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NO. 89377-2

SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN SCRIVENER,

Petitioner,

v.

CLARK COLLEGE,

Respondent.

PETITIONER'S ANSWER TO WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION'S AMICUS CURIAE MEMORANDUM

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ORIGINAL

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Petitioner Kathryn Scrivener, appellant in the Court of Appeals and the plaintiff in the Clark County Superior Court proceeding, respectfully submits the following Answer in response to and support of the Washington Employment Lawyers' Associations Amicus Curiae Memorandum.

A. Conflicting Court of Appeals' Opinions on an issue of substantial public interest warrant accepting review here

As the Amicus Curiae Memorandum of the Washington Lawyers' Association ("WELA") details, there is a clear conflict between the divisions here: this decision of the Court of Appeals, Division II, and Division I's opinion in *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 272 P.3d 865, *review denied*, 174 Wn.2d 1016, 218 P.3d 687 (2012).

Here, Division II expressly rejected *Rice*, holding: "In our view, *Rice* confused the burden of persuasion with the burden of production, and we decline to follow its analysis here." No. 43051-7-II, p. 8 (Slip Opinion). The Court went on to hold that in employment discrimination actions bought under the Washington Law Against Discrimination ("WLAD") the "substantial factor" test does not apply to the consideration of whether a plaintiff produced evidence of pretext to rebut the non-discriminatory justification the defendant alleges under the *McDonnell*

Douglas burden shifting framework. *Id.* 8-9. The conflict between *Rice* and the Division II decision here is whether: (Division II) a plaintiff must negate the employer's given reason, the pretext, entirely through evidence demonstrating that the pretextual reason was not a motivating factor in the challenged employment decision, *see* 43051-7-II, p. 8 (Slip Opinion); or (*Rice*) a plaintiff can survive summary judgment by providing evidence from which a reasonable jury could determine that, regardless of whether the pretextual reason was a motivating factor, an illicit reason was a substantial factor, *see* 167 Wn. App. at 89. This is a central holding in *Rice*, not, as Respondent argues, *dicta*. Indeed, even Division II did not characterize this principle from *Rice* as *dicta*. *See* No. 43051-7-II, p. 8 (Slip Opinion).

Under the interpretation of the WLAD by Division II and Respondent, a plaintiff must disprove the pretextual reason entirely at the summary judgment stage - a burden higher than a plaintiff would face at trial under his or her burden of persuasion. As the WELA Amicus Memorandum points out, this would upend the burden of proof placed on a plaintiff under the WLAD, making it more difficult to survive summary judgment than to prevail at trial. Such an outcome would undermine the protections afforded to employees under the WLAD by permitting an

employer to avoid trial simply by putting forth any legitimate reason that may have factored into its employment decision, regardless of whether an illicit reason was also a substantial factor. This is contrary to the law.

Indeed, under the current pattern jury instruction, the illicit factor need only be a significant motivating factor and need not be the only or even primary factor motivating the challenged act or decision. *See* WPI 330.01.01. Yet Division II's contradictory interpretation would dismiss cases pre-trial that could satisfy the trial burden under the pattern jury instruction.

The Amicus Memorandum correctly contradicts Respondent's assertion that there is no conflict between Divisions I and II here. Respondent's argument deals with *how* an alleged justification is shown to be pretextual, e.g. the reason given was not based in fact, not actually a motivating factor in the decision, or disproportionate to the actual outcome. *See* Resp. at 10-11. Both *Rice* and the decision here agree on that ancillary point. The issue here is what the plaintiff's burden of production is: i.e. *Rice's* substantial factor or Division II's only factor analysis. As *Rice* holds, a plaintiff can meet its burden at the "pretext" stage, even if the employer's asserted justification is not shown to be

pretext pursuant to the tests above, by showing that an illegitimate reason was also a substantial factor in the challenged decision.

Division II itself noted the applicability of the substantial factor standard at summary judgment in another recent decision in which it determined that the plaintiff had offered "direct" rather than "circumstantial" evidence of an illicit motive for an employment decision and therefore did not apply the burden shifting framework. *See Alonso v. Qwest Communications*, No. 43703-1-II (December 31, 2013). The distinction between direct and circumstantial evidence is artificial, as the law holds that they are equally valid. *See* WPI Civil 1.03; *State v. Tucker*, 32 Wn.App. 83, 645 P.2d 711 (1982).

Since Division II's opinion in the current case directly contradicts Division I's holding in *Rice, as Division II itself expressly stated in its decision here*, this Court should accept review to resolve this conflict under RAP 13.4(b)(2). WELA as an organization representing employment lawyers with a vital interest in clear standards and protections for employees should be permitted to participate as Amicus.

B. WELA correctly explains that the college president's ageist remarks cannot be ignored as a matter of law.

College President R. Wayne Branch made formal remarks that Clark College needed to hire younger employees. As noted in the Petition for Review and pointed out by the WELA Amicus Memorandum, these remarks cannot be ignored as a matter of law for the purposes of summary judgment simply by labeling them "stray," as the Court of Appeals's opinion did.

Respondent's Answer to the Amicus Memorandum inaccurately states that the Amicus's challenge to the "stray remarks doctrine" is the first time that the issue has been raised in the context of this briefing. While Petitioner's challenge has not been framed in the same terms used by the Amicus, Petitioner has consistently opposed the "stray remark" analysis as an inappropriate weighing of the evidence, noting that in fact President Branch's remarks can be seen as direct evidence of discrimination. The Court of Appeals failed to appreciate the fact that the President was the final decision-maker in the challenged employment decision and made the published remarks as a general statement of hiring goals during the hiring process for this very position. Taken in the required light most favorable to the non-moving party at summary

judgment, this gives rise to the reasonable inference that age was to be considered in all hiring decisions from the time of the speech. CP 95-96. Brief of Appellant, pp. 17-19. Argument to the contrary is unsupported by the record.

Dismissal of President Branch's statement of policy as "stray remarks" also fails in light of Respondent taking contradictory positions that (a) it did not consider age in its hiring decision, and (b) it had, and should have had, a policy that favored age diversity.

Previously, Respondent Clark College denied that age played *any* role in its hiring decisions. Respondent's Motion and Memorandum in Support of Summary Judgment, p. 12; Respondent's Answering Brief, p. 24. Thus, Respondent asserted that its touted desire to increase diversity in age – i.e. increasing the number of young employees, or "Funk Factor" – was not a consideration in hiring two applicants under 40 years of age instead of Petitioner, who was over 40. The Court of Appeals held that age had *no* part in Clark College's decision. *See* No. 43051-7-II, p. 9 (Slip Opinion).

In its Response to the Petition for Review, Respondent states that employers like Clark College can, and indeed should, direct recruiting efforts to foster diversity. *See id.* at 15. But if Clark College had an *age*

diversity policy, as established by College President R. Wayne Branch and his remarks at the "State of College" address about seeking younger employees, then age was a factor in Clark College's recruitment and hiring decisions.

Thus, Clark College's asserts it both considered, through its "younger hires" policy, and did not consider age in recruiting and hiring for the English professor positions in question. Shifting justifications and rationales in the face of legal confrontation is indicative of illicit motivation. "Multiple, incompatible reasons may support an inference that none of the reasons given is the real reason." *Renz v. Spokane Eye Clinic, PS*, 114 Wn.App. 611, 623, 60 P.3d 106 (2002) (citing *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn.App. 852, 860, 851 P.2d 716 (1993)).

This issue supports review on two grounds: Under RAP 13.4(b)(4), it is a matter of substantial public interest because, under Division II's decision, employers in age discrimination in employment cases can prevail at summary judgment by asserting any legitimate reason, regardless of the presence of an "age diversity" policy to focus on hiring younger workers. An employer can combat any age discrimination claim by simply asserting that its policy statements were "stray comments," simply manufacturing self-serving assertions that it did not consider age in the disputed hiring, in

the face of a policy stating it will consider diversity in age generally. As long as the employer has an employee testify to any reasonable-sounding alternative or additional basis for the decision to hire the younger candidate, a plaintiff will be unable to "disprove" the pretext even where age was a motivating factor, thus failing at summary judgment under Division II's "only factor" interpretation. This would hamstring the age discrimination protection afforded under Washington law, allowing employers to side-step the law.

Also, Division II's "only factor" interpretation contradicts *Rice*, which permits a plaintiff to avoid summary judgment if the plaintiff can produce evidence that an illicit motive was a substantial factor, regardless of whether there were other factors involved. 167 Wn. App. at 89. This conflict between Divisions I and II warrants review. *See* RAP 13.4(b)(2).

C. Conclusion

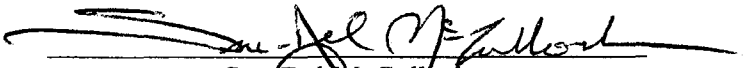
The issues raised for review involve a serious conflict between the Divisions and invoke matters of substantial public interest regarding the protections to be afforded to employees under the WLAD. Both of these grounds warrant review.

WELA, as a professional organization dedicated to protecting employees' rights and composed of primarily plaintiff employment

lawyers, has a substantial interest in these issues and should be permitted to appear as Amicus.

DATED January 6, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 6, 2014, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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

DATED this 10th day of January, 2014.

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Attachments: Petitioner's Answer to WELA Amicus Curiae Memorandum.pdf

Dear Clerk:

Attached please find Petitioner's Answer to Washington Employment Lawyers Association's Amicus Curiae Memorandum in the above matter for filing.

Thank you,

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