NO. 89377-2

SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN SCRIVENER,

Petitioner,

v.

CLARK COLLEGE,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Respondent Clark College did not hire Petitioner Kathryn Scrivener for a tenure-track faculty position because she was not as strong of a teacher as the successful candidates, and the College prioritizes teaching ability in making hiring decisions. In claiming that this decision constitutes age discrimination, Ms. Scrivener principally focuses on comments regarding diversity made by the College's President, who is older than Ms. Scrivener and who had an established track record of hiring individuals over the age of 40. Consistent with Washington law, the Court of Appeals affirmed the dismissal of Ms. Scrivener's claim because general comments that affirm a commitment to, and a desire to increase, diversity do not constitute evidence of discrimination that would entitle a plaintiff to a jury trial.

Ms. Scrivener cites no authority for the proposition that comments such as the College's President's warrant a jury trial. Nor does any such authority exist. Instead, in petitioning for review, Ms. Scrivener focuses on dicta in the Court of Appeals' decisions in this case and another case, claiming that they present conflicting standards for what constitutes "pretext" under the burden-shifting analysis that applies to employment cases such as this one. Yet both decisions at issue articulate substantively identical pretext standards, and Ms. Scrivener failed to provide sufficient

evidence to establish a genuine issue of material fact under any possible standard. Thus, there is no conflict between these decisions. Nor does Ms. Scrivener identify any issue of substantial public interest. Accordingly, the College respectfully requests that the Court deny review.

II. COUNTER-STATEMENT OF THE ISSUES FOR REVIEW

1. Whether Ms. Scrivener fails to identify a conflict between two Court of Appeals decisions when both decisions at issue articulate substantively identical pretext standards and Ms. Scrivener failed to create a genuine issue of material fact under any possible standard.

2. Whether Ms. Scrivener fails to identify an issue of substantial public interest when the Court of Appeals properly affirmed the dismissal of Ms. Scrivener's discrimination claim because statements affirming a commitment to, and a desire to increase, diversity do not constitute evidence of discriminatory intent.

III. COUNTERSTATEMENT OF THE CASE

A. The College Based Its Hiring Decisions On Teaching Ability

In the fall of 2005, Respondent Clark College's (the "College") English department began accepting applications for the two tenure-track faculty positions at issue in this case. CP at 32, 36-37. Petitioner Kathryn Scrivener was one of 156 applicants for these positions. CP at 32, 101.

In hiring faculty, the College "plac[es] a premium on quality teaching." CP at 18. It holds good teaching as a "fundamental[] value . . . at the center of [the] institution," CP at 18, and has a "commitment to being a learning college." CP at 20. Faculty members are expected to be innovative teachers who are "central" to student learning. CP at 21. Administrators keep those goals in mind during hiring, (CP at 1-3, 36, 59-60), and the hiring decision at issue in this case was no exception. In its job posting for these positions, the College focused on inventive, student-centered teaching, asking all applicants to "[d]escribe your teaching philosophy" and to "[d]escribe strategies you have used to ensure your teaching is effective and students are succeeding." CP at 36. Additionally, the teaching skills of each finalist for these positions were observed in the classroom during the hiring process. CP at 32. Put simply, every aspect of the hiring process was directed toward hiring the best teachers. CP at 30-32.

In accordance with the College's written tenure-track hiring policy, the first step in filling the positions at issue in this case was for a faculty committee to select a group of finalists. CP at 32. The committee reviewed applications, checked references, and conducted interviews. CP at 30-32. The committee reduced the applicant pool to 13 candidates, who were each asked to give teaching demonstrations. CP at 32. The

committee observed the demonstrations, critiqued the applicants' classroom styles, and selected four finalists for the positions. CP at 32. Ms. Scrivener was one of those four finalists. CP at 63-65. The committee composed a memorandum detailing each finalist's strengths and weaknesses. CP at 32.

This memorandum was sent to the College's President, Dr. R. Wayne Branch, and its acting Vice President of Instruction, Dr. Sylvia Thornburg. CP at 32. In accordance with the College faculty hiring policy, Drs. Branch and Thornburg interviewed each of the four finalists. CP at 2. As the College's President, Dr. Branch was the appointing authority for all faculty positions, meaning he had the ultimate decision-making authority regarding these positions. CP at 1-2. In making his decisions, however, he consulted with Dr. Thornburg. CP at 2, 59. In May 2006, after this deliberate, months-long hiring process that followed the College's written faculty hiring policy, Dr. Branch decided to hire Ms. Geneva Chao and Ms. Jill Darley-Vanis for the two positions. CP at 3. Drs. Branch and Thornburg agreed that these two were the best candidates for the positions. CP at 4. They also "agreed that of the four finalist[s], Ms. Scrivener was ranked last." CP at 59.

The successful candidates were well-qualified for the positions. Ms. Chao was a graduate of Barnard College of Columbia University in

New York City, and later earned separate masters degrees from San Francisco University in English (M.A.) and Creative Writing (M.F.A.). CP at 49. She had taught English at New York University, the Art Institute of California in San Francisco and Clark College. CP at 47. After observing Ms. Chao's teaching demonstration, the faculty committee called her an "[a]rticulate fast thinker who can challenge expectations without insulting or offending." CP at 63. The committee also commended her "[c]larity when presenting information" while praising her teaching demonstration as "[s]killed, enjoyable and interactive." CP at 63.

Ms. Darley-Vanis earned a B.A. in both English and French from Oregon State University and an M.A. in English from Portland State University. CP at 53. Ms. Darley-Vanis had also studied at the Universite de Poitiers as an undergraduate. CP at 53. Ms. Darley-Vanis had significant and varied experience, having taught at Clark College since 2000, and other universities and community colleges prior to that, including Lower Columbia, Concordia and Portland State. CP at 51. According to the faculty committee, Ms. Darley-Vanis's teaching demonstration was "[e]xtremely organized," and the committee admired her "creative[] use[]" of "outstanding written materials." CP at 64. During the demonstration, Ms. Darley-Vanis demonstrated excellent

"patience and compassion" with students that helped to achieve their "buy in." CP at 64.

In contrast, the faculty committee expressed concerns about Ms. Scrivener's teaching. According to the committee, while Ms. Scrivener was an "[e]nergetic and enthusiastic" presenter, she "lost her place and was not as smooth or clear as she could have been." CP at 65. Further, the committee expressed concern that students might find her "exuberance and passion . . . off-putting" because she had such an extreme "up-front style." CP at 65.

B. Dr. Branch, Who Is Older Than Ms. Scrivener, Regularly Hired Individuals Over 40 For Faculty Positions

At the time of this hiring decision, Ms. Scrivener was 54 years old, Dr. Branch was 55, and Dr. Thornburg was 61. CP at 3. 60, 73. Ms. Chao and Ms. Darley-Vanis were both under 40.[1] Statistics regarding the College's workforce demonstrate that Dr. Branch was not at all reluctant to hire individuals over 40 years of age. Dr. Branch had been the College's president since August 2003. CP at 1. As of October 2005, 74 percent of the College's total workforce was over 40 years of age. CP at 39. Dr. Branch's willingness to hire individuals over 40 applied to his hiring of faculty as well. During the 2005-2006 academic year at issue in

[1] "Over 40 years of age" is the relevant protected class for age discrimination claims. RCW 49.44.090.

this case, 7 of the 16 (or 44 percent) of all faculty, and 4 of the 12 (or 33 percent) of all tenure-track faculty, Dr. Branch hired were over 40 years of age, a proportion equal to or greater than the proportion of applicants for the tenure-track faculty positions at issue in this case who were over 40 (50 of 156, or 32 percent). CP 32, 43-44. Ms. Scrivener was a beneficiary of Dr. Branch's hiring as well, as he annually hired her for non-tenure track hiring positions from 2003 through 2006. CP at 1, 101.

C. Procedural History

In 2009, Ms. Scrivener filed this lawsuit against the College in Clark County Superior Court, alleging that the decision to not hire her for one of the tenure-track faculty positions constituted age discrimination in violation of the Washington Law Against Discrimination. CP at 122-25. The trial court granted the College's motion for summary judgment, dismissing Ms. Scrivener's claim with prejudice. CP at 117-18. Ms. Scrivener appealed and the Court of Appeals affirmed.

IV. REASONS WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) provides for review of a Court of Appeals decision only when that decision conflicts with another Washington appellate decision, presents a significant question of law under the Constitution, or involves an issue of substantial public interest. None of these criteria apply to this case. While Ms. Scrivener contends that the Court of

Appeals' decision in this case conflicts with the decision in *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 272 P.3d 865, *review denied*, 174 Wn.2d 1016, 281 P.3d 687 (2012), both decisions articulate substantively identical standards for what constitutes "pretext" and, in any event, Ms. Scrivener failed to create a genuine issue of material fact under any possible standard. Further, the Court of Appeals' proper application of well-established Washington law does not raise an issue of substantial public interest. Accordingly, the Court should deny review.

A. There Is No Conflict In The Law That Ms. Scrivener Was Required To Provide Evidence Of Pretext To Survive Summary Judgment

1. The Court of Appeals in this case and in *Rice* articulated and applied substantively identical pretext standards

There is no conflict in the requirement articulated by the Court of Appeals in this case and in *Rice*, 167 Wn. App. 77, that a plaintiff pursuing a discrimination claim under the Washington Law Against Discrimination, RCW 49.60, without direct evidence of discrimination must provide evidence of pretext to survive summary judgment.

As context, this pretext requirement arises under the burden-shifting scheme articulated by this Court in *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006). In

employment discrimination suits, such as this case, where the plaintiff lacks direct evidence of discriminatory intent, Washington courts employ a burden-shifting scheme to rule on summary judgment motions. *Hill*, 144 Wn.2d at 180. Under this scheme, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Id.* at 181. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action at issue. *Id.* After the defendant articulates such a reason, the burden shifts back to the plaintiff to demonstrate that the stated reason was pretext for discrimination. *Id.* at 182. If the plaintiff demonstrates pretext, summary judgment should be denied if the record contains reasonable but competing inferences of discrimination and nondiscrimination. *Id.* at 186-90.

In this case, the College moved for summary judgment and both parties agreed that Ms. Scrivener had established a prima facie case and that the College had articulated a legitimate, nondiscriminatory reason for the adverse employment action at issue—not hiring Ms. Scrivener for a tenure-track faculty position. CP 80, 93. The issue thus was whether Ms. Scrivener had established pretext. *Hill*, 144 Wn.2d at 182.

In concluding that Ms. Scrivener had not established pretext in this case, the Court of Appeals articulated the following pretext standard:

> To show pretext, a plaintiff must show that the defendant's articulated reasons (1) had no basis in fact, (2) were not really motivating factors for its decision, (3) were not temporally connected to the adverse employment action, or (4) were not motivating factors in employment decisions for other employees in the same circumstances.

Scrivener v. Clark College, 176 Wn. App. 405, 309 P.3d 613, 617 (2013). Washington courts consistently relied upon this pretext standard for over two decades, since it was first articulated in *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn. App. 852, 860 n.14, 851 P.2d 716 (1993), *review denied* 122 Wn.2d 1018, 863 P.2d 1352 (1993), *overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995). The lineage of authority the Court of Appeals relied upon in this case can be traced back to *Sellsted*.[2]

Similarly, the Court of Appeals in *Rice*, which Ms. Scrivener claims articulated a pretext standard that conflicts with the Court of Appeals' decision in her case, directly quoted *Sellsted*'s articulation of the pretext standard:

> An employee can show that the employer's proffered reason is pretextual in several ways: "(1) the company's reasons have no basis in fact; or (2) if they have a basis in fact, by showing that they were not really motivating factors; or (3) if they are factors, by showing they were jointly insufficient to motivate the adverse employment

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[2] *See Scrivener*, 309 P.3d at 617, citing *Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 161, 279 P.3d 500 (2012), citing *Kuyper v. State*, 79 Wn. App. 732, 738-39, 904 P.2d 793 (1995), *review denied* 129 Wn.2d 1011, 917 P.2d 130 (1996), citing *Sellsted*, 69 Wn. App. at 859-60 n.14.

> decision, [e.g.], the proffered reason was so removed in time that it was unlikely to be the cause or the proffered reason applied to other employee[s] with equal or greater force and the company made a different decision with respect to them."

Rice, 167 Wn. App. at 89-90 (quoting *Sellsted*, 69 Wn. App. at 859 n.14). Other than stylistic differences in wording, there is no substantive difference between this standard and that articulated by the Court of Appeals in the present case. Thus, there is no conflict between the pretext standard applied in this case and *Rice*. In fact, Ms. Scrivener does not even contend that there is any such conflict.

Instead, Ms. Scrivener focuses on dicta from *Rice* summarizing the question at issue in that case:

> The central dispute here is whether Rice met his burden of producing sufficient evidence to support a reasonable inference that a discriminatory retaliatory motive was a substantial factor in his discharge—pretext.

Rice, 167 Wn. App. at 90. Ms. Scrivener argued to the Court of Appeals in her case that this isolated summary, which lacked any citation to authority, substantively altered the pretext standard articulated by the *Rice* court in just the preceding paragraph. While the Court of Appeals did state that it declined to follow the *Rice* analysis, the court ultimately applied the pretext standard quoted above, which was substantively identical to the standard actually articulated and applied in *Rice*.

Ms. Scrivener appears to contend that by relying upon the decades-old pretext standard rather than the uncited dicta in *Rice*, the Court of Appeals required her to directly attack the articulated reasons for the hiring decision rather allowing her to present evidence of discriminatory intent unrelated to the articulated reasons for the hiring decision. In other words, Ms. Scrivener argues that by requiring her to show pretext, the Court of Appeals imposed a "but for," rather than a "substantial factor," standard of causation.

Ms. Scrivener is incorrect. The pretext standard applied by the Court of Appeals in this case, as well as in *Rice*, is broad enough to encompass evidence of discriminatory intent that does not directly attack the articulated reason for the employment action. Further, if the Court of Appeals had actually required Ms. Scrivener to directly attack that articulated reason, then the Court of Appeals would have had no need to analyze Ms. Scrivener's alleged evidence of pretext, because none of that evidence related to the College's articulated reasons for the promotion decision—the relative teaching abilities of the candidates. Instead, the Court of Appeals carefully considered that evidence over several pages of thoughtful analysis. 309 P.3d at 617-20. Accordingly, there is no conflict between this case and *Rice*.

2. Ms. Scrivener's claim failed as a matter of law under any possible pretext standard

The fact that Ms. Scrivener failed to establish pretext under any possible standard further demonstrates that there is no conflict between this case and *Rice*. In her Petition for Review, Ms. Scrivener focuses her pretext argument on comments Dr. Branch made during his January 2006 State of the College address. In particular, Ms. Scrivener focuses on the following passage:

> Long before my arrival, the College held Respect for Differences as one of its core values. And that his value also become one of the College's mission imperatives by way of our Strategic Plan highlights the recognition that respect for differences is a skill essential to success in today's workforce. As Sylvia Thornburg, Acting Vice President for Instruction, put it during our last management team meeting, "Exposure to dealing with persons – student colleagues or staff – of different cultures or life experiences is of value. Conversely, the absence of such exposure to multi-cultural, multi-ethnic, multi-dimensional viewpoints is a gap in the education of anyone expected to operate successfully in an increasingly multicultural environment or a global economy."
>
> And though 19% of our student body represents some form of ethnic diversity, only 12.2% of our workforce brings diversity to college community. And when we examine our faculty, only 9.6% of that critical aspect of the learning enterprise brings diversity to the experiences of student at Clark College. Yet perhaps the most glaring need for increased diversity is in our need for younger talent. 74% of Clark College's workforce is over forty. And though I have a great affinity for people in this age group, employing people who bring different perspectives will only benefit our college and community.

CP at 24. These comments do not indicate any age-related animus, they occurred months before the hiring decision at issue, and they are unrelated to Ms. Scrivener and the positions at issue in this case. Thus, the Court of Appeals appropriately held that Dr. Branch's comments affirming a commitment to, and a desire to increase, diversity, including generational diversity, constituted a "stray" comment that does not give rise to an inference of discriminatory intent. 309 P.3d at 618-19. In so holding, the Court of Appeals reached a result consistent with prior Washington authority.[3]

Ms. Scrivener contends that the Court of Appeals erred in reaching this conclusion, but she cites no authority for this proposition. Petition for Review at 15. That is because there is no such authority—without more, comments affirming a commitment to, and a desire to increase, diversity are simply not evidence that a protected characteristic was a substantial

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[3] *Domingo v. Boeing Emps'. Credit Union*, 124 Wn. App. 71, 90, 98 P.3d 1222 (2004) (holding that employer's comment that the plaintiff was "no longer a spring chicken," even if "the comment were seen as circumstantial evidence of age discrimination, . . . creates such a weak issue of fact that no rational trier of fact could conclude that BECU fired Domingo because of her age"); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 467 & n.10, 98 P.3d 827 (2004) (holding that "references to older officers as the 'old guard' and getting 'gray-haired old captains to leave'" did not establish pretext because "stray remarks, . . . when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such comments are made by the decision-maker in issue" (quotation marks omitted)), *review denied* 154 Wn.2d 1007, 114 P.3d 1198 (2005); *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 458, 115 P.3d 1065 (2005) ("If workplace comments do not pertain to an individual's qualifications as an employee, they are 'stray remarks' that have no bearing in a claim for employment discrimination."), *review denied* 156 Wn.2d 1027, 133 P.3d 473 (2006).

factor in a hiring decision. There are numerous ways to increase diversity without taking unlawful factors into consideration when making hiring decisions. Employers can direct recruiting efforts towards diverse candidates and implement diversity programs that make their organization more attractive to diverse candidates and retain current employees who offer diversity. In fact, the mere act of making comments such as those made by Dr. Branch can help increase diversity through attracting and retaining diverse individuals by making it clear that an organization values diversity. It is for these reasons that courts that have considered arguments such as those advanced by Ms. Scrivener have routinely rejected that such comments constitute evidence of pretext.[4] Further, to the extent Ms. Scrivener is suggesting that the government cannot

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[4] *Bissett v. Beau Rivage Resorts Inc.*, 442 Fed. Appx. 148, 152-53 (5th Cir. 2011) (holding that statements that employer "value[s] diversity and consider[s] it an important and necessary tool that will enable us to maintain a competitive edge," and that employer "is committed to maintaining a workforce that reflects the diversity of the community" were not evidence of pretext.); *Plumb v. Potter*, 212 Fed. Appx. 472, 477 & 481 (6th Cir. 2007) (holding that comment of "that's what we need in the VMF, a little more diversity" was not evidence of pretext); *Altizer v. City of Roanoke*, No. 02-484, 2003 WL 1456514, at *4 (W.D. Va. 2003) ("Gaskins' concern about the lack of diversity in the Department's ranks is not evidence of discriminatory animus. Nor is the fact that Gaskins thought it important to recruit and prepare minorities for promotion. That evidence says nothing about Gaskins willingness to promote a candidate *because* that candidate is an African-American. In fact, the expression of those concerns may have the salutary effect of an announcement that a predominately white, male institution will conduct itself as an equal opportunity employer."), *aff'd*, 78 Fed. Appx. 301 (4th Cir. 2003). Where they are not inconsistent with Washington law, federal authorities are persuasive authority in interpreting Washington employment discrimination law. *Hill v. BCTI*, 144 Wn.2d at 180. Citation to unpublished federal opinions is permitted. GR 14.1(b); Fed. R. App. P. 32.1. Pursuant to GR 14.1, a copy of *Altizer* is attached to this Answer.

consider diversity as an important goal in its operations, such a position would be contrary to public policy.[5]

In summary, Ms. Scrivener has failed to present a conflict of authority. The Court of Appeals in this case and in *Rice* articulated substantively identical pretext standards, and dismissal was appropriate under any possible standard. Accordingly, the Court should deny review.

B. The Court of Appeals' Decision Is Consistent With Well-Settled Washington Law And Does Not Raise Any Issue Of Substantial Public Interest

1. The Court of Appeals properly applied the burden-shifting analysis, which Ms. Scrivener consented to

Ms. Scrivener now argues for the first time that the Court of Appeals erroneously forced her to prove her case through the burden-shifting analysis articulated by this Court in *Hill*, 144 Wn.2d 172. Yet Ms. Scrivener never raised this issue before the trial court, where she agreed that the burden-shifting analysis applies. CP at 92 (stating in opposition brief that "Washington courts have adopted the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973)" and opposing summary judgment based on that framework). She cannot raise this issue for the first time on appeal. RAP 2.5(a), 9.12. Further, it is well-settled that burden-shifting is the appropriate analysis

[5] *See* GR 12.1 (identifying "promot[ing] diversity" as a goal of the WSBA).

for summary judgment motions where the plaintiff lacks direct evidence of discrimination. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 354, 172 P.3d 688 (2007) ("Disparate treatment claims based on circumstantial evidence are evaluated according to the three-step, burden-shifting protocol articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *see also Hill BCTI Income Fund–I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001).").

Ms. Scrivener also contends that she provided direct evidence of discrimination—Dr. Branch's State of the College address—that obviated the need to proceed under the burden-shifting analysis. Again, Ms. Scrivener failed to raise this issue before the trial court—she never argued that she had presented direct evidence of discrimination and instead argued that she was "not required to produce 'direct'" evidence, CP at 94. Further, Dr. Branch's address does not constitute direct evidence of discrimination. Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption. *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (2005); *Stork v. Int'l Bazaar, Inc.*, 54 Wn. App. 274, 281, 774 P.2d 22 (1989) ("In the present case, there was some direct evidence of age discrimination by the defendants against Stork. The trial court found that 'more likely than not' Hong told

Chappel that Stork had not been promoted because she was too old."), *overruled on other grounds by Mackay*, 127 Wn.2d 302. Accordingly, this issue does not warrant review.

2. Defendants are not prohibited from relying upon their employees' declarations on summary judgment

Ms. Scrivener further contends that the Court of Appeals allegedly erred by relying upon the declarations of the College's employees in affirming the trial court's decision. In making this argument, Ms. Scrivener relies upon the United States Supreme Court's opinion in *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), which stated that, in ruling on summary judgment motions, a court "must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses." *Id.* at 151 (quotation marks and citations omitted). Again, Ms. Scrivener never raised this issue before the trial court. And in any event, *Reeves* does not prevent a court from relying upon the employer's declarations in

a discrimination case. Indeed, courts that have considered the argument advanced by Ms. Scrivener have resoundingly rejected it.[6]

3. The Court of Appeals did not improperly weigh evidence

Finally, Ms. Scrivener contends that the Court of Appeals erroneously weighed evidence. She cites two alleged examples of this. First, she claims that the Court of Appeals did this by "bas[ing] its decision on the statements of the interested defense witnesses." Petition for Review at 16. As indicated above, however, this argument is without merit and is improperly being asserted for the first time on appeal. Second, Ms. Scrivener claims that the "Court of Appeals put itself in the position of the fact finder by analyzing the relative qualifications of the applicants." Petition for Review at 16. Yet this claim is incorrect, the Court of Appeals merely noted that the individuals who were hired for the positions at issue were qualified, an objective fact based on the

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[6] *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1205 n.14 (11th Cir. 2013) ("Indeed, if we were to accept Kidd's argument that a district court can never credit an employer's witnesses for purposes of the second stage of the *McDonnell Douglas* analysis, then we'd be categorically barred from considering an employer's legitimate, non-discriminatory reason for hiring one individual over another. This is certainly not what the Court intended by the passage in *Reeves* that Kidd relies on." (citation omitted)); *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 898 (5th Cir. 2002) ("The definition of an interested witness cannot be so broad as to require us to disregard testimony from a company's agents regarding the company's reasons for discharging an employee. As the Seventh Circuit [has] noted . ., to so hold would foreclose the possibility of summary judgment for employers, who almost invariably must rely on testimony of their agents to explain why the disputed action was taken.").

requirements for the position, not that they were relatively more qualified than Ms. Scrivener. Accordingly, this is not a basis for review.

V. CONCLUSION

The Court of Appeals' decision in this case does not conflict with *Rice*, as both cases articulate substantively identical pretext standards and the evidence in this case is inadequate to demonstrate pretext under any standard. Further, Ms. Scrivener does not raise any issues of substantial public interest, as the purported issues she identifies were not raised before the trial court and, in any event, are without merit. Accordingly, the College respectfully requests that this Court deny the petition for review.

RESPECTFULLY SUBMITTED this 3rd day of December, 2013.

ROBERT W. FERGUSON
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Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of December, 2013, at Tumwater, Washington.

Melissa Kornmann, Legal Assistant 3

APPENDIX A

Not Reported in F.Supp.2d, 2003 WL 1456514 (W.D.Va.), 91 Fair Empl.Prac.Cas. (BNA) 660
(Cite as: 2003 WL 1456514 (W.D.Va.))

H

United States District Court,
W.D. Virginia.
Scott B. ALTIZER, et al. Plaintiffs,
v.
CITY OF ROANOKE, VIRGINIA, Defendant.

No. Civ.A. 7:02CV00484.
March 21, 2003.

Memorandum Opinion

WILSON, Chief J.

***1** Plaintiffs, three white police officers, Scott B. Altizer, Susan Camper and J.R. Drewery bring this "reverse discrimination" suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), against the City of Roanoke ("the City"), alleging that the City promoted a less qualified African–American female to police sergeant ahead of them because of her race. Camper also alleges that the City discriminated against her on the basis of her sex.[FN1] The court finds that the plaintiffs are unable to marshal evidence that creates a genuine issue of triable fact, and grants the City's motion for summary judgment.

> FN1. Camper did not raise a retaliation claim in her complaint, although in her brief in opposition she complains of retaliation. She has never moved to amend her complaint to assert such a claim, and the discovery cut-off has long since passed.

I.

A Roanoke City Police Department "operational directive" details the procedure for promotions from patrol officer to sergeant. (Operational Directive 2.3.3, Def.'s Attach. B to Ex. 3). According to that directive, the Chief of Police "will select the most qualified candidate" from a candidate list established by the Department of Human Resources. The Department of Human Resources administers a written examination. The twenty-four officers with the highest scores are then sent to an independent "assessment center." The assessment center conducts a single day of practical testing and interviews. A candidate's test results from the assessment center are "weighed as 100% of the candidate's total examination score." Human Resources then forwards the eligibility list to the chief of police "ranked in the order of their test scores," and this list remains "valid" for two years. The top six are "certified as eligible for promotion." The Chief of Police then selects "from those certified on the eligibility list" based on but "not limited to," the candidate's performance evaluations, job description, adaptability, experience, skills, job knowledge and on comments by staff. When the Chief of Police makes that selection, the next highest scored officer is placed on the certified eligibility list. (Operational Directive 2.3.3).

Altizer, a white male; Camper, a white female; and Drewery, a white male, are police officers for the Roanoke City Police Department ("the Department"). Each sought, but was not selected for, promotion from patrol officer to sergeant.

The plaintiffs appeared on the eligibility list released May 24, 2000. Camper ranked first, Drewery tied for second along with another white male, and Altizer ranked fourth. Gaskins, the Chief of Police, formed a command staff to assist in his decision. The command staff had four white senior officers, Reece Ross, Steven Wills, Bobby Lugar, and James Day. Each time that a sergeant's position opened, the command staff and Gaskins met and discussed the "pros and cons" of the candidates until they reached a consensus as to the most qualified person for the position. Lieutenants who supervised the candidate were also invited to provide written comments. Although Gaskins has the final say, he testified that he considers his role to be one of a decision maker who acts only if the command staff is unable to achieve unanimity. (Gaskins Dep. at 19–20).

***2** During the period from May 2000 to June 13, 2001, the Department promoted a total of six officers to sergeant: five white male officers and one African–American female. (Def.'s Attach. A to Ex. 3). On June 13, 2001, the Department promoted Officer Cornelia McCoy, the African–American female, along with Eric P. Charles, a white male, to the position of sergeant. McCoy initially ranked eleventh on the list of eligible applicants; however, as Gaskins promoted the other officers, her rank eventually improved to sixth. The plaintiffs claim that Gaskins chose McCoy because of her race. Camper also claims that the Department discriminated against women because McCoy was the only woman promoted during that time. The members of the command staff recognized that the plaintiffs were suitable candidates for promotion, but they purportedly identified deficiencies they believed made plaintiffs less suitable for promotion than other candidates on the eligibility list. When the Department promoted the other candidates plaintiffs were not told why they were not selected. Plaintiffs filed charges with the Equal Employment Opportunity Commission, received right to sue letters, and then filed suit in this court.

Various members of the command staff testified in their depositions that after the Department received a report on the number of minority officers in its ranks, Gaskins and other officers discussed the need to recruit and prepare minorities for promotion and to increase diversity. (Wills Dep. at 32); (Ross Dep. at 16–17); (McCoy Dep. at 29). They denied, however, discussing the issue of minority recruitment and promotion during the promotional process or that they considered race in making actual promotions. (Wills Dep. at 32–33, 38); (Ross Dep. at 16–17).

In the light most favorable to the plaintiffs, it appears from deposition testimony and affidavits that Gaskins and McCoy are friends and that Gaskins has made statements to the effect that he would promote McCoy if she simply took the test. (Gaskins Dep. at 56–57); (Palmer Aff. ¶ 2); (Sharp Aff. ¶ 2).

The City has moved for summary judgment on the ground that plaintiffs' evidence is insufficient to raise an inference of either race or sex discrimination. The court agrees and now addresses each claim in turn.

II.

A Title VII plaintiff can establish a triable issue of fact either through direct and indirect evidence of sufficient evidentiary force to prove intentional discrimination or through the proof scheme of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 803 (1973). The court now reviews plaintiffs' claims through those respective prisms.

A. Plaintiffs' Race Discrimination Claims

The court assumes without deciding that plaintiffs have proven a *prima facie* case of reverse discrimination under*McDonnell Douglas* Instead, the court focuses on the final stage of that proof scheme and concludes that plaintiffs' evidence raises no inference of pretext.

***3** "To prove a *prima facie* case of discriminatory refusal to promote under *McDonnell Douglas* [citation omitted], plaintiff must prove that (1) plaintiff is a member of a protected group; (2) plaintiff applied for the position in question; (3) plaintiff was qualified for the position; and (4) plaintiff was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." *Carter v. Ball,* 33 F.3d 450, 458 (4th Cir.1994) (quoting *McNairn v. Sullivan,* 929 F.2d 974, 977 (4th Cir.1991)). If the plaintiff establishes a *prima facie* case, the burden of production shifts to the defendant to "articulate some legitimate nondiscriminatory reason" for its action. *McDonnell Douglas,* 411 U.S. at 802. Plaintiff then has the burden to show that the stated reason is a mere pretext. *Id.* at 804. Plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept*

of Comty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The process of making promotions to jobs that, for obvious reasons, require considerable judgment and suitable temperament necessarily involves subjectivity. Although an employer cannot prevent the court from scrutinizing its employment decisions by cloaking them in subjectivity, Title VII is not a vehicle for judging the wisdom of those decisions. In the present case, there is a common thread that runs through the Department's failure to promote each of the plaintiffs: the perception of various members of the command staff that the attitude of each plaintiff was not quite as good as the other officers selected for promotion.[FN2] Of course, this perception is very subjective and is quite capable of masking intentional discrimination. Under different circumstances it would likely raise an issue of pretext. There is a compelling reason why it does not raise an issue of pretext in this case, however: the Department has repeatedly skipped over the plaintiffs, promoting white officers who like McCoy scored substantially lower than plaintiffs on the one-day assessment center examination. Camper was first on the eligibility list, Drewery tied for second, and Altizer was fourth. Yet, the Department promoted the white officer who tied Drewery for second, the white officer who was fifth, the white officer who was sixth, the two white officers who tied for seventh, the white officer who was ninth, and the white officer who was tenth. Obviously, something quite apart from race was involved in these decisions. Certainly, nothing is to be garnered from the fact that the Department picked the officer who was eleventh-next on the eligibility list-and who happens to be an African–American.

> FN2. Plaintiffs deposed the four white members of the command staff and Gaskins. Plaintiffs' counsel asked each member to recollect their discussions at the command staff meetings of the plaintiffs' "pros and cons." "The biggest negative" Officer Ross recalled about Camper was her "very negative" attitude. (Ross Dep. at 11). "[O]ne of the big negatives he recalled about Drewery was Drewery's "self-serving," "selfish" attitude. (Ross Dep. at 12). A "negative" he recalled about Altizer was the perception that Altizer sometimes seemed to lack an appropriately serious attitude. He was known for "joking [and] clowning around." (Ross Dep. at 13). Wills, Camper's friend who is no longer with the Department and who favored her promotion, confirmed that other members of the command staff thought Camper was "negative towards the department." (Wills Dep. at 25). Officers Lugar and Day had similar recollections about discussions concerning the plaintiffs. (Lugar Dep. at 21, 24); (Day Dep. at 24, 26–28.) In contrast, Day thought McCoy—who was also a sergeant in the United States Army Reserves—had a "superior attitude." (Day Dep. at 19).

Plaintiffs argue that the Department simply promoted the other white police officers as part of a scheme to advance McCoy to the certified eligibility list in order to promote her. That suggestion, however, is highly speculative and makes little sense. It is highly speculative because there is no evidence to support it. It makes little sense because if the Department, in fact, considered plaintiffs to be the most qualified as evidenced by their scores on the assessment center examination, it would have promoted them before the other white officers.

***4** Plaintiffs also argue that they have direct and circumstantial evidence that the Department promoted McCoy on account of her race. Plaintiffs point to evidence that Gaskins was concerned about the lack of diversity in the Department's ranks, thought it important to recruit and prepare minorities for promotion, was close friends with McCoy, and had purportedly stated he would promote her if she took the examination. This evidence, however,

is not sufficient to raise an inference that the Department promoted McCoy because she is an African–American.

Gaskins' concern about the lack of diversity in the Department's ranks is not evidence of discriminatory animus. Nor is the fact that Gaskins thought it important to recruit and prepare minorities for promotion. That evidence says nothing about Gaskins willingness to promote a candidate *because* that candidate is an African–American. In fact, the expression of those concerns may have the salutary effect of an announcement that a predominantly white, male institution will conduct itself as an equal opportunity employer. Finally, evidence that Gaskins and McCoy are friends and that he wanted to promote her cuts against the notion that he intended to promote her because she was African–American. It proves that friendship, not race, motivated Gaskins and, therefore, these facts "better suit a disparate impact case than a disparate treatment case." See *Autrey v. North Carolina Dept of Human Resources,* 820 F.2d 1384, 1385 (4th Cir.1987).

Plaintiffs contend that they have raised issues of fact for trial in accordance with *Lucas v. Dole,* 835 F.2d 532 (4th Cir.1987). In that case, which is clearly distinguishable, plaintiff Julia Lucas, an employee of the Federal Aeronautics Administration (FAA), applied along with eighteen others for promotion to the position of Quality Assurance and Training Specialist, a job requiring a Pilot Weather Briefing Certificate. Two local managers interviewed the candidates, asked them each five questions, and recommended the top four based upon their answers. The selecting official chose an African–American female although she did not have the required certificate. Lucas brought a reverse discrimination suit under Title VII, the district court heard Lucas' evidence, found she had failed to establish a *prima facie* case, and dismissed her suit. In reversing the district court, the Court of Appeals looked to the employer's use of subjective criteria, the promotion of an "underqualified black," irregular acts of favoritism towards the black employee, and the opinion testimony of other employees that race was a factor in concluding that Lucas had established a *prima facie* case. *Lucas* at 534–535.

The case before the court is clearly distinguishable from *Lucas* . McCoy, unlike Lucas who did not have the necessary certificate for the promotion, is not "underqualified." More importantly, the procedural posture in*Lucas* is quite different from the procedural posture here. The District Court in *Lucas* dismissed Lucas' suit because it found that she had failed to establish a *prima facie* case. It never proceeded to the next analytical stage under *McDonnell Douglas* and, therefore, did not consider the evidence bearing on the question of pretext. Here, the court has examined the evidence of pretext, found no material issue of fact for trial, and grants the City's motion for summary judgment.

B. Camper's Sex Discrimination Claim

***5** Camper's sex discrimination claim fails on substantially the same grounds as her race discrimination claim. The fact that, based only upon a single day of testingCamper received a higher score from the assessment center than the males who were promoted, under the circumstances, does not give rise to an inference of sex discrimination. The Department skipped over Altizer and Drewery just as it skipped over her. Moreover, as the court stated earlier, members of the command staff thought she had a "negative" attitude. Even her friend, officer Wills, who wanted to promote her, testified that it was a concern during the command staff's review. The correctness of the perception is not the issue. The issue remains whether the City discriminated against her on account of her sex, not the correctness of the command staff's perceptions. Finally, it seems incongruous to the court that Camper complains, on the one hand, in her reverse race discrimination claim about the Department's desire for diversity, and on the other hand, asks the court to infer that the Department has intentionally discriminated against her because she is a female.

III.

No where has the City maintained that these three plaintiffs are not capable police officers. Frequently, however, employers must make thin line distinctions in choosing from marginally different candidates for promotion. Although an employer cannot cloak discrimination in subjectivity, an employee suing for disparate treatment must show sufficient evidence from which the finder of fact reasonably could conclude that the employer based its decision on a factor Title VII forbids. On that score, plaintiffs' evidence fails. Accordingly, the court will enter summary judgment for the City.

FINAL ORDER

For the reasons stated in the accompanying memorandum opinion, it is ORDERED and ADJUDGED that defendant's motion for summary judgment is GRANTED. This action is stricken from the active docket of the court.

W.D.Va.,2003.
Altizer v. City of Roanoke, Virginia
Not Reported in F.Supp.2d, 2003 WL 1456514 (W.D.Va.), 91 Fair Empl.Prac.Cas. (BNA) 660

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