No. 738496

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

MARNIE L. SIMMONS,

Appellant,

v.

MICROSOFT CORPORATION, A WASHINGTON CORPORATION,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Marnie L. Simmons, a former Microsoft employee, brought an age and race discrimination action against Microsoft for terminating her employment due to, at least in substantial part, her age and race, in violation of the Washington Law Against Discrimination (WLAD), RCW 49.60.180. Microsoft moved for summary judgment, and the trial court granted the motion. In doing so, the trial court failed to properly address the burden placed on the respondent under the burden shifting framework of *McDonnell Douglas* and misconstrued the evidence presented by Appellant. The evidence presented to the trial court, when viewed in the light most favorable to Ms. Simmons, raises a genuine issue of material fact as to whether age and race were substantial factors in Microsoft's decision to terminate Appellant's employment. The trial court thus erred in granting Microsoft's motion, and this Court should reverse and remand the case for further proceedings to allow a reasonable trier of fact to make the factual determinations in a case where several substantial material issues of fact are undeniably present.

II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

Assignment of Error

The trial court erred by entering the order granting Microsoft's motion for summary judgment because Microsoft did not meet its burden under the *McDonnell Douglas* burden shifting framework. Furthermore, because Appellant met its burden of production and produced sufficient evidence of pretext, it established a genuine issue of material fact as to whether age and/or race were substantial factors in Respondent's decision to terminate Appellant, and it was thus error for the trial court to grant Respondent's motion for summary judgment

Issues Presented

A. Whether Microsoft presented clear non-contradictory evidence sufficient to establish that Ms. Simmons' employment was terminated for a legitimate nondiscriminatory reason and thus meet its burden under the *McDonnell Douglas* burden shifting framework?

B. Whether Appellant successfully overcame its burden under the *McDonnell Douglass* burden-shifting framework and prove that there is a genuine issue of material fact as to (i) age as a substantial factor in Microsoft's decision to terminate Ms. Simmons' employment, and (ii) race as a substantial factor in Microsoft's decision to terminate Ms. Simmons' employment?

III. STATEMENT OF THE CASE

1. Procedural Posture

On September 8, 2014, Ms. Simmons filed a complaint for unlawful discrimination in violation of RCW 49.60 against her employer, Microsoft ("Respondent"). CP 1. Microsoft moved for summary judgment to dismiss, with prejudice, Ms. Simmons' claims. CP 23. On July 31, 2015, following a brief hearing, the trial court granted Microsoft's motion. Order Granting Def's Mot. Summ. J. Ms. Simmons timely filed a notice of appeal from the order of the trial court. CP 43.

2. Statement of Facts

In February 2013, Appellant Marnie Simmons was unexpectedly terminated after seven years as a full-time employee with Microsoft, during which time she received numerous promotions, positive performance reviews and awards. Ms. Simmons was replaced by a younger, less-experienced employee, Ms. Sara Young. Ms. Simmons is currently 45 years old, and was 43 years old when she was terminated from Microsoft. CP 347, 351. Ms. Simmons identifies as a Hawaiian/Pacific Islander; her mother was born in Hawaii. *Id.* Ms. Simmons was hired by Microsoft on June 3, 2006, as a Business Administrator. CP 347. During the course of her employment, Ms. Simmons completed yearly performance reviews, which included self-evaluation and feedback from her supervisors. Appellant also received feedback during mid-year Check-In reviews, which underscored the quality of her work, work ethic, and "willingness to support others in a selfless

fashion," "very knowledgeable about the admin role and ... really good at performing those tasks." CP 348, 409. During the course of her employment, Ms. Simmons received several promotions and exhibited a pattern of successfully addressing any areas identified by her supervisors as areas needing improvement over the course of several years without incident. Although there were instances of constructive criticism that supervisors are commonly expected to offer to stimulate professional growth of their employees, any patterns of comments or concerns that Petitioner attempted to point out in its briefing and at the summary judgment hearing are manifestly absent in the reviews of Ms. Simmons' performance of her job duties.

In 2011, Appellant applied for a position as Executive Assistant to Bret Arsenault, then Chief Information Security Officer and head of the Information Security Risk Management Group ("ISRM") at Microsoft. CP 349. Ms. Simmons was hired, although Mr. Arsenault's first choice for the position was a contract assistant who had worked for him in the past. *Id.* When this person declined the job offer, Mr. Arsenault offered the position to Ms. Simmons. *Id.* While Ms. Simmons was working with Mr. Arsenault, he made a racially charged comment that implicated her Hawaiian/Pacific Islander heritage in her presence. Ms. Simmons found the comment patently offensive. Specifically, when Mr. Arsenault brought a new employee onto

the team, he announced: "I'm bringing in the real kahuna." CP 303. The other employee that Mr. Arsenault was referencing as the "real kahuna" was also Hawaiian, like Ms. Simmons. Appellant was troubled by the inappropriate nature of the comment because, among other things, it implied that she was somehow not fully Hawaiian, not the real deal, and subpar CP 303-04.

Up until fall of 2011, Mr. Arsenault and Ms. Simmons had a positive, professional business relationship. CP 349-50. However, this began to change when Sara Young, then aged 30, was hired into the ISRM group. CP 350. In November 2011, Ms. Young interviewed for a position with the ISRM team that was managed by Mr. Arsenault. CP 320. Ms. Young was chosen for the position from a pool of four candidates, was the least qualified in terms of skill set and experience, and was the youngest candidate. CP 351.

Ms. Simmons' 2012 Check-In review continued to reflect that she was performing her job duties well. CP 350. Then, just months after giving Ms. Simmons positive feedback and stating that she was "on track" for meeting six out of her seven job commitments on the 2012 Check-In, Mr. Arsenault completed an assessment of Ms. Simmons in her 2012 performance review that represented a sudden and drastic departure from all of Ms. Simmons prior reviews. In particular, Mr. Arsenault alleged

"significant challenges" with Cross Team Collaboration, a category he had specifically identified as one where Ms. Simmons was "on track" during the mid-year check-in. CP 462, 483.

Shocked after receiving the first and only negative performance review in her seven years with Microsoft, Ms. Simmons immediately sought colleague feedback in the form of a Microsoft 360 Feedback ("360 Review")[1] CP 350, 486, and received positive feedback from her colleagues in a majority of categories ranging from "interpersonal awareness" to "communication skills." 351, 493-94. Across all categories, Ms. Simmons received a markedly lower score only from her Direct Manager, Mr. Arsenault. CP 351.

Mr. Arsenault's assessment aside, Appellant continued to receive recognition for job performance at Microsoft. CP 350-35. *See also* CP 533 (receiving a Microsoft "Kudos" award). Nevertheless, on February 11, 2013, Mr. Arsenault chose to terminate Ms. Simmons employment at Microsoft citing "job performance and competency levels [not meeting] minimum performance and expectations for [Appellant's] position." CP

[1] The 360 Review consisted of a report of feedback from Ms. Simmons' colleagues, managers, Mr. Arsenault, and herself. In the "Communication Skills" section, Ms. Simmons' peers gave her a "3.64" rating while other colleagues rated Ms. Simmons performance at "4.04" out of a possible "5." Mr. Arsenault gave Appellant a markedly lower "1.75" rating. In the "Planning, Organizing, and Coordinating" category, Ms. Simmons was rated "4.33" by her peers, "4.50" by others, and again received a markedly lower score of "1.80" from Mr. Arsenault.

352, 540. Mr. Arsenault further cited "ongoing performance issues, coupled with the demands of the business" and "[having] to spend inordinate amounts of time debating with Ms. Simmons about her performance issues and seeking to resolve conflicts between her and others." CP 237. When asked at his deposition, Mr. Arsenault stated that Ms. Simmons was terminated because of a "lack of performance and business impact going beyond the performance review." CP 343.

Ms. Young, then 32 years old, immediately stepped in as Mr. Arsenault's interim assistant and took over Ms. Simmons' role. She was thereafter hired as Mr. Arsenault's full-time Executive Administrator in May 2013. CP 238, 334-35, 338.

Since Ms. Simmons was terminated from employment with Microsoft in February 2013, she has been unable to find permanent employment, despite actively applying for jobs. CP 352. As a result of such unjust treatment and warrantless termination, Ms. Simmons and her family lost significant income. Marnie continues to suffer emotional pain and feels that her ability to obtain employment has been significantly degraded due to an unwarranted discharge where race and age were two substantially motivating factors.

IV. ARGUMENT

A. Standard of Review

The appellate court "reviews an order granting summary judgment *de novo*, 'taking all facts and inferences in the light most favorable to the nonmoving party." *Biggers v. City of Bainbridge,* 162 Wn.2d 683, 693, 169 P.3d 14 (2007). Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The moving party has the burden of showing that there is no genuine issue as to any material fact. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.,* 162 Wn.2d 59, 70, 170 P.3d 10 (2007). A grant of summary judgment will not be affirmed by the appellate court unless it "determine[s], based on all of the evidence, [that] reasonable persons could reach but one conclusion." *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment to an employer is "seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motivation." *Scrivener v. Clark College*, 181 Wn.2nd 439, 445, 334 P.3d (2014).

B. Respondent's Motion for Summary Judgment Fails under Washington Employment Discrimination Law

1. Burden-shifting framework

Washington courts have adopted the burden-shifting framework established in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817

(1973). *Scrivener,* 181 Wn.2nd at 445. Under *McDonnell Douglas*, the plaintiff bears the initial burden of establishing a prima facie case of unlawful discrimination. The defendant must then present evidence that the plaintiff was rejected for the position for a legitimate nondiscriminatory reason. If the employer meets its burden of production, the employee must then show that the employer's proffered reason was mere pretext for discrimination. *Domingo v. Boeing Emps.' Credit Union,* 124 Wn. App. 71, 77, 98 P.3d 1222 (2004). 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. *Fulton v. Dep't of Soc. & Health Servs.,* 169 Wn. App. 137, 161, 279 P.3d 500 (2012). To meet this burden, the employee is not required to produce evidence beyond that already offered to establish a prima facie case. *Sellsted v. Wash. Mut. Sav. Bank,* 69 Wn. App. 852, 860, 851 P.2d 716, *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). Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's burden. *Id.* at 861. An employee must meet her burden of production to create an issue of fact but is not required to resolve

that issue on summary judgment. "For these reasons, summary judgment in favor of employers is often inappropriate in employment discrimination cases." *Id.*

The *McDonnell Douglas* framework "was never intended to be rigid, mechanized, or ritualistic." *Fumco Const. Co. v. Waters,* 438 U.S. 567, 577 (1978). Rather, it was developed to aid the plaintiff in surviving summary judgment, in recognition that discriminatory intent is often difficult to prove. *See Costa v. Desert Palace, Inc.,* 299 F.3d 838, 855 (9th Cir. 2002) (en banc) (Legal proof structure is a tool to assist plaintiffs at the summary judgment stage so that they may reach trial); *Hill v. BCTI Income Fund-I,* 144 Wn.2d 172, 180, 23 P.3d 440 (2001) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff [has] his [or her] day in court despite the unavailability of direct evidence.") (citations omitted).

2. Respondent failed to establish that Appellant's employment was terminated for a legitimate nondiscriminatory reason.

The trial court erred in finding that Microsoft presented evidence sufficient to show that Ms. Simmons' employment was terminated for a legitimate nondiscriminatory reason and thus satisfied its burden of production. To the contrary, Respondent was unable to rebut the

presumption of discrimination raised by a prima facie showing under Washington Law Against Discrimination (WLAD).

"Employers infrequently announce their bad motives orally or in writing." *Hill* v. *BCTI Income Fund–I,* 144 Wn.2d 172, 179, 23 P.3d 440 (2001) (quoting *DeLisle v. FMC Corp.,* 57 Wn.App. 79, 83, 786 P.2d 839 (1990)). Whereas Ms. Simmons established a prima facie case of unlawful discrimination and Microsoft conceded that she had established a prima facie case of unlawful discrimination (cite to hearing transcript), Microsoft failed to provide evidence sufficient to establish that Ms. Simmons employment was terminated for a legitimate nondiscriminatory reason. Specifically, in its motion for summary judgment, Respondent states that Ms. Simmons' performance was terminated due to her poor performance in an apparent attempt to divert the court's attention from the overwhelmingly positive performance evaluations Ms. Simmons has received throughout her tenure at Microsoft. CP 255.

Respondent also overstates the significance of constructive criticism contained in Ms. Simmons' performance evaluations, criticisms that supervisors routinely offer to stimulate employee professional growth, while trying to undermine the significance of numerous positive performance reviews and rewards Ms. Simmons received throughout her

employment with Microsoft. In doing so, instead of meeting its burden of production, Respondent is obfuscating the abrupt nature of Appellant's termination by Bret Arsenault, and attempts to meet its burden of production under the *McDonnell* framework by offering evidence that is wholly inconsistent with the overwhelmingly positive job performance of Appellant, further suggesting that none of the reasons given was the real reason for her termination. At the hearing, the trial court focused almost exclusively on the pretext prong the of *McDonnell Douglas* framework, having all but assumed that Microsoft has successfully met its showing of a legitimate reason for Appellant's termination. Having failed to establish a showing of a legitimate reason for Ms. Simmons' termination, Microsoft thus failed to meet its burden. It was therefore error for the trial court to grant Respondent's motion for summary judgment.

3. Trial court erred in finding that evidence offered by Appellant to establish pretext in regards to race and gender being substantially motivating factors leading to Appellant's termination was insufficient and that reasonable minds could not differ regarding the evidence offered.

In the event the defendant has met its burden of production, the burden shifts back to the plaintiff to provide evidence of pretext. 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. *Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 161, 279 P.3d 500 (2012). Additionally, the Washington State Supreme Court rejected the proposition that employees must prove that discrimination was the "determining factor" (i.e., that but for the discrimination, the employer's decision would have been different). *See Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309–10, 898 P.2d 284 (1995). The trial court inappropriately ruled in Microsoft's favor on the motion for summary judgment because Appellant has offered ample evidence of race and gender as substantially motivating factors leading to Appellant's termination, creating a genuine issue of material fact. Based on all the evidence offered by Appellant and the inconsistent reasons offered by Microsoft, holding that reasonable persons could reach but one conclusion in this case is clear error.

a. Appellant presented sufficient evidence of age being a substantial factor pertaining to Appellant's termination.

Specifically, the trial court inappropriately ignored the fact that replacement by a younger employee creates a presumption of discriminatory intent. Bret Arsenault treated Ms. Simmons differently than similarly situated young employees, and that he was biased against Ms. Simmons. Almost immediately after terminating Ms. Simmons, Mr.

Arsenault replaced her with a much younger employee, Ms. Young, his only stated reason for doing so being previously articulated constructive criticism offered to Appellant in conjunction with otherwise overwhelmingly positive performance feedback. In order to decide the ultimate question whether Ms. Simmons' age and race played a role in Mr. Arsenault's decisions, a fact-finder must make credibility determinations and choose from multiple competing inferences, making summary judgment inappropriate where competing presumptions clearly exist.

In an age discrimination in employment claim under Washington law, "the employee's task at the summary judgment stage is limited to showing that a reasonable trier of fact could, but not necessarily would draw the inference that age was a "determining factor" in the decision. *DeLisle*, 57 Wn. App. 79 at 83-84. Subsequent Washington courts have replaced the "determining factor" standard articulated by the *Sellsted* court with the less onerous "substantial factor" in employment discrimination claims under Washington law. *See e.g. Scrivener v. Clark College*, 181 Wn.2nd 439, 445, 334 P.3d (2014).

Therefore, the ultimate question in an employment discrimination case is motive. *See Johnson v. Dep't of Social and Health Serv's*, 80 Wn.App. 212, 907 P.2d 1223 (1996); *Sellsted,* 69 Wn.App. 852 at 860. "This issue of the defendant's intent at the time of [its decision] is clearly a

factual question." *Sellsted*, 69 Wn.App.852 at 863 (quoting *Chippolini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987)). By pointing to evidence which calls into question the defendant's intent, the plaintiff raises an issue of material fact which, if genuine, is sufficient to preclude summary judgment. *Id.* Ms. Simmons' firing and immediate replacement by a much younger employee, in light of the overwhelmingly positive reviews of her performance, does not render general constructive criticism proffered by her employer sufficient to substantiate his overwhelmingly negative final reviews sufficient to depict a pattern of warnings leading to a sound decision to terminate employment without pretext.

Because employers rarely admit or "openly reveal" an unlawful motive for their employment decisions, discrimination cases ordinarily must be decided by weighing credibility of witnesses and drawing from competing inferences based on circumstantial evidence. *See Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 621, 60 P.3d 106 (2006). For this reason, "summary judgment should rarely be granted in employment discrimination cases." *Johnson*, 80 Wn.App. at 226 (citing *DeLisle v. FMC Corp.*, 57 Wn.App. 79, 84, 786 P.2d 839 (1990)). As a general matter, the Plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment. *Chuang v. Univ. of Cal. Davis, Bd. Of Trs.*, 225 F. 3d 1115, 1124

(9th Cir. 2000). Ms. Simmons has gone well beyond the "very little" mark, and the trial court's decision to ignore her concerns and to dismiss at the summary judgment stage clear error.

Mr. Arsenault based his decision to terminate Ms. Simmons' employment solely on his inconsistent and highly subjective judgments. CP 350, 486. This inconsistent approach, coupled with the evidence that Mr. Arsenault judged Ms. Simmons on these attributes differently than he judged younger employees and employees of other race than Ms. Simmons, as discussed below, is legally sufficient to raise an inference of discrimination which must be decided by a jury. To defeat summary judgment, Ms. Simmons need only produce evidence that calls into question Respondent's explanation. *See, e.g., Johnson,* 80 Wn. App. at 227. This is a burden of production, not of persuasion. *Jones v. Kitsap County Sanitary Landfill,* 60 Wn. App. 369, 372-73, 803 P.2d 841 (1991). Ms. Simmons did just that. Therefore, it was error for the trial court to grant Respondent's motion for summary judgment as a matter of law.

b. Appellant presented sufficient evidence of race being a substantial factor pertaining to Appellant's termination.

At the hearing, Respondent took great pains to emphasize the subjective nature of Ms. Simmons' interpretation of the "real kahuna" comment, going as far as to argue that Appellant's subjective interpretation

of the racially charged comment was "legally irrelevant." MSJ Hr'g Tr. 15, July 29, 2015 (Appendix). Aside from the fact that potentially offensive racially charged language has no place in a healthy work environment to begin with, the remark in question clearly brings enough to the table to cast doubt on Bret Arsenault's rapport with and his subsequent decisions regarding Ms. Simmons. The trial court appeared to have bought into Microsoft's subjectivity argument, at one point cajoling Appellant's counsel to agree that comments such as "old goat" are "pretty clear" on their face and thus could be viewed more objectively as pretext, whereas the connotations of the phrase "real kahuna" are somehow less indicative of or less likely to produce a showing of racial pretext. MSJ Hr'g Tr. 20, July 29, 2015 (Appendix).

All Ms. Simmons had to do to meet her burden at the summary judgment stage under the *McDonnell Douglas* framework was to produce sufficient evidence to support a "reasonable inference" that a discriminatory motive was a substantial factor in her termination. *Rice v. Offshore Systems, Inc.*, 167 Wn. App. 77, 90, 272 P.3d 865 (2012). Ms. Simmons introduced evidence of both the inconsistent reasons proffered for her termination by Respondent, along with comments pertaining to her race—evidence sufficient to establish a reasonable inference of pretext. If the objective meaning of terms like "real kahuna" could be used to determine whether

racially charged comments could be used to produce such a showing, an employer could get away with subjecting Appellant to volumes of subtly racist or ageist comments by arguing that her interpretation of such comments was her subjective interpretation, and nothing more. Instead, it is the task of a reasonable factfinder in the form of a jury to be able to determine whether what took place was in fact motivated by animus, and the trial court clearly erred by granting summary judgment in this instance.

The evidence here shows a disconcerting comment by Mr. Arsenault regarding Ms. Simmons' race. CP 23. It further shows that Mr. Arsenault took the first opportunity to "paper" Ms. Simmons' personnel file with negative evaluations with which, as the evidence shows, only he agreed. At the same time, Mr. Arsenault treated similarly situated younger white employee Sara Young completely differently, giving her performance glowing reviews. Ms. Young, who went on to replace Ms. Simmons, was substantially less qualified for the position than Appellant, but was selected to step into Ms. Simmons' shoes on an interim basis immediately upon Ms. Simmons' departure. CP 334.

Justice Ginsburg recently pointed out that the "[p]ractice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to

biases of which they are unaware." *Wal-Mart Stores v. Dukes,* 2011 564 U.S. 388 (2011) (Ginsburg, J., concurring in part and dissenting in part).

In his declaration in support of Defendant's motion, Mr. Arsenault stated that in 2012, he became concerned with Ms. Simmons' interactions with others on the team. CP 234. Notably, in the same paragraph of his declaration, Mr. Arsenault refers to this alleged conduct by Ms. Simmons as "performance issues." Such ambiguous and inconsistent assertions not only fail to negate the inference of age and race discrimination, but leave open the reasonable inference that both may well have been substantial factors in how these "interaction" and "performance issues" were determined. Statements by Mr. Arsenault in support of the summary judgment motion that he made the decision to terminate Ms. Simmons' employment based on her interaction and performance issues present material facts which are squarely "within the knowledge of the moving party" on which Washington appellate courts have been "reluctant to grant summary judgment." *See, e.g., Riley v. Andres,* 107 Wn. App. 391, 395, 27 P.3d 618 (2001).

IV. CONCLUSION

Microsoft did not meet its burden under the *McDonnell Douglas* burden shifting framework and did not produce a legitimate reason for discharging Appellant. Microsoft was thus unable to rebut the presumption

of discrimination raised by a prima facie showing under Washington Law Against Discrimination (WLAD). It overstated the significance of any constructive criticism it cited as "legitimate" and "nondiscriminatory" reasons for terminating Ms. Simmons' employment while producing no credible legitimate evidence of issues with Ms. Simmons' performance of her duties, issues serious enough to warrant an abrupt termination in light of the overwhelmingly positive feedback over the course of her employment at Microsoft.

Furthermore, the evidence set forth by Ms. Simmons is plainly sufficient to defeat summary judgment because it raises genuine factual issues as to Microsoft's reasons for terminating Ms. Simmons' employment. When an employee presents "comparator" evidence showing that the employer treated white employees better than they treated her, she "*necessarily* ha[s] raised a genuine issue of material fact with respect to the bona fides of the employer's articulated reason for its employment decision." *Johnson,* 80 Wn. App. at 229 (quoting *Sischo-Nownejad v. Merced Comm'y Coll. Dist.,* 934 F.2d 1104, 1111 (9th Cir. 1991)). The plaintiff opposing summary judgment in an employment discrimination claim is not required to produce "direct or 'smoking gun' evidence" of discriminatory animus. *Chen v. State,* 86 Wash.App. 183, 190, 937 P.2d 612 (Div. 2, 1997), (citing *Sellsted v. Wash Mut. Sav. Bank,* 69 Wn. App.

852, 860, 851 P.2d 716 (1993)). Rather, "[c]ircumstantial, indirect, and inferential evidence is sufficient to discharge the plaintiff's burden." *Id.* A clear question of fact exists regarding whether Ms. Simmons' age and race were substantial factors in Microsoft's decision to terminate her employment in violation of Washington anti-discrimination law. Summary judgment was inappropriate as a reasonable trier of fact could draw the inference that age was a "substantial factor" in the decision. *See Sellsted,* 69 Wn. App. at 860; *Mackay* 127 Wn.2d at 311. Viewing the evidence and the reasonable inferences in the light most favorable to Ms. Simmons as the nonmoving party, a question of fact exists as to whether age and race were substantial factors in Microsoft's decision to terminate Ms. Simmons' employment and the trial court's order granting summary judgment to Microsoft should be overturned. The trial court erred in granting Microsoft summary judgment: (1) because Microsoft did not meet its burden under the *McDonnell Douglas* burden shifting framework and (2) and because the court failed to apply the "substantial factor" analysis correctly under the *McDonnell Douglas* model, dismissing relevant probative evidence set forth by Appellant.

DATED January 29, 2016.

Respectfully submitted,

George O. Tamblyn
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WSBA #15429

APPENDIX

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MARNIE L. SIMMONS)
Plaintiff,) No. 14-2-24686-2 SEA
vs.) COA No. 73849-6-I
MICROSOFT CORPORATION, a Washington)
corporation,)
Defendant.)

HEARING
July 29, 2015
The Honorable Sean P. O'Donnell Presiding

TRANSCRIBED BY: Bonnie Reed, CETD
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July 29, 2015

THE COURT: This is Simmons v. Microsoft. The cause number is 14-2-24686-2.

And let's start with Plaintiff's counsel, have you introduce yourself and your client for the record, please.

MS. COATES: Yes. Good morning, Your Honor. Lauren Coates with Advocates Law Group representing the plaintiff, Marnie Simmons.

THE COURT: Ms. Simmons, good morning.

MS. SIMMONS: Good morning.

MS. COATES: And my co-counsel, Vera Fomina.

THE COURT: All right. Go morning to you, Counsel. And let's hear from defense.

MR. DIAMOND: Good morning, Your Honor. I'm Ken Diamond representing Microsoft. This is my colleague, Vanessa Chambers.

THE COURT: All right. Good morning to both of you.

MR. DIAMOND: And Cindy Randall and Erin Flaucher from Microsoft.

THE COURT: From Microsoft. All right. Good morning to both of you as well.

All right. I have received Microsoft's moving papers. I've received Ms. Simmons' response and Microsoft's reply.

And I've also received Microsoft's -- let's see, withdrawal of Ms. Ho's declaration --

MR. DIAMOND: Correct.

THE COURT: -- that was the subject of the motion to continue, which I obviously ruled on.

Let's see if I have proposed orders from both sides; let me just double-check. I think I do.

All right. This is Microsoft's motion. I'll give each side 15 minutes. I tend to ask questions during these hearings, so if I am eating into your presentation and you need a little more time, I'm happy to give it to you. All right.

Who's going to be arguing on behalf of Microsoft this morning?

MR. DIAMOND: I am, Your Honor. Would you prefer sit, stand, come to the bench?

THE COURT: Wherever you are most comfortable making your presentation. I can hear you fine if you're sitting or standing. So if you're more comfortable with your materials at counsel table, by all means you can sit there.

MR. DIAMOND: All right. I'll stay put then, thank you.

Well, Your Honor, in our motion papers, we explained why summary judgment should be granted in this case. So this morning, what I'd like to do is just focus on a few of the key points and, of course, answer any questions you have.

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And I'd like to reserve a few minutes to be able to respond to whatever Ms. Simmons' counsel might say.

Ms. Simmons asserts two claims here, both under the Washington law against discrimination, one for race discrimination, the other for age discrimination.

So first I want to reiterate from our papers what the framework for analysis is here. And what Washington courts apply is the standard that the U.S. Supreme Court established in 1973 in the McDonnnel Douglas case. And that is a three-part shifting burden analysis. First, the plaintiff has to make a prima facie case, which as we've explained in our reply papers, is easy to do.

That puts the burden to Microsoft to present a legitimate non-discriminatory reason for the termination decision, which Microsoft did and which is also straightforward.

Then that brings the burden back to Ms. Simmons, as the plaintiff, to establish pretext. And that's really the heart of the matter here.

So at the summary judgment stage, that means that Ms. Simmons needs to show that there are material facts which create a reasonable inference that race or age was a substantial factor motivating Bret Arsenault's decision to terminate her employment. And in reviewing the pretext piece of the analysis, there is a second legal standard that applies in this case as well, as we've explained, and that's

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the same actor inference.

Mr. Arsenault made the decision to hire Ms. Simmons to work for him and then less than two years later, for the reasons explained, made the decision to terminate her employment. And in situations like this, courts hold that the plaintiff has to make an extraordinarily strong showing of discrimination to beat that inference. It creates a heightened burden for Ms. Simmons. Frankly, respectfully, we think even under any burden, she doesn't meet her standard, but there is a heightened burden here.

And it's not just the legal standard, but frankly, I also think it's just common sense if you step back from it. You know, Ms. Simmons was of Pacific Islander heritage and 41 years old when Mr. Arsenault made the decision to hire her. If he had animus towards her based on her race or based on her age, why would he have hired her in the first place? And that's the question the courts ask. For example, I think the Washington Supreme Court set forth that question in the Hill case.

But Mr. Arsenault did hire her, and the undisputed record shows that Ms. Simmons, you know, had certainly had many strengths, which is why he hired her, but she also had some interpersonal skills issues before he hired her. Concerns were raised about that issue during the interview process, and as the record shows, Mr. Arsenault gave her the benefit

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of the doubt and, of course, hired her. And it's undisputed he thought highly of her, he initially gave her a positive review, while at the same time noting that she needed to focus on improving those interpersonal skills; that remained a challenge.

And it's undisputed that he gave her repeated verbal and written notice of his concerns and repeated opportunities to improve and resolve that issue, you know, to meet his performance expectations, including, it's undisputed, that after he gave her a low performance rating in September 2012, he continued to spend time helping her understand this issue in the hopes she would succeed. And then finally, by February 2013, which is about six months later, he reached the decision that termination was appropriate.

Now, Ms. Simmons was an at-will employee, like virtually every employee in Washington; it's not unique to Microsoft or to Ms. Simmons. But that means that she could be terminated for a good reason, a bad reason, for no reason. The courts are not supposed to second-guess Mr. Arsenault's decision. Again, the Washington law against discrimination is the antidiscrimination statute. So the question here is at the pretext stage on summary judgment is: What material admissible evidence in this record has Ms. Simmons presented that could raise a reasonable inference that Mr. Arsenault made Ms. Simmons, being a Pacific Islander or 43 years old,

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a substantial motivating factor in his decision? That's where the Court's focus should be. And the answer is that there isn't anything in this record, which is why summary judgment is appropriate.

So race discrimination, where is the evidence of race discrimination here? The only thing that Ms. Simmons points to is a comment, which for purposes of summary judgment we accept as being true, that Mr. Arsenault used the term "real kahuna." That into 2011 when he was hiring someone he had worked with before who was, in fact, Hawaiian Pacific Islander to come on to the team -- in fact, as part of his leadership team -- that he told Ms. Simmons that this guy is the real kahuna.

First, if anything, the fact that he's hiring someone who is Hawaiian Pacific Islander, I think common sense would suggest -- would reveal that he doesn't hold animus toward people who are Hawaiian Pacific Islander.

Second, there's nothing about that comment that would suggest animus toward Ms. Simmons based on being Hawaiian Pacific Islander.

She indicates in her papers in her deposition that she thought that he meant that since she was only half Hawaiian Pacific Islander because her father was Caucasian, her mother was Hawaiian, that he was somehow making a jab at her, which she didn't ask him about it, they didn't discuss

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it; it's complete speculation on her part. And, again, the record is undisputed that he didn't even know that her father was not Hawaiian. So he could not have had that animus to begin with.

THE COURT: I have a minor question. I didn't see any of the parties address it in their pleadings and it may be because everybody assumes the meaning of the word. But what is the -- do either side know the direct translation of "kahuna"?

MR. DIAMOND: Well, Your Honor, it is, in fact, in our opening papers.

THE COURT: It was?

MR. DIAMOND: Yeah.

THE COURT: I overlooked it, then.

MR. DIAMOND: No, that's okay. It's on page -- Ms. Chambers will tell you what page.

MS. CHAMBERS: Page 18, Your Honor.

MR. DIAMOND: And we just took it from the Oxford-English dictionary.

THE COURT: I know --

MR. DIAMOND: -- and from Merriam Webster dictionary what it means. I mean, it's a complimentary term, is the point.

THE COURT: Got it. Okay.

MR. DIAMOND: There's nothing pejorative about it, which is consistent with the fact that he was hiring this guy who

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he was a friend with and had worked with to come in and be part of his leadership team. So that's it on race. I mean, there's just no basis to go past summary judgment on this.

And so the only remaining claim is age discrimination.

THE COURT: One other question.

MR. DIAMOND: Sure.

THE COURT: So the new hire's race is of no significance in terms of evidence of -- so the new administrative assistant's race in terms of factoring in potentially --

MR. DIAMOND: That's correct.

THE COURT: -- discriminatory reason for terminating Ms. Simmons has no bearing?

MR. DIAMOND: That's correct.

THE COURT: And because -- why don't you finish that thought.

MR. DIAMOND: Sure. And it's interesting -- I'm glad you raised it because, first, I hope there's a clear distinction here as to the meaning of that comment and what could be inferred from it reasonably, et cetera, in the context in which it arose, and that's one issue over here.

THE COURT: Oh, I'm sorry; not the --

MR. DIAMOND: No, I understand. And you're asking about the hiring of the --

THE COURT: The new OA?

MR. DIAMOND: I'm sorry.

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THE COURT: The new OA, the new administrative assistant.

MR. DIAMOND: Exactly.

THE COURT: You got that. All right.

MR. DIAMOND: I got it. My point is -- I was just separating out the "kahuna" comment.

But now turning to that, that was Sara Young. And it's interesting because Ms. Simmons' focus in her papers is on the fact that Ms. Young -- ironically, her name is Young -- was younger than Ms. Simmons, and therefore, that raises an age claim or an inference of age discrimination. But they don't even argue that somehow the fact that her race -- I don't know even know if it's in the record what her race is.

THE COURT: I didn't see it.

MR. DIAMOND: It's not. So on the one hand, even though she may be of different -- she's not Hawaiian Pacific Islander, that's not an issue on race, and yet they're trying to say it is an issue on age. And as we explained in our papers, and in particularly in the reply specifically to this point, it is not evidence of pretext, period. It goes to the prima facie case. It's an element of the prima facie case which is easy enough to make. But that's -- that's it.

And a couple things on that. One, the Washington Supreme Court -- I think we noted more of our footnotes -- actually addressed that very issue in the Grimwood case, which involved Washington law against discrimination.

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And in Grimwood the court made that point, that if you're doing satisfactory performance, satisfactory in terms to meet a prima facie case, it's a very low standard, and it has nothing to do then with the reasons that are given -- the reasons for the termination itself. And there's actually a good parallel between Grimwood and this case because in Grimwood, as the court explained, there was an undisputed record of -- written record contemporaneous of the decision-maker working with the employee who was ultimately terminated, on the issues, et cetera, which led to the termination, which is what we have here.

But to go back to your point. Again, it goes to the prima facie case, period. And that isn't just a legal point, but I think again as we tried to explain, it's a commonsensical point, too, if you step back from it. Because if it were otherwise, then no employer could ever terminate an employee who was at-will unless the employer then replaced that person with someone with the protected class, because otherwise you'd have a discrimination claim which, of course, is -- doesn't make sense and it's not the law. If I terminate a male employee and replace with a female employee, you know, it's -- a Catholic with a Jew, a -- on and on, it's just --

THE COURT: Let me ask another question in terms of timing.

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MR. DIAMOND: Yeah.
THE COURT: So the timing -- you'll have to remind me procedurally, and I think I have this right, but at the time of Ms. Simmons' termination, her boss hadn't decided who her replacement was?
MR. DIAMOND: Correct. He had not. That decision --
THE COURT: So -- okay.
MR. DIAMOND: Right. That decision had not been made. Ms. Young was put into the role on an interim basis to manage his calendar, and then there was an open hiring process, and then she was selected, which I would note is consistent with how the process worked ultimately when Ms. Simmons was hired. So nothing unique.
Does that answer your question?
THE COURT: It does. And you have about five minutes remaining.
MR. DIAMOND: Okay.
THE COURT: So let's go to evidence of pretext based on age. Why don't you address that argument.
MR. DIAMOND: Right. Well, again, I -- there is no evidence. There is no material admissible evidence in this record that goes to it. All they're really saying is, well, Ms. Young replaced Ms. Simmons and Ms. Young was younger than Ms. Simmons. That's really the essence of what they're saying, and that doesn't get them where they want to go.

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When you look at the cases that they cite and they rely upon, of course, there are cases where summary judgment is denied in employment cases, but the facts in those cases are totally different than the record that exists here. And we tried to explain that in our reply as well. I mean, in those cases, there were ageist comments being made. The plaintiff being called an old goat or something, told he was too old to do the job, or the president of the college saying that he's committed to hiring younger faculty; those kind of comments that doesn't exist here. In those cases, the same actor inference didn't apply. Because of the circumstances, it does apply here. In those cases -- in a few of them, there were totally different explanations that were given for termination, apples and oranges explanations, which raise some questions in the context of the other facts presented.
That's not the case here at all either, particularly for the reasons set forth in Grimwood with the contemporaneous explanation and process of identifying the concerns and trying to help the plaintiff improve prior to the termination decision being made.
And then also in those cases, the plaintiff was in his or her, like, early 60, late 50s, which frankly, I don't think is that old anymore, but -- and the decision-maker was younger. I mean here, we don't have that either.

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Mr. Simmons <sic> was 50, Ms. Simmons was 43. So --
THE COURT: Well, actually she was 41, wasn't she?
MR. DIAMOND: 41 when hired.
THE COURT: When hired.
MR. DIAMOND: And he was 48. And then 43 and 50.
So those cases just are -- do not apply, they're completely a different set of facts, they don't support a denial of summary judgment. In fact, if anything, they support our motion and help explain why summary judgment is fully appropriate here.
THE COURT: Let me go back to the evidence of racial pretext. And you have, I believe, addressed this in your responsive materials, but just take a moment to evaluate or address Ms. Simmons' subjective belief that the big kahuna or the real kahuna comment was racially motivated. So what do I do with that?
MR. DIAMOND: Her subjective belief is legally irrelevant is what you do with it. It's not material. She can have subjective beliefs about many things, but objectively, I mean, it is not -- well, A, objectively, it's not reasonable, it's not material. And, B, the undisputed record undermines whatever her subjective belief was because the record shows that Mr. Arsenault could not, by any of the stretch of the imagination, have used that term to use animus toward her when he didn't even know that her father

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was Caucasian, and et cetera. So that's what you do with it.
THE COURT: All right. Thank you, Counsel.
MR. DIAMOND: Thank you.
THE COURT: Why don't we turn to Plaintiffs for a response.
MS. COATES: Thank you, Your Honor. I will focus as opposing counsel has already drawn the focus to the pretext issue. Ms. Simmons was --
THE COURT: So by doing that, do you agree that that is where really I need to devote my analysis in terms of their motion is --
MS. COATES: Yes.
THE COURT: -- evidence of pretext?
MS. COATES: Yes, Your Honor.
THE COURT: All right.
MS. COATES: I'm happy to discuss the prima facie case, but in --
THE COURT: I mean, I think he's conceding that you've made the prima facie case, which -- I think that issue has sailed in a matter of speaking.
MS. COATES: I agree, Your Honor.
Opposing counsel is overlooking the summary judgment burden for a plaintiff in an employment discrimination case. And at the summary judgment phase, a plaintiff satisfies the

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pretext requirement by showing that discrimination was a substantial factor motivating the employer's decision to terminate. And the plaintiff can meet this burden by producing evidence that the protected characteristic, age or race, was the motivating factor but not the sole factor.

THE COURT: All right. Let's break them down then. What direct evidence or circumstantial evidence or inference from what's been presented do I draw that the decision to terminate your client was based on race or there was a basis connected to race for that decision?

MS. COATES: If I may, Your Honor, first elaborate slightly on the standard.

THE COURT: You may.

MS. COATES: The evidence that discrimination is a substantial factor can be proven by a variety of subfactors, and I think that is an important distinction in this case. The case law that has recently applied -- the recent Scrivener decision by the Washington Supreme Court focuses on numerous factors. And these factors, which some have already been discussed, include proximity in time between the termination of the employee and their replacement by either a younger person or a person of a different race, specific comments about age or race, the employer offering inconsistent or ambiguous reasons for termination, the employee's ability to offer reasonable explanations for

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their actions, and conflicting testimony as to whether the employee was performing satisfactorily.

This is important in this case because if Washington courts had intended to focus on the -- to make the requirement that there's one factor that must be found in order to find -- for a finding of employment discrimination, the courts would have stated that one factor was all that was needed.

THE COURT: Okay. Let's assume for a minute that proximity in time, there may be inconsistent reasons for the termination, there may be conflicting testimony regarding your client's performance; where is the race component? I mean, you've established she's Pacific Islander in your prima facie case. Okay. So what other evidence is there with respect to race? That the decision was motivated by race?

MS. COATES: Well, evidence that the plaintiff was replaced by someone of a different race.

THE COURT: Where is that -- where is that in any evidence submitted with respect to the moving papers or the responsive materials?

MS. COATES: It was my understanding that that was in the record, but perhaps that's not. The comment, the specific comment about real --

THE COURT: The "real kahuna" comment?

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MS. COATES: And in Ms. Simmons' declaration -- it's page 5 of her declaration, paragraph 23, she states that this comment was offensive to her because it implied that she was not a real Hawaiian Pacific Islander.

THE COURT: Well, but isn't that her subjective interpretation of the comment?

MS. COATES: It is, Your Honor. But I -- the record doesn't reflect that either party seems to have an understanding of -- a mutual understanding of the term.

THE COURT: Well --

MS. COATES: And in the context of which it was used, which is in Mr. Arsenault's deposition, it was used in context to hiring another employee, implying that -- I brought in the real kahuna, he's the real kahuna, implying that, you know, he may be better than Ms. Simmons.

THE COURT: Okay. So she says she thinks it means she's not a real Hawaiian. But she doesn't really in her deposition say what the word means. She says what she thinks it means. Is there a difference there?

MS. COATES: Are you asking, Your Honor, whether her interpretation of the word is different from the legal -- the dictionary definition of the word?

THE COURT: Well, I mean, I think that matters, doesn't it? What -- I mean, if she -- if she thinks the word "kahuna" means -- and I'm going to use a very simplistic

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example here. Say if she thinks the word -- and I know she doesn't mean this -- right, I'm just using it for the purposes of the argument. If she thinks the word "kahuna" means big sky or blue sky or something like that, and it doesn't, and she has this subjective interpretation that's completely out of context, why would I gave any weight to that interpretation?

MS. COATES: Your Honor, I believe that analysis applied to any comments about age or race then would refute any plaintiff's employment discrimination claim because certain -- because if an employee heard something about their race or age and they subjectively took it one way, the case law doesn't address that if one hears a comment --

THE COURT: Well, I think Microsoft provided some examples, at least in terms of the age context, where comments regarding age are pretty clear on their face. When you refer to someone as an "old goat," you're not going to miss the meaning behind that. Whereas, as I think as Ms. Simmons has acknowledged, big kahuna -- or not big kahuna -- real kahuna can have -- a kahuna can have different context and different meaning.

Okay. Why don't you continue with your presentation.

MS. COATES: Thank you, Your Honor. As I was saying that the substantial factor test is proven by a variety of subfactors. And I would reiterate that in none of the cases

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that apply this test does the court focus on any one factor, and specifically, courts focus on finding a reasonable but competing inferences of discriminatory intent. And with the purpose of Washington's law against discrimination, an employer can have a legitimate and illegitimate reason for the termination and they can still be liable under Washington's law against discrimination. And in this case Ms. Simmons has produced sufficient evidence to show that her age and race was a substantial motivating factor behind Microsoft's decision to terminate her.

THE COURT: All right. Let's focus now on age. What is the evidence that you are relying on specifically related to her age that shows Microsoft's decision was discriminatory?

MS. COATES: Aside from the other factors, Your Honor?

THE COURT: Yeah, let's set aside the proximity in time, the inconsistent reasons for term -- set those aside for just a minute. Let's assume that you made that showing. Where is the evidence or the inference I draw that age was that motivating factor?

MS. COATES: Specifically that Ms. Simmons was replaced by a younger person. The -- Ms. Young was --

THE COURT: So in any instance where someone of a certain age is let go if they're not replaced by someone of the same age or older, you're looking at a scenario where it's discriminatory?

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MS. COATES: Your Honor, I believe the case law supports that the -- that that is one factor that the court can consider, and that that is not the only factor.

THE COURT: And was the serendipitously-named Ms. Young actually -- I mean, at the time that Ms. Simmons let go, was Ms. Young the new hire? She wasn't, was she?

MS. COATES: She was -- she had been hired into --

THE COURT: The group.

MS. COATES: -- the group.

THE COURT: Working for another direct report of Ms. Simmons' boss?

MS. COATES: Yes.

THE COURT: But not hired by her boss to replace her at the time?

MS. COATES: No. She had interviewed -- she interviewed for that position after Mamie -- after Ms. Simmons was terminated. She did step in immediately as an interim assistant for Mr. Arsenault and then was formally hired through Microsoft's hiring process into that position.

THE COURT: Okay.

MS. COATES: But she was part of the group that works intimately with Mr. Arsenault and it's part of the same team.

THE COURT: Okay. All right. Go ahead.

MS. COATES: I would like to address the same actor

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inference that opposing counsel urges applies in this case.

The Scrivener holding -- the recent Scrivener holding by the Washington Supreme Court rejected a heightened burden for plaintiffs in employment discrimination cases at summary judgment. And the -- Microsoft cites several cases in support of its argument that the same actor inference does apply at summary judgment. However, the Hargrave case directly did not -- did not apply the same actor inference. And Hargrave cites Coughlin v. American Seafood, which is a 9th Circuit case that was decided well before Scrivener. And the applying the same actor inference to a case at summary judgment would, in essence, contravene the holding in Scrivener because it would assign a heightened burden to a plaintiff at summary judgment. And holding specifically that a plaintiff does not have to prove all of the merits of their case at summary judgment, as Your Honor is well aware of the standard of summary judgment in all cases that the plaintiff needs to show genuine issue of material fact exists.

And the same actor inference simply based on very recent case law does not refute Ms. Simmons' claims at this stage. She has produced sufficient evidence to show that there is a genuine issue of material fact as to whether the employees -- the employer's decision to terminate her was based on discriminatory purposes. The record reflects

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numerous employee -- employer reviews, even Mr. Arsenault's reviews. There is a stark contrast between the 2012 check-in review that Mr. Arsenault completed and Ms. Simmons' end-of-the-year performance review.

THE COURT: All right. I didn't hear you say this, and I didn't really see it addressed in your responsive materials, but you're not suggesting that there were real problems with Ms. Simmons and Mr. Sexsmith's working relationship?

MS. COATES: Ms. Simmons has acknowledged that they had a strained relationship, that there was -- their job duties often overlapped and there was some confusion between them as to who is doing what and they were both reporting to the same supervisor.

THE COURT: Is she disputing that that affected her performance as Mr. Arsenault's lead assistant?

MS. COATES: Yes.

THE COURT: She's disputing that affected her performance?

MS. COATES: Her -- it -- the record shows that Ms. Simmons, again, acknowledged that there was a strained relationship and that that was -- but that was between Mr. Sexsmith and Ms. Simmons and the --

THE COURT: Okay.

MS. COATES: The record reflects that the performance reviews really speak for themselves. What Mr. Arsenault is providing in comments to Ms. Simmons just a few months

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before he writes a -- gives her a very low review shows that, you know, she had been performing her job duties satisfactorily. She had years of positive reviews. She had a peer review conducted where 17 of her colleagues gave her overwhelmingly positive reviews and those scores are -- scores, for lack of a better word -- are shocking in comparison to what Mr. Arsenault assigned. And the -- you know, the difference between the 2012 check-in and the end-of-the-year performance review is important here because had, you know, Ms. Simmons been provided -- that's the mechanism for feedback at Microsoft, and had Ms. Simmons been provided comments in that 2012 review that reflected the end-of-the-year review, this would be a different story. But the reviews, especially the peer review, the fact that she got awards just days before she was terminated at a minimum raises an issue of material fact in this case that Ms. Simmons has produced sufficient evidence to show that there was a -- that discrimination was a substantial factor behind her termination.

THE COURT: All right. Anything else you want to add?

MS. COATES: That's all for plaintiffs, Your Honor.

THE COURT: All right. Response.

MR. DIAMOND: Yeah, very quickly, thank you. Again, respectfully, I didn't hear Ms. Simmons' counsel really set forth anything that changes the analysis here

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that would suggest that summary judgment isn't appropriate. Let me quickly run through a few things. First, on the kahuna point, I think it -- Your Honor, I think it's slightly more nuanced, I think, than how it was -- you were presented it. Because I don't think the -- there isn't a suggestion that Ms. Simmons thought that the use of the word "kahuna" was pejorative toward people who are Pacific Islander, which it's not. I think the suggestion being made is that while using this positive comment about this fellow who was --

THE COURT: It was dismissive of her?

MR. DIAMOND: It was a slap at her for only being half Hawaiian Pacific Islander. That's what she's trying to allege. And it doesn't make -- respectfully, it doesn't make sense. It doesn't raise any inference whatsoever of race discrimination, and if anything, if he had that animus, I don't think he'd be hiring someone for his leadership team who was Hawaiian Pacific Islander. That's point number one. And let me add to that. Her subjective belief, again, is legally irrelevant because what matters isn't her subjective belief, it's Mr. Arsenault's state of mind. I mean, discrimination is intentional. He has to have animus in his mind. And what her subjective belief about whether he does or he doesn't is legally irrelevant. There has to be something objectively demonstrating that that animus exists.

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Number one.

Second, on the same actor inference, again, I think it's a somewhat academic discussion because I don't think Microsoft needs to rely on it here because even under the regular burden, summary judgment is appropriate.

But just to be clear, in the Hargrove case -- you know, we're obviously limited, we can only provide you with published decisions. So with that limitation, there's Hargrove, it is after the Scrivener case, and it does stand for the proposition that the same actor inference still applies. It was then not applied in that case because the facts didn't support applying it because there were different decision-maker, which unlike here we have the same decision-makers. So it does still apply.

Third, the peer reviews, as we explained in our papers, I mean, number one, besides the fact that those were people who Ms. Simmons asked -- selected to provide the feedback, anonymously, coworkers' opinions about someone's performance are legally irrelevant. You know, you might want to terminate someone who works for you who other people think is just swell, but that's neither here nor there.

And also, frankly, as we mentioned, we'd ask that it be struck because it's hearsay; it's coming in for the truth of the matter asserted here from anonymous people. I mean, again, it's an academic issue, I think, but it's in the mix

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as well.

Yeah, you mentioned there was a -- there's acknowledgement that there was friction with Ken Sexsmith who came in as the business manager, who was eight levels higher in the organization. He was a level 64, Ms. Simmons was a level 56. He was a much higher player in the group in terms of responsibilities. And this friction exists and it's something that it's undisputed that Mr. Arsenault was trying to address along the way, both in writing and in meetings.

And the fact that Mr. Arsenault had positive comments about Ms. Simmons, again, to me simply reflects the lack of animus that exists here which is non-existent in the record. But, again, just to be clear, even when he gave that first review, which was about four months after she had gotten there and the bloom was still on the rose, if you will in terms of her employment, even then the record shows and it's in our papers that he flagged the concern, the thing he focused on with her that she needed to focus on, she needed to work on. So those are my points.

THE COURT: All right. Thank you all for your presentation and the materials that you've submitted. What I typically do in instances like these -- I've taken notes in your oral argument, I'll go back and review your papers one additional time before issuing my decision.

So I hope to get you my decision by the end of the week.

If that for whatever reason doesn't happen and -- sometimes my schedule goes beyond my control -- I'm going to be out for the first two weeks of August, so you would not get a decision until the week of August 17th. But as I say, my hope is to get you something before the end of this week.

MR. DIAMOND: Thank you, Your Honor.

THE COURT: All right. Thank you. And I do have your proposed orders, so I'm set on those.

MS. COATES: Thank you, Your Honor.

(Conclusion of hearing.)

CERTIFICATE

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, the undersigned, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 29th day of September, 2015.

_____
Bonnie Reed, CETD

CERTIFICATE OF SERVICE

I, HEATHER MALONEY, certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Advocates Law Group, PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served Brief of Appellant, Marnie L. Simmons.

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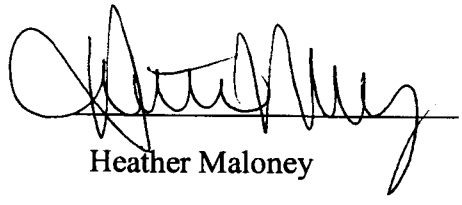

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