NO. 92349-3

SUPREME COURT
OF THE STATE OF WASHINGTON

REBECCA A. RUFIN,

Petitioner,

v.

CITY OF SEATTLE and JORGE CARRASCO,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Ms. Rufin's LPSM retaliation claim was properly dismissed on summary judgment. The only person she identified as having any retaliatory animus was Mr. Carrasco (the General Manager and CEO of City Light). She offered nothing but speculation, however, that Mr. Carrasco had anything to do with her application for the LPSM position—a position that was three levels below him. Without evidence that Mr. Carrasco knew about the LPSM hiring process and had some involvement, Ms. Rufin's claim failed.

Ms. Rufin has identified no conflict between the result below and the decisions of this Court. The decisions of the Court of Appeals and the trial court adhered to this Court's direction that summary judgment rarely should be granted defendants in Washington Law Against Discrimination ("WLAD") claims. Ms. Rufin was permitted to proceed to trial on one claim based on favorable inferences drawn from circumstantial evidence, and was not permitted to proceed where only speculation supported her claim for relief. The Court of Appeals' affirmance was consistent, and not in conflict, with this Court's precedents regarding summary judgment and the WLAD.

Nor does this case present an issue of substantial public interest. There is no question that the WLAD is to be construed liberally to effect

the purpose of eliminating discrimination. But not every case brought under the WLAD presents a matter of significant public concern. The unpublished decision by the Court of Appeals presents none. The Court should deny review.

II. RESPONSE TO ISSUES PRESENTED FOR REVIEW

Issue No. 1: Ms. Rufin asks this Court to review the appropriate articulation of the causation element of an unlawful retaliation claim under the WLAD. The Court of Appeals applied the correct standard below, as announced by this Court in *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991) ("[A] plaintiff bringing suit under RCW 49.60.210 must prove causation by showing that retaliation was a substantial factor motivating the adverse employment decision"); *see* Court of Appeals Opinion ("Opinion") at 5 (quoting *Allison*). There is no conflict of law on the applicable causation standard.

Issue No. 2: Neither the Court of Appeals nor the trial court held that a WLAD plaintiff is required to produce "admissions" by relevant decision-makers to survive summary judgment, or that circumstantial evidence was insufficient to survive summary judgment. Instead, the Court of Appeals determined that Ms. Rufin did not produce "sufficient facts showing a causal link between her involvement in the protected activity and City Light's not hiring her for the LPSM position," because

there was "clear evidence presented that the persons responsible for making the decision ... were not aware of the protected activity." Opinion at 5, 6. Because Ms. Rufin responded to this "clear evidence" with nothing more than speculation, summary judgment was proper.

Issue No. 3: Ms. Rufin's assertion that the trial court failed to consider all the evidence before dismissing her LPSM claim on summary judgment does not merit this Court's review. First, her assertion is incorrect. Moreover, the Court of Appeals conducted a *de novo* review of the trial court's summary judgment dismissal of the LPSM claim. Ms. Rufin does not assert that the Court of Appeals failed to review the entire record in reaching its decision to affirm the trial court.

Issue No. 4: The trial court properly concluded there was no evidence that the LPSM hiring process was retaliatory. Thus, it was not error to exclude evidence regarding that hiring process under ER 402 and ER 403 at the trial on Ms. Rufin's claims regarding the separate CME hiring process. Basic considerations of relevance and unfair prejudice under the evidence rules are committed to the trial court's discretion, and these rulings below create no decisional conflict for this Court to resolve.

III. STATEMENT OF THE CASE

We incorporate by reference the Court of Appeals' statement of facts, Opinion at 2-3, and the statement of facts in Respondents' Brief on Appeal at 3-26. The key points are as follows:

- Ms. Rufin does not claim that Darnell Cola, the LPSM hiring manager, had any retaliatory motive (CP 1256 at 70:17-71:17), and she offers no evidence that Mr. Cola or his boss, Mr. West, knew anything about her protected conduct. (CP 1258 at 79:21-80:3.)

- Mr. Carrasco is the person Ms. Rufin claims retaliated against her; Ms. Rufin has "been pointing to Carrasco from the beginning." (2/27/14 RP at 30:8-16.)

- There is no evidence that Mr. Carrasco was involved in the LPSM hiring process, in which another admittedly highly-qualified candidate was chosen instead of Ms. Rufin. (*See* Respondent's Brief on Appeal at 7-8.)

- The trial court found the evidence "insufficient to establish [Mr. Carrasco's] involvement" in the LPSM position and dismissed that claim (2/27/14 RP at 60:2-4), but denied summary judgment as to Ms. Rufin's retaliation claim on the CME position, holding that certain circumstantial evidence, when viewed in the light most favorable to Ms. Rufin, created an issue of fact regarding Mr. Carrasco's purported

involvement in the CME hiring process. (*Id.* at 60:5-61:3.) This claim was tried to the jury, which returned a defense verdict.

IV. ARGUMENT

A petition for review is accepted only if the decision of the Court of Appeals is in conflict with a decision of this Court or another decision of the Court of Appeals; if a significant Constitutional question is presented; or if the petition involves an issue of substantial public interest that should be determined by the Court. RAP 13.4(b). Here, there is no decisional conflict, and there is no substantial public interest raised by the Court of Appeals' application of settled Washington law in an unpublished decision. The petition therefore should be denied.

A. Affirming Partial Summary Judgment Dismissing Ms. Rufin's LPSM Claim Created No Decisional Conflict.

1. The Court of Appeals applied the correct standard in determining whether Ms. Rufin met her prima facie production burden.

Under the WLAD, a plaintiff makes a prima facie case of unlawful retaliation by producing evidence of (1) protected activity; (2) an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action, "*i.e.*, that the employer's motivation for the [adverse action] was the employee's exercise of or intent to exercise the statutory rights." *Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991); *see also,*

Milligan v. Thompson, 110 Wn. App. 628, 638, 42 P.3d 418 (2002); *Graves v. Dept. of Game*, 76 Wn. App. 705, 711-12, 887 P.2d 424 (1994). This is not a "but for" causation standard; the plaintiff need only show that retaliation was a "substantial factor" in the adverse employment decision. *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 95-96, 821 P.2d 34 (1991);[1] *see also* Opinion at 5 (quoting *Allison*).

The causal link standard announced in *Allison* is precisely that urged by Ms. Rufin below and applied by the Court of Appeals. Appellant's Br. at 31 ("In Washington, a plaintiff bringing a retaliation claim proves causation by 'showing that retaliation was a *substantial factor* motivating the adverse employment decision.'") (quoting *Allison*) (emphasis original); Opinion at 5. Ms. Rufin's suggestion that the test she urged and that the Court of Appeals applied "may be the wrong test" (Pet. at 15) is puzzling. Certainly *Allison* is not the wrong test.

Ms. Rufin's only support for the "wrong test" notion is a citation to *Davis v. West One Automotive Group*, 140 Wn. App. 449, 166 P.3d 807 (2007). In *Davis*, the Court of Appeals used slightly different words ("substantial motive behind" rather than "substantial factor motivating") to describe the same causation factor decided in *Allison*; if there is any

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[1] In *Allison*, this Court affirmed that the prima facie causation showing announced in *Wilmot* (which involved a claim for common law retaliatory discharge) supplied the correct standard for such a claim under the WLAD. *Allison*, 118 Wn.2d at 89 n.3.

distinction, it is without difference. 140 Wn. App. at 460.[2]

There also is no support for the notion that the Court of Appeals ignored *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014), failed to consider circumstantial evidence, or failed to view the evidence in the light most favorable to Ms. Rufin. (Pet. at 14-15.) To the contrary, the Court of Appeals cited and acknowledged *Scrivener*. Opinion at 4. The Court of Appeals concluded that there was only speculation, not reasonable inference or circumstantial evidence, supporting a causal link between Ms. Rufin's protected activity and an adverse employment action. Opinion at 6. The Court of Appeals reached the correct conclusion, for the reasons briefly summarized below.

Darnell Cola was the hiring manager responsible for the LPSM hiring process. Opinion at 5. Ms. Rufin conceded there was no evidence that Mr. Cola or any other member of the panel was aware of her prior protected conduct. (CP 1256 at 70:17-71:17.) Glynda Steiner eventually was offered and accepted the position. (*Id.*; CP 1124 ¶ 7.) Ms. Rufin admitted that the decision to hire Ms. Steiner was not discriminatory and

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[2] There is no indication that the Court of Appeals in *Davis* intended any departure from the *Allison* substantial factor test by the use of slightly different language. The *Davis* court cited to *Campbell v. State*, 129 Wn. App. 10, 22-23, 118 P.3d 888 (2005). *Campbell* in turn relied upon *Kahn v. Salerno*, 90 Wn. App. 110, 129, 951 P.2d 321 (1998), which cited to *Allison.* Although Ms. Rufin cited to *Davis* in passing below (*see* Appellant's Br. at 27, 28), she never argued for a different causation test than that announced by this Court in *Allison.*

expressed only admiration and respect for Ms. Steiner. (CP 1259-60 at 85:21-86:10; CP 1274 at 244:13-245:15.)

Mr. Carrasco is the person Ms. Rufin claims retaliated against her. He was not involved in the LPSM hiring process. (CP 1123 ¶ 4; CP 250 ¶ 24; CP 1062 ¶ 5; CP 1064 ¶ 5; CP 1127 ¶ 5.) The uncontroverted evidence is that Mr. Cola and the members of the hiring panel decided not to hire Ms. Rufin. (CP 250 ¶ 24; CP 1123-24 ¶¶ 4, 6-7; CP 1061-62 ¶¶ 2-4; CP 1063-64 ¶¶ 2-4; CP 1126-27 ¶¶ 2-4, 6.)

Ms. Rufin argues that Mr. Carrasco must have learned of her application for the LPSM position, and that he must have intervened in the hiring process. (CP 1256-57 at 73:10-76:21; CP 607 ¶ 77; CP 610 ¶ 92.) As "evidence," Ms. Rufin cites a single, handwritten entry in the LPSM hiring status report, which notes that three candidates were to receive second interviews, and later states "two [candidates, Ms. Ooka and Ms. Steiner] decided for 2nd intv by Phil West." (*Id.*; CP 1308-10.) However, as Ms. Rufin admitted at deposition, this entry does not show that Mr. Carrasco intervened, and she can only speculate whether he did. (CP 1257 at 75:8-76:21. *See also*, CP 610 ¶ 92.)

Ms. Rufin's alternate theory is that Mr. Carrasco's attitude about her "permeated down" to Mr. West, but she admitted that this view is based on belief rather than fact. (CP 1257-58 at 76:7-79:20; CP 1272 at

219:17-220:8.) The uncontroverted evidence was that the hiring panel unanimously decided not to hire Ms. Rufin following the first interview, and made this decision without any influence from Mr. Carrasco. (CP 1123-25 ¶¶ 4, 6-7; CP 250 ¶ 24; CP 1061-62 ¶¶ 2-5; CP 1063-64 ¶¶ 2-5; CP 1126-27 ¶¶ 2-5.)

When asked whether she believed that Mr. Carrasco was aware of the LPSM position that Ms. Rufin was seeking, she said it was possible, saying "[t]hat I'm less confident of, but I'm – if he was not directly aware, then I believe that Phil West was aware that Jorge did not like me." Opinion at 6. The Court of Appeals properly did not credit this speculation. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) ("[h]owever, a nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain"); *see also Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996) (a WLAD plaintiff "must do more than express an opinion or make conclusory statements" to avoid summary judgment).

This is not a case like *Scrivener*, which turned on the question of whether an employer's asserted non-discriminatory reason for an adverse employment action was pretext. Here, there were no "reasonable but competing inferences of discriminatory and nondiscriminatory intent," 181 Wn.2d at 450, but instead a failure to produce evidence of a causal link in

the first place. There simply was no evidence connecting Mr. Carrasco to the LPSM hiring decision.[3]

In reaching this conclusion, the Court of Appeals and the trial court considered the evidence regarding the CME hiring process. Ms. Rufin clings to a statement by the trial court that each process was considered separately (Pet. at 14), but the trial court was absolutely clear that it granted summary judgment on the LPSM claim "even when evaluating the evidence in light of what had occurred during Ms. Rufin's attempt to be hired into the CME 3 position." (CP 3661.) And the Court of Appeals itself conducted a *de novo* review of the trial court's summary judgment, engaging in "the same inquiry as the trial court." Opinion at 4. There was

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[3] Evidence about inconsistencies in the LPSM process might matter if the process had been conducted by Mr. Carrasco. But there is no evidence linking Mr. Carrasco to the process, and the evidence of purportedly inconsistent explanations of Mr. Cola's decision not to hire Ms. Rufin are irrelevant because none of the alleged inconsistencies tends to show that Mr. Carrasco was secretly involved in the LPSM process.

Ms. Rufin cites to three cases for the proposition that inconsistent explanations provide evidence of discriminatory intent. These cases are inapposite because they all address the use of inconsistencies to establish pretext, not a prima facie showing of a causal link. *Hill v. BTCI Income Fund-I, L.P.*, 144 Wn.2d 172, 184, 23 P.3d 440 (2001) (inconsistent explanation for employment action probative of pretext; pretext alone insufficient to avoid judgment as a matter of law); *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 748-49, 332 P.3d 1006 (2014) (affirming judgment after trial; court was not required to credit non-discriminatory justifications for termination of employment in light of inconsistent testimony and lack of contemporaneous documentation); *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 624, 60 P.3d 106 (2002) (reversing summary judgment; inconsistencies surrounding non-discriminatory reasons for termination supported showing of pretext). Here, the Court of Appeals did not reach the question whether the stated reasons were pretextual, because Ms. Rufin did not meet her initial prima facie burden of establishing that her protected activity was connected to the decision not to hire (that is, her burden of showing that an action by Mr. Carrasco was a substantial factor in her non-hiring for the LPSM position).

no failure to consider the entire record below.

Rather, the circumstantial evidence regarding the CME process was simply unrelated to the LPSM process, and qualitatively different than the speculation Ms. Rufin offered about the LPSM process. There was evidence that Mr. Carrasco became aware of the CME process; there was never any evidence that he knew anything about the LPSM process. There was no evidence that Phil West had anything to do with the CME process; he was (slightly) involved in the LPSM process. The pertinent events the trial court found sufficient to show a prima facie connection between Mr. Carrasco and the CME process, beginning with Ms. Rufin's e-mail to Mr. Carrasco on June 11, 2012, occurred months after the LPSM hiring process had closed. Any connection between these two hiring processes was entirely speculative.

Ms. Rufin's position appears to be that when a trial court is presented with one claim that survives summary judgment, all claims necessarily must proceed to trial. This position finds no support in Washington law. Partial summary judgment was appropriate here and does not conflict with this Court's precedents.

2. The Court of Appeals did not apply the "stray remarks" doctrine.

Ms. Rufin notes the Court's implicit rejection of the "stray

remarks" doctrine in *Scrivener*, 181 Wn.2d at 450, as if to suggest that the Court of Appeals applied that doctrine here to avoid considering evidence. It did not.

In *Scrivener*, the responsible hiring official made a statement indicating a desire to hire "younger talent," which the Court held to be circumstantial evidence of an intent to discriminate based on age. 181 Wn.2d at 449-50.

Here, unlike in *Scrivener*, the two "remarks" in question – an alleged statement by Ms. Johnson that Ms. Rufin had "burned her bridges," and an alleged statement by Mr. Cola that the CME hiring process was "political" – neither were connected to Ms. Rufin's protected activity nor connected to Mr. Carrasco. Both comments were made in the context of the CME process, and no evidence connected a burned bridge or a political decision to the LPSM hire. Both the trial court and the Court of Appeals considered these remarks and concluded that they did not support a reasonable inference that retaliatory intent was a substantial factor in the decision not to hire Ms. Rufin for the LPSM position. The Court of Appeals indicated no dispute with this Court's implicit rejection of the "stray remarks" doctrine. No conflict needs be resolved.

* * *

The Court of Appeals broke no new ground in its decision

affirming partial summary judgment: considering the record as a whole, including admissions by Ms. Rufin and the testimony of the City Light decision-makers who decided not to hire her, Ms. Rufin failed to produce evidence that protected activity was a substantial factor in the decision to hire another, concededly well-qualified applicant. This straightforward application of the causation standard announced by this Court in *Allison* creates no decisional conflict justifying this Court's review.

B. Affirming the Trial Court's Evidentiary Rulings Created No Decisional Conflict.

Having determined that Ms. Rufin's LPSM claim should be dismissed, the trial court did not permit Ms. Rufin to present evidence regarding that hiring process to the jury. This was a proper exercise of the trial court's discretion and the Court of Appeals did not err in affirming.

Ms. Rufin implicitly contends that this decision is in conflict with *Wilmot*, which held that "evidence of a pattern of retaliatory conduct" can support a prima facie causal link between protected activity and an adverse employment decision. 118 Wn.2d at 69. But *Wilmot* stands only for the proposition that that other "retaliatory" conduct may be used to support a claim that the adverse employment decision, too, was retaliatory.

Nothing in the Court of Appeals' decision is contrary to this principle. Instead, the Court of Appeals held that it was not an abuse of

discretion to exclude evidence regarding the LPSM hiring process, because that hiring process had been determined not to be discriminatory or retaliatory as a matter of law at summary judgment. Opinion at 7-8. Thus, evidence that Ms. Rufin was not hired for the LPSM position was not relevant to her CME claim and was properly excluded. ER 402. Moreover, the trial court determined that the probative value was substantially outweighed by the risk of unfair prejudice and misleading the jury, confusion of the issues, or considerations of waste of time. ER 403. This was a proper exercise of the trial court's discretion. Opinion at 8.

Ms. Rufin has identified no applicable precedent in conflict with the Court of Appeals' decision, and review of the Court of Appeals' affirmance of discretionary trial court rulings is unnecessary.

C. This Case Presents No Matter of Substantial Public Interest.

Ms. Rufin contends that this Court should make clear that a WLAD plaintiff need not "produce admissions from the relevant decision-maker(s), admitting either that they had knowledge of the plaintiff's statutorily protected activity or were influenced in their decision by a person with such knowledge." (Pet. at 20.) This argument is a straw man, not a matter of substantial public interest. Neither the trial court nor the Court of Appeals set such a burden in this case. Indeed, Ms. Rufin

prevailed on summary judgment on a claim where she presented no direct evidence of retaliation and where she produced no such admissions.

A plaintiff may not proceed on speculation alone, but circumstantial evidence of discriminatory intent may be admissible. The result in this case confirms that Washington courts permit plaintiffs to proceed to trial on the basis of minimal, circumstantial evidence but do not allow claims to go forward based on outright speculation: the entirely speculative LPSM claim was dismissed on summary judgment but the highly circumstantial CME claim was presented to, and rejected by, a jury. There is no need to further address a WLAD plaintiff's burden through review of this unpublished opinion.

V. CONCLUSION

There is no conflict between the Court of Appeals' decision and this Court's decisions or other decisions of the Court of Appeals, and this matter is not of substantial public interest. Review should be denied.

DATED: November 23, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 23, 2015, a true and correct copy of the foregoing **ANSWER TO PETITION FOR REVIEW** was delivered by electronic mail, by agreement, to:

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DATED this 23rd day of November, 2015, at Seattle, Washington.

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