; E6, P. 579). In addition, he met or exceeded all other minimum requirements for the position. (E4, p. 43; E6, p. 577-578).

Appellant on appeal, like at the trial court, relies on general, vague, and conclusory statements not supported by any evidence in support of her argument that the legitimate, nondiscriminatory reasons for the hiring decisions were actually pretext for discrimination. But an appellate court is not obligated to scour the record to find support for vague or unsubstantiated claims. *State v. Lessley*, 312 Neb. 316, 327, 948 N.W.2d 620, 633 (2022). Appellant argues, without citation to the record, that the Appellee's purported nondiscriminatory reasons for its decisions were pretext because Appellant worked in Appellee's Customer Service division twice as long as Bach and that Bach's most recent position with Appellee did not involve working in quality assurance or training. (Brief of Appellant, p. 27). Appellant makes a similar claim, without citation to the record, that the job qualifications for the New Position were tailored to Bach. (Brief of Appellant, p. 27). The evidence, however, shows that this was a new position and that the requirements were created for legitimate, nondiscriminatory business reasons. (E4, p. 6-11; E4, p. 2, ¶4; E6, p. 541-543). In addition, these claims imply, without evidentiary support, that it was predetermined that Bach was going to be the selection. The evidence shows that an external female candidate, not Bach, was the initial choice for the position, undercutting the argument that the position was created specifically for Bach. (E4, p. 13, ¶¶20-21; E4, p. 39 and 46). The Appellant also argues, for the first time in any of

these proceedings and without citations to supporting evidence in the record, that Appellee made “this one job the only job which has a ‘recent’ performance requirement and not allowing an applicant time to qualify,” and cites this as evidence of pretext. (Brief of Appellant, p. 19). Appellant again does not cite evidence in the record to support these claims, and no such evidence exists.

And while it is true that Appellant had worked in the Customer Service division for longer than Bach, the length of time each person worked in the Customer Service division was not relevant to the hiring decision and therefore does not serve as evidence of pretext. Likewise, the fact that Bach’s most recent position did not have training or QA responsibilities is also immaterial.

Appellant also makes a number of arguments, without citations to the record, regarding the process of notifying Appellant about the New Position and requesting her input regarding changes to her old position. Appellant claims that she was not invited to apply for the position but rather told Buffum that she would be applying. (Brief of Appellant, p. 27). This general, conclusory statement, even if it were to be considered, does not create a genuine issue of material fact regarding pretext. Whether or not she was invited to apply or informed her supervisor that she was going to apply is immaterial. In addition, the only actual evidence in the record states that she *was* invited to apply. (E4, p. 5-6, ¶10). Similarly, she argued, without citation to the record, that she was actually discouraged from applying. (Brief of Appellant, p. 28). This is not supported by any evidence in the record.

Finally, Appellant argues, without citation to the record, that Appellant had a history of laudable performance, that her performance was questioned at a meeting following the creation of the New Position, and that she was asked to provide input on the modifications to her old position. (Brief of Appellant, p. 27). To the extent that these general statements are offered as evidence that Appellee’s nondiscriminatory motive was a pretext for discrimination, they are

not supported by evidence in the record and, in any case, are not relevant to establish pretext. While it is true that Appellant's performance appraisals were generally positive, the New Position was a different position. (E6, p. 372-375 and 366-368). Success in one position did not necessarily correlate to success in the other. Appellee did consider Appellant's history of laudable performance in her Supervisor, QA Customer Service position when considering her for the New Position. She was marked as "Meets" for the major minimum requirement of minimum three years of quality management experience. (E4 p. 42).

No evidence has been presented to show that Appellant's performance was questioned in an attempt to make her look bad. In fact, the only evidence in the record shows the opposite. (E4, p. 6-7, ¶11). In addition, the record shows that the meeting referenced by Appellant occurred on November 16, 2022 and that Buffum was not made aware of Appellant's intent to apply for the New Position until November 21, 2022. (E4, p. 7, ¶12).

Finally, no evidence has been presented to show that Appellant being asked to provide input on the modifications to her existing position was related in any way to her candidacy for the New Position. The only evidence in the record shows that Appellee wanted Appellant's input on the title and job description for her existing position regardless of her candidacy for the New Position. (E4, p. 15-17, ¶¶26, 28, and 29).

Appellant also cites *Hartley vs. Metro. Utils. Dist. Of Omaha* and states that it demonstrates "the long history of discrimination by MUD particularly against women, and with respect to Hartley also age." (Brief of Appellant, p. 21). It is improper for Appellant to argue, and for this court to rely, on this previous case as evidence of a history of discrimination. Appellant is essentially arguing that the law-of-the-case doctrine applies. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those

holdings conclusively settle, *for purposes of that litigation*, all matters ruled upon, either expressly or by necessary implication.

TransCanada Keystone Pipeline, LP v. Tanderup, 305 Neb. 493, 509, 941 N.W.2d 145, 156 (2020) (italics added). The law-of-the-case doctrine only applies to the litigation at issue and is therefore not applicable to this case.

Beyond the law-of-the-case doctrine, Appellant's argument that the Appellee has a "long history of discrimination" based on a single, unrelated case from several years ago in which different decisionmakers were involved fails as a matter of law, is inadmissible, and should not be considered by this court. Evidence of prior litigation, particularly a prior judicial finding in an unrelated case, is not admissible to prove that an employer acted with discriminatory intent in a later, unrelated action. Such evidence lacks any probative value under Neb. Evid. R. 401 in that its existence does not make it any more probable or less probable that Appellee engaged in discriminatory conduct in this case and it is therefore irrelevant under Neb. Evid. R. 402. In addition, Appellee's reference to that case as evidence of a history of discrimination is highly prejudicial and would rightly be excluded under Neb. Evid. R. 403.

The prior case Appellant relies on involved a different position, different facts, and different supervisors, and it occurred years before the events at issue here. Appellee is a political subdivision of the State of Nebraska that has operated for more than one hundred years. A single, dated lawsuit does not constitute a "long history" of discrimination, nor does it bear on whether the specific decisionmakers in this case acted with discriminatory motive. Because the cited prior case does not relate to the decisionmakers or circumstances here, it cannot create a genuine issue of material fact, and it does not undermine the trial court's conclusion that Appellant failed to produce evidence of pretext.

Finally, Appellant argues that Appellee's assertion that Appellant did not have 3 years of training experience, as well as

Appellee's assertion that Bach was qualified for the New Position, were questions for the jury. (Brief of Appellant, p. 25). As the court determined and as shown in this brief, Appellant failed to produce sufficient evidence to establish a genuine issue of material fact that Appellee was discriminated against by Appellant. As such, the trial court was correct in granting the motion for summary judgment.

CONCLUSION

For all these reasons, this is precisely the kind of case for which summary judgment was designed: one in which the material facts are undisputed, the plaintiff cannot establish essential elements of her claim, and the employer's legitimate business reasons stand wholly unrefuted.

The district court faithfully applied the governing standards and correctly concluded that this case presents no triable issue. Appellee met its prima facie burden by articulating a clear, legitimate, and nondiscriminatory basis for its decisions grounded in business judgment rather than bias. In contrast, Appellant offered nothing beyond conjecture and unfounded accusations, falling far short of demonstrating pretext. The law does not permit a plaintiff to proceed to trial on mere speculation, nor does it invite courts to second-guess reasonable managerial decisions in the absence of competent evidence.

Because the district court's ruling rests on a sound application of settled law to an undisputed record, its decision is not only correct; it is compelled. For these reasons, and for those set forth more fully above, Appellee respectfully requests that this Court affirm the judgment of the district court in all respects.

BRIEF ON CROSS-APPEAL

TABLE OF CONTENTS

STATEMENT OF THE BASIS OF JURISDICTION.....	32
STATEMENT OF THE CASE.....	32
ASSIGNMENT OF ERROR ON CROSS-APPEAL.....	32
PROPOSITIONS OF LAW	32
STATEMENT OF FACTS	33
SUMMARY OF THE ARGUMENT	33
ARGUMENT ON CROSS-APPEAL	35
I. THE TRIAL COURT ERRED IN NOT DETERMINING THAT APPELLANT WAS UNQUALIFIED FOR THE NEW POSITION.....	35
A. No evidence that Appellant met the three years of training experience requirement.....	35
B. No evidence that Appellant met the data analysis experience requirements	38
C. No evidence that Appellant met the data analysis experience requirement.....	39
II. THE TRIAL COURT ERRED IN NOT DETERMINING THAT THE CHANGE TO APPELLANT'S JOB TITLE WAS NOT A DEMOTION	40
CONCLUSION	41
CERTIFICATE OF COMPLIANCE	42

TABLE OF AUTHORITIES CITED

Cases

<i>Boyle v. Welsh</i> , 256 Neb, 118, 589 N.W.2d 118 (1999).....	32, 34
<i>Hartley v. Metro. Utils. Dist. Of Omaha</i> , 294 Neb. 870, 885 N.W. 2d 675 (2016).....	32, 33

STATEMENT OF THE BASIS OF JURISDICTION

Please refer to the Statement of the Basis of Jurisdiction section of the Brief of Appellee above.

STATEMENT OF THE CASE

Please refer to the Statement of the Case section of the Brief of Appellee above.

ASSIGNMENT OF ERROR ON CROSS APPEAL

1. The trial court erred when it failed to determine that Appellant was unqualified for the New Position.
2. The trial court erred when it failed to determine that the change to Appellant's job title was not a demotion.

PROPOSITIONS OF LAW

1. Appellant must establish each of the essential elements of her discrimination claim, which, for a failure-to-promote claim, includes a demonstration that (1) the employee is a member of a protected group, (2) that the employee was qualified and applied for the available position, (3) that the employee was rejected for the position, and (4) that a similarly situated employee, not part of the protected group, was promoted instead of Appellant. *Hartley v. Metro. Utils. Dist. Of Omaha*, 294 Neb. 870, 893, 885 N.W.2d 675, 693 (2016).
2. Self-serving statements, each unsupported by citations to the record, are not evidence and mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. *Boyle v. Welsh*, 256 Neb, 118, 127, 589 N.W.2d 118, 125 (1999).

STATEMENT OF FACTS

Please refer to the Statement of Facts section of the Brief of Appellee.

SUMMARY OF ARGUMENT

To the extent this Court finds merit in any of Appellant's assigned errors, the trial court's order should be affirmed nonetheless because Appellant failed to produce evidence sufficient to meet its prima facie burden that 1) Appellant was qualified for the New Position; and 2) Appellant was demoted when her title was changed. She was not qualified for the position because A) she did not have the required three years of training experience; B) she did not have the required data analysis experience; and C) she did not have the required knowledge of business process improvement methods.

With regards to Appellant's qualifications for the New Position, Appellant must establish each of the essential elements of her discrimination claim, which, for a failure-to-promote claim, includes a demonstration that (1) the employee is a member of a protected group, (2) that the employee was *qualified* and applied for the available position, (3) that the employee was rejected for the position, and (4) that a similarly situated employee, not part of the protected group, was promoted instead of Appellant. *Hartley v. Metro. Utils. Dist. Of Omaha*, 294 Neb. 870, 893, 885 N.W.2d 675, 693 (2016). (italics added). In support of its motion for summary judgment, Appellee argued that Appellant failed to meet its prima facie showing that Appellant was qualified for the New Position. The trial court granted Appellee's motion for summary judgment on the grounds that Appellee produced sufficient evidence that the decision not to promote Appellant was done for legitimate, nondiscriminatory business reasons and that Appellee failed to produce sufficient relevant evidence of pretext to create a genuine issue of material fact. (T118-119). The trial court elected not to decide whether Appellant's evidence was sufficient to meet her prima facie burden of demonstrating that she was qualified

for the position, choosing to assume without deciding that she was qualified. (T115).

With regards to the change in Appellant's job title, the trial court granted Appellee's motion for summary judgment on the grounds that Appellee produced sufficient evidence that the change to Appellant's job title was done for legitimate, nondiscriminatory business reasons and that Appellee failed to produce sufficient relevant evidence of pretext to create a genuine issue of material fact. (T119). The trial court elected not to decide whether Appellant's evidence was sufficient to meet her prima facie burden of demonstrating that she was demoted when her job title was changed, choosing to assume without deciding that she was demoted. (T119).

In both cases, the trial court erred in not determining that appellant failed to meet her prima facie burden. In her attempt to meet her prima facie burden with regard to her qualifications for the New Position and the alleged demotion, Appellant relied almost exclusively on a number of conclusory statements. Such self-serving statements, each unsupported by citations to the record, are not evidence. *Boyle v. Welsh*, 256 Neb, 118, 127, 589 N.W.2d 118, 125 (1999). "Mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment." *Id.*

Appellee has adduced affirmative, uncontroverted evidence that Appellant was not qualified for the New Position. Six major minimum requirements were identified for the position. (E4, p. 39). Appellant was found to not meet three of those requirements. Appellant did not meet the minimum requirement of three (3) years of experience training. (E4, p. 11-13, ¶¶17-19; E4, p. 42; E6, p. 552-553). Appellant did not meet the minimum requirement for experience in analyzing multiple sources of data driven recommendations for improved outcomes. (E4, p. 11-13, ¶¶17-19; E4, p. 42; E6, p. 553). Appellant also did not meet the minimum requirement for knowledge of business process improvement methods, Lean Six Sigma, or other

related methodologies. (E4, p. 11-13, ¶¶17-19; E4, p. 42). Likewise, Appellee has adduced affirmative, uncontroverted evidence that the change to Appellant’s job title was not a demotion. Appellant has failed to adduce sufficient evidence to create a genuine issue of material fact on both counts.

ARGUMENT ON CROSS APPEAL

I. THE TRIAL COURT ERRED IN NOT DETERMINING THAT APPELLANT WAS UNQUALIFIED FOR THE NEW POSITION.

A. No evidence that Appellant met the three years of training experience requirement.

The additional training responsibilities in the New Position are outlined in the job description. The job description requires a “Minimum three (3) years of experience training” and the “Ability to develop high quality targeted training programs to ensure customer satisfaction.” (E6, p. 372-375). No such training requirement existed for Appellant’s Supervisor, QA Customer Service position. (E6, p. 366-368).

Appellant erroneously points to comments in Appellant’s 2019, 2020, and 2021 performance appraisals as evidence that Appellant had the required training experience. (Brief of Appellant, p. 11-12). However, those performance appraisals merely comment on her performance in the position she held at the time they were written and do not show or even infer that Appellant had the required three years of required training experience for the New Position.

The portion of the 2019 appraisal cited by Appellant includes Buffum’s comment, “Reina’s due diligence is recognizing trends in the call center through her QA efforts have also led to her working with Training and offering refresher training classes to all call center employees.” (E7, p. 55). Appellant chooses that portion of the

appraisal carefully and has mischaracterized its language. In fact, the 2019 performance appraisal includes other references that make it clear that Appellant did not have a training role in her position at that time. For example, Appellant states in the performance appraisal that, “If I hear repetitive incorrect information, I talk to Shalon, the other Supervisors and Training for additional training. Due to my findings, we have had emergency training and etiquette training. These classes has helped but, I am often making recommendations to the Training Department regarding future training classes. I often give suggestions to Janelle to send reminders from Training Department to entire call center.” (E7, p. 56). In addition, in Appellant’s 2019 appraisal, she acknowledges that training is a separate function from her role in quality assurance. She writes, “In the future I would like to be over Training and Q.A. and come up with ways to work together to enhance the Quality of our agents and constant training and refresher training throughout the year.” (E7, p. 56). Of note, this statement in her performance appraisal shows that Appellant agreed with Appellee’s nondiscriminatory business reason for creating the New Position, i.e. aligning the quality assurance function with the training function within Appellee’s Customer Service division (E4, p. 3-4, ¶6) so that the organization can run more efficiently. (E4, p. 4, ¶7).

The 2020 appraisal includes Appellant’s comment, “I work with the Supervisors, and Training to provide feedback, evaluate and mentor all of the clerks. The Supervisors, Manager Training and I develop action plans to help clerks who fall below expectations.” (E7, p. 63). The 2021 appraisal includes Buffum’s comment, “If new employees were unsuccessful, Reina provided feedback to Training to address immediate issues.” (E7, p. 71). Despite Appellant’s contention, these performance appraisals fail to establish that Appellant had training experience. Appellee’s Customer Service division at the time the appraisals were written included a dedicated Training Supervisor who was responsible for training all customer

service clerks (E4, p. 2-4, ¶¶5 and 6). In all three performance appraisals, the word “Training” is capitalized indicating that Appellant’s role was to consult with the Training Supervisor to provide her with the necessary information so that she could provide those employees with training. (E7, p. 55-56, 63, 71). This is reflected in Buffum’s scoring of Appellant as “Does Not Meet” for training experience following her interview in which she notes, “Reina does consult with Training when needed to gain understanding of her own and should she be selected for this position, Reina would explore E-Learning as a training tool.” (E4, p. 42). Likewise, Buffum states in her notes from the interview that Appellant, “Was confused by training and coaching. She’s actually coaching. Experience with training is working with training, but not actually conducting training.” (E6, p. 552-553).

Even viewed in the light most favorable to Appellant, these performance appraisals do not create a genuine issue of material fact whether Appellant has three years of training experience. The job description for the position required the “Ability to develop high quality targeted training programs to ensure customer satisfaction.” (E6, p. 372-375). No evidence in the record shows that Appellant developed targeted training programs. To the extent that the 2019 performance appraisal’s reference to offering refresher training is evidence of experience training, it is evidence of, at a maximum, one year of training experience. Performance appraisals for Appellee cover the preceding calendar year. (E7, p. 51-61). Therefore, the 2019 performance appraisal, which was completed on March 5, 2020, would only be applicable to work performed during 2019. As detailed previously, there is no language in the 2020 or 2021 performance appraisals offered by Appellant showing that she had experience conducting or developing training during those years.

After reviewing Appellant’s application and conducting her interview, Buffum rightfully concluded and noted in her interview

notes that Appellant did not fully understand what training experience meant.

“It was apparent during her interview that [Appellant] believed her experience coaching would satisfy the training experience of this position. However, coaching and training are different. Coaching is a personalized, one-on-one or small-group process that focuses on helping individuals achieve specific goals or improve performance. Training is more formal and involves pre-designed programs with a set of curriculum, specific objectives, and defined outcomes and is usually conducted in groups or delivered in a classroom setting, online course, or workshop. Training focuses on transferring knowledge and teaching new skills. [Appellant’s] only actual experience with training was working with Trainers. Unlike the top two candidates, [Appellant] had not actually conducted training on her own and had no experience developing training curriculums or programs.”

(E4, p. 11-13, ¶18; E6, p. 552-553).

Appellant failed to produce any evidence that she conducted training or developed training programs. Appellant’s general statements that she had the required experience are insufficient to create a genuine issue of material fact.

B. No evidence that Appellant met the data analysis experience requirement.

The training responsibilities were not the only difference between Appellant’s Supervisor, QA Customer Service position and the New Position. The latter required the “Ability to analyze multiple sources of data to provide data-driven recommendations for improved outcomes.” (E6, p. 372-375). No such requirement existed for Appellant’s Supervisor, QA Customer Service position. (E6, p. 366-368). MUD has produced evidence that Appellant did not have the required data analysis experience. (E4, p. 42; E6, p. 553). Appellant

was given an opportunity during her job interview for the promotion to describe the experience that she had in this area and failed to do so. “Reina did not demonstrate experience in analyzing multiple sources of data to provide data-driven recommendations for improved outcomes.” (E4, p. 42; E6, p. 553).

Appellant has failed to produce any evidence that she met the data analysis experience requirement. Appellant’s general, conclusory statements that she had the required experience are insufficient to create a genuine issue of material fact.

C. No evidence that Appellant met the knowledge of business process improvement methods requirement.

The job description for the New Position also required “Knowledge of business process improvement methods, metrics, and reporting. Certification(s) in quality management, Lean Six Sigma, or other related process improvement methodologies preferred.” (E6, p. 372-375). No such requirement existed for Appellant’s Supervisor, QA Customer Service position. (E6, p. 366-368). Thus, this was a requirement for the New Position that was not part of her job responsibilities as the Supervisor, QA Customer Service.

MUD has produced evidence that Appellant did not meet this requirement. Appellant failed to articulate any knowledge of business process improvement methods during her interview. “The extent of Reina’s knowledge of business process improvement methods, LSS, or other related methodologies is meeting with floor supervisors for input or consulting with Information Technologies to help with improvements.” (E4, p. 42).

Appellant failed to produce any contrary evidence. Thus, there was insufficient evidence to create a genuine issue of material fact whether Appellant was qualified for the New Position. The trial court erred in not determining that the motion for summary judgment

should also be granted because Appellant failed to meet its prima facie burden of demonstrating that she was a qualified applicant.

II. THE TRIAL COURT ERRED IN NOT DETERMINING THAT THE CHANGE TO APPELLANT'S JOB TITLE WAS NOT A DEMOTION.

Appellant did not produce evidence that the change to Appellant's job title was a demotion. The closest Appellant came was general conclusory statements made in the Brief in Opposition of Summary Judgment that the job was downgraded from a "4 to a 3" and that this "would certainly affect Appellant if she made application inhouse to MUD." (T84). However, this statement is not supported by any evidence in the record. MUD's evidence, by contrast, shows that Appellant has been and will continue to be paid as an SPA-4 for as long as she remains in her current position. (E4, p. 5-6, ¶9-10; E5, p.3-4, ¶7).

Appellant fails to provide evidence regarding how Appellant's future advancement prospects would be impacted by the change in job title when her pay has remained the same. Appellant also states, with no evidentiary basis, that Appellant "supervised, mentored and trained customer service representatives" as Supervisor, QA Customer Service. (T84). MUD has produced undisputed evidence that Appellant did not train employees (E4, p. 11-13, ¶18; E6, p. 366-368) and had no direct reports. (E4, p. 4-5, ¶8). Appellant has not provided any evidence to support her assertion that she is not able to continue mentoring customer service representatives under her new job title of Sr. QA Specialist.

Appellee adduced affirmative evidence that the change to Appellant's job title was not a demotion. The only changes were her title and who she reported to, not her job duties or her salary. (E4, p. 5-6, ¶10). A review of the Supervisor, QA Customer Service job description compared to the current Sr. QA Specialist job description shows minimal changes to Appellant's responsibilities. (E7, p. 7-9;

E6, p. 366-371). The salary grade reflected on the Sr. QA Specialist job description is listed as SPA-3, but Appellant's salary remained at SPA-4 and the salary for the position will not change until the position became vacant. (E4, p. 5-6, ¶10; E7, p. 17-18). Appellant continues to be paid at the SPA-4 level and will continue to be until she voluntarily vacates the position. (E4, p. 5, ¶9; E5, p. 3-4, ¶7). The change in the salary grade for the position, which would not take effect until after Appellant voluntarily vacated the position, was not indicative of any change in the position's roles or responsibilities; rather it reflected a salary survey and re-evaluation that took place completely independently of these changes back in 2015. (E4, p. 5, ¶9; E5, p. 3-4, ¶7).

Because Appellant failed to produce evidence that Appellant suffered a demotion when her job title was changed, the trial court erred in not determining that the motion for summary judgment should also be granted on the grounds that Appellant failed to meet its *prima facie* burden of demonstrating that she was demoted.

CONCLUSION

Even were this Court to look beyond the district court's well-reasoned disposition of Appellant's claims, the record independently compels judgment in Appellee's favor on the additional grounds outlined above. The undisputed evidence shows that Appellant lacked the requisite qualifications for the position she sought, foreclosing any viable claim of discriminatory failure to promote. Likewise, the administrative refinement of her job title—unaccompanied by any loss of pay, responsibility, or status—cannot, as a matter of law, constitute an adverse employment action.

For these reasons, the judgment below is correct not only for the reasons the district court articulated, but also for the independent grounds set forth in Appellee's cross-appeal. Where the employee was indisputably unqualified for the position she sought, and where the refinement of her job title resulted in no adverse change whatsoever,

her claims cannot stand as a matter of law. Appellee therefore respectfully urges this Court to affirm the district court's judgment in its entirety and to recognize the additional bases on which that result is fully warranted.

DATED this 25th day of November, 2025

METROPOLITAN UTILITIES
DISTRICT OF OMAHA, Appellee

s/Marc Willis

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CERTIFICATE OF COMPLIANCE

Pursuant to Neb. Ct. R. App. P. §2-103(C)(4), I hereby certify that this Brief complies with the typeface requirements, being Century Schoolbook font, size 12-point. The document was prepared using Microsoft 365's Word program and, relying on the word processor word count feature, contains 12,331 words.

DATED this 25th day of November, 2025

By: s/Marc Willis

Marc Willis #24325

Certificate of Service

I hereby certify that on Tuesday, November 25, 2025 I provided a true and correct copy of this *Brief of Appellee MUD With Cross Appeal* to the following:

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