

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 06, 2014, 8:11 am
BY RONALD R. CARPENTER
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN SCRIVENER)	
)	
Petitioner,)	No. 89377-2
)	
v.)	WELA'S RESPONSE TO
)	RESPONDENT'S MOTION
)	TO STRIKE
)	
CLARK COLLEGE,)	
)	
Respondent.)	
)	
)	
)	

I. INTRODUCTION

The Petitioner, Kathryn Scrivner, filed a Petition for Review on or about October 4, 2013. Thereafter, the Respondent moved for an extension of time within which to file its Response. The Respondent's motion was granted, and it filed its Response on or about December 3, 2013. The Washington Lawyers Employment Association (WELA) filed its Amicus Curiae Memorandum (ACM) in support of review on or about December 3, 2013. The Respondent filed an Answer to the ACM on or about December 20, 2013.

On December 31, 2013, WELA filed a letter with the Clerk of this Court which explicitly referenced RAP 10.8, and requested that the letter be considered as a statement of additional authority. In that regard, WELA called the Court's attention *Alonso v. Quest Communications*, No. 43703-1-II, which had been decided on that same day. The Respondent moved to strike the statement of additional authority, and the Clerk has advised that any Answer to the motion should be filed no later than 9:00 a.m. on January 6, 2014.

The Respondent argues that the Statement of Additional Authority is argumentative, and that issues raised in *Alonso* are not properly before the Court. For the reasons stated below, the Motion to Strike should be DENIED.

II. ARGUMENT OF COUNSEL

A. The Statement of Additional Authorities is Not Argumentative.

The letter filed with the Court as a Statement of Additional Authority is not argumentative. The letter simply, and in a straightforward way, recites the legal claims made by the Plaintiff in *Alonso*, the result in the trial court and Court of Appeals, and the basis for the appellate court's ruling. Without this very basic information, the Court would have no way of assessing the case's significance. The letter filed with Court also "identifies the issue[s] for which . . . the authority is offered." RAP 10.8. Although the Defendant asserts that his information is argumentative, it fails to explain in what way, and none can be discerned.

B. The Issues Raised by *Alonso* are Properly Before the Court.

In *Scrivener v. Clark College*, 176 Wn.App. 405, 309 P.3d 613 (2013), the Court of Appeals considered the trial court's grant of summary judgment in favor of the defendant. The Court ruled that the shifting burden model adopted from *McDonnell Douglas* must be applied. *Id.* at 617. The Court further ruled that under the shifting burden model, the "substantial factor" standard, which is applicable at trial, did not apply to summary judgment. *Id.*, at 618. The Court of Appeals affirmed because Plaintiff could not, as a matter of law, prove that the Defendant's legitimate reason for an adverse action was a pretext. *Id.* at 620.

The Court also ruled that age related comments made by the President of the College were "stray remarks" and for this reason refused to consider the evidence at summary judgment. *Id.* at 618-19. Indeed, the Court discussed the stray remarks doctrine at length, and cited both state and federal cases which it utilized to distinguish the comments made by the President of the College as "stray remarks." *Id.* The Respondent would have this Court ignore the "stray remark" doctrine despite the Court of Appeals' obvious reliance upon it in *Scrivener*. This Court should reject that argument.

In *Alonso v. Quest Communications*, *supra*, the Court also considered an appeal from a grant of summary judgment in favor of the defendant. *Alonso* was also decided by Division II of the Court of

Appeals, and was on opinion written by the exact same judge who authored the decision in *Scrivener*.

In *Alonso*, the Court ruled that the discriminatory comments made by a manager were "direct evidence," and applied the "direct evidence test" rather than the *McDonnell Douglas* framework. Slip Opinion at 6-7. The Court then proceeded to analyze whether there was sufficient evidence to conclude that an illegal motive was a "substantial factor" in the decision making process. *Id.* at 9-10. The Court ruled that a reasonable jury could so find and reversed the grant of summary judgment to the employer. *Id.* at 12.

In Division II of the Court of Appeals, it appears that a "substantial factor" standard applies for deciding summary judgment when there exists "direct evidence" of an illegal motive. However, in the absence of "direct evidence" the "substantial factor" standard does not apply and the Plaintiff must prove pretext utilizing the *McDonnell Douglas* shifting burden test.

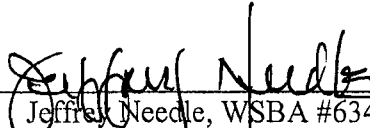
The "stray remarks" doctrine discussed in *Scrivener* turns on the Court's determination that there was no "direct evidence." Whether different standards apply for deciding summary judgment under the Washington Law against Discrimination based upon whether the plaintiff has direct evidence of discrimination is an issue which is directly before the Court in *Scrivener*. The Court of Appeal's subsequent decision in *Alonso* demonstrates that it applies a different analytical framework

depending upon its characterization of the evidence in the case as “direct” or “circumstantial.” This is the same issue raised in *Scrivener*.

III. CONCLUSION

The Motion to Strike should be DENIED.

Dated this 5th day of January, 2014.



Jeffrey Needle, WSBA #6346
Mike Subit, WSBA ##29189

CERTIFICATE OF SERVICE

I hereby certify that on 8th day of January, 2014, I presented the foregoing Response to Respondent's Motion to Strike for filing electronically and by email to the following:

Sue-DelMcCulloch
Law Offices of Sue-Del McCulloch LLC
111 SW Columbia Street Suite 1010
Portland, OR 97201-588
email: SDMcCulloch@sdmlaw.net

Christopher Lanese
Attorney General's Office
PO box 40126
Olympia, WA 98504
email: ChristopherL@ATG.WA.GOV

Dated in Seattle this 8th day of January, 2014.



Jeffrey Needle, WSBA #6346

OFFICE RECEPTIONIST, CLERK

From: Jeffrey Needle <jneedle@wolfenet.com>
Sent: Sunday, January 05, 2014 5:07 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: SDMcCulloch@sdmlaw.net; ChristopherL@ATG.WA.GOV; 'Michael Subit'
Subject: Scrivener v. Clark College - 89377-2 Filing
Attachments: WELA Response Motion to Strike.pdf

Clerk:

Attached hereto please WELA's Response to the Respondent's Motion to Strike in the above referenced case. As reflected above, a copy is being sent to counsel for Petitioner and Respondent. Thanks.

Jeffrey Needle
119 1st Ave. South - Suite #200
Seattle, Washington 98104
206.447.1560