NO. 43051-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

KATHRYN SCRIVENER,

Appellant,

v.

CLARK COLLEGE,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY

HONORABLE BARBARA A. JOHNSON

BRIEF OF APPELLANT

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pm 6/4/12

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I.

INTRODUCTION

Appellant Kathryn Scrivener ("Scrivener"), a non-tenured English Instructor employed by Respondent Clark College ("College"), brought an age discrimination in employment action against the College for refusing to hire her for a tenure track teaching position due at least in substantial part to her age, in violation of the Washington Law Against Discrimination, RCW 49.60.180. *See CP* [1] *69-72 (Complaint).*

The College moved for summary judgment against Scrivener's age discrimination claim, and the trial court granted the motion. However, the evidence, viewed in the required light most favorable to Scrivener as the nonmoving party, raises a genuine issue of material fact as to whether age was a substantial factor in the College's refusal to hire Scrivener for a tenure track position. The College failed to meet its burden under CR 56 of establishing (1) that there was no genuine issue of material fact and (2) that it was entitled to judgment as a matter of law. Accordingly, the trail court erred in granting the College's motion for summary judgment and

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[1]Clerk's Papers (hereafter "CP").

this Court should overturn the trial court's Order granting summary judgment.

II.

ASSIGNMENT OF ERROR AND ISSUES PRESENTED

Assignment of Error: The trial court erred by entering the Order Granting Clark College's Motion for Summary Judgment.

Issues Presented: Did Respondent prove that there is no genuine issue of material fact as to whether Scrivener's age was a substantial factor in the College's refusal to hire her for a tenure track position and that it is entitled to summary judgment as a matter of law.

III.

STATEMENT OF CASE

A.

Procedural Posture

On July 13, 2009, Appellant Kathryn Scrivener filed a Complaint for Unlawful Practices of Employers R.C.W. 49.60 - Age Discrimination against her employer, Respondent Clark College. *CP 69-72 (Complaint).* Clark College moved for summary judgment dismissing, with prejudice, plaintiff's claim. *CP 73-85 (Defendant's Motion for Summary Judgment).* On January 5, 2012, the trial court granted the College's motion. *CP 117-*

118 (Order Granting Defendant's Motion for Summary Judgment). Scrivener appeals that order.

B.

Statement of Facts

1. Clark College hired younger applicants over Scrivener for tenure track positions despite Scrivener's superior experience

Scrivener has been employed by Clark College since 1994. She was hired as a part time English teacher and went to full time in 1999. *CP 106 (Scrivener Deposition 13:19-22, Exhibit 1 to Declaration of Sue-Del McCulloch in Support of Opposition).* She has been awarded year long contracts as a full time temporary English instructor every academic year since 1999. There is no guarantee of future contracts. *CP 101 (Declaration of Scrivener in Support of Opposition, ¶1).* Scrivener is 59 years old. *CP 101 (Dec. of Scrivener, ¶3).*

In fall of 2005, Scrivener applied for two open tenure track teaching positions within the College's English Department. The College concedes that Scrivener was one of the top applicants for the positions and was one of four names forwarded from the hiring committee for a final interview with then-President R. Wayne Branch and then-interim Vice President of Instruction Sylvia Thornburg. *CP 32 (Declaration of Sue*

Williams in Support of Motion, ¶10). Scrivener was a much more experienced instructor than either of the younger applicants hired. *CP 46-57 (Exhibit 5 to Dec. of Williams).* Scrivener possessed all of the qualifications listed as "desirable" on the recruitment announcement for the position. *CP 37 (Ex.1, p. 2 to Dec. of Williams) and CP 101 (Dec. of Scrivener, ¶2).* The position announcement for the tenure track positions for which Scrivener applied indicated that "computer assisted and/or distance education composition instruction" experience was a desirable qualification. *CP 37 (Ex 1, p. 2 to Dec. of Williams).* The Strengths and Weaknesses memorandum provided by the hiring committee to President Branch and interim Vice President of Instruction Thornburg with the names of applicants for final interviews indicated that Scrivener had that desirable distance education experience, which neither of the younger applicants who were hired instead of Scrivener had. *CP 8-10 (Ex. 1 to Dec. of Branch*).

At the time of Scrivener's interview, the College President made final faculty hiring decisions. *CP 2 (Declaration of R. Wayne Branch in Support of Motion, ¶5).* Scrivener interviewed with President Branch and Vice President Thornburg on May 11, 2006. That same day, shortly after Scrivener's interview, the College informed Scrivener that it had selected

two much younger applicants for the positions and that both had accepted. *CP 101 (Dec. of Scrivener, ¶3).*

2. Clark College's President formally asserted that the College needed to hire "younger talent"

In his "state of the college" address in January 2006, in the midst of the hiring process for the two tenure track openings in College's English Department, the College's then-President Branch, the final decision maker on hiring, asserted that the College had a "glaring need" for "younger talent" under forty on the faculty. *Appendix A-1, CP 24 (Ex.3, p 10 to Dec of Branch).* In a public forum discussing hiring prior to posting the position openings for which Scrivener applied, President Branch stated that he opposed having any minimum experience requirement for applicants. *CP 109-110 (Scrivener Depo 71:21-72:9, Ex. 1 to Dec. of McCulloch).*

3. College hired predominantly faculty under 40 for tenure track positions in 2005-06

There were 17 faculty positions filled in 2005-06; four temporary positions and 13 tenure-track. While three of the hires for the four temporary positions were 40 years old or over, only four of the 13 hires for

tenure track positions (approximately 30%) were 40 or over. *CP 43-44 (Ex.4 to Dec. of Williams)*

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 Island,* 162 Wash.2d 683, 693, 169 P.3d 14 (2007)." *Fitzpatrick v Okanogan County*, 169 Wn.2d 598,605, 238 P.3d 1129 (2010). 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 Wash.2d 59, 70, 170 P.3d 10 (2007) (citing *Vallandigham v Clover Park Sch. Dist. No 400,* 154 Wash.2d 16, 26, 109 P.3d 805 (2005). The appellate court considers all "facts and reasonable inferences in the light most favorable to

the nonmoving party." *McNabb v Dep't of Corrs.,* 163 Wash.2d 393, 397, 180 P.3d 1257 (2008). 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,* 154 Wash.2d at 26, 109 P.3d 805.

1. Summary judgment not appropriate where material facts within particular knowledge of moving party

"We are reluctant to grant summary judgment when 'material facts are particularly within the knowledge of the moving party.' *Riley v. Andres,* 107 Wash.App. 391, 395, 27 P.3d 618 (2001). In such cases, the matter should proceed to trial 'in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.' *Mich. Nat'l Bank v. Olson,* 44 Wash.App. 898, 905, 723 P.2d 438 (1986)." *Arnold v Saberhagen Holdings, Inc* , 157 Wn.App. 649, 661-62, 240 P.3d 162 (2010).

2. Summary judgment against employee often inappropriate under Washington employment discrimination law

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. . . . [S]ummary judgment in favor of employers is often inappropriate in employment discrimination cases. *deLisle,* 57 Wash. App. at 83-84 [citations omitted]." *Sellsted v. Washington Mutual*, 69 Wn. App. 852, 860, 851 P.2d 716 (Div. I 1993), *rev. den'd*, 112 Wn.2d 1018, 857 P.2d 716 (1993)(Note that 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. Mackay v. Acorn Custom Cabinetry*, 127 Wash.2d 302, 306-07.)

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 Corp V Green,* 411 U.S. 792, 93 S. Ct. 1817 (1973); *Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000). *Hill v BCTI-Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440, 446 (2001), *abrogated on other grounds, McClarty v. Totem Elec.* 157 Wn.2d 214, 137 P.3d 844 (2006). Under this formula, the

plaintiff bears the initial burden of establishing a prima facie case of unlawful discrimination. To "rebut this inference, the defendant must present evidence that the plaintiff was rejected for the position . . . for a legitimate nondiscriminatory reason. At this point, the plaintiff retains the final burden of persuading the trier of fact that discrimination was a substantial factor in the disparate treatment. *See Patterson,* 491 U.S. at 187, 109 S.Ct. at 2378; *Mackay*, 127 Wash.2d at 310, 898 P.2d 284." *Marquis v. City of Spokane*, 130 Wash.2d 97, 114, 922 P.2d 43 (1996). In this case, for the limited purpose of this summary judgment argument, Clark College acknowledged that Scrivener had established her prima facie case of discrimination and Scrivener acknowledged that Clark College had articulated a legitimate nondiscriminatory reason for its challenged action, leaving only the third prong: whether there is any question of fact that age was a substantial factor in the College's decision not to hire Scrivener for a tenure track position. The record clearly shows that there is such a question of fact.

2. The Washington Law Against Discrimination is to be liberally construed.

In adopting the Washington Law Against Discrimination (WLAD), found in RCW chapter 49.60, the Washington Legislature issued a strong

policy statement against discrimination "for the protection of the public welfare, health, and peace of the people of this state," finding that "such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. The Legislature directed that "the provisions of this chapter are to be liberally construed for the accomplishment of the purposes thereof." RCW 49.60.20. Accordingly, the Washington Supreme Court has held that given the remedial purpose of the WLAD, "the statutory protections against discrimination are to be liberally construed and its exceptions narrowly confined." *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989)(*internal cite omitted*).

a. Employee's ultimate burden under the WLAD is less onerous than under the federal ADEA

The mandate of the WALD is to eradicate discrimination in the workplace, and the burden of proof under the statute is calculated to further that goal. "Plaintiff's ultimate burden under the WLAD is less onerous than under the ADEA[2]. A successful ADEA plaintiff must

[2]The federal Age Discrimination in Employment Act of 1967, 29 USC §621 *et seq*

establish that age is the but-for cause of an adverse action, but, under the WLAD, a plaintiff only needs to prove that age was a substantial factor in the employer's decision." *Turcotte v ABM Janitorial Services*, Slip Copy, 2011 WL 1154486, W.D.Wash. (2011). "Washington courts have adopted the substantial factor test in cases involving discrimination or unfair employment practices. . . . The substantial factor test is appropriate in these cases, where causation is difficult to prove, largely due to public policy considerations that strongly favor eradication of discrimination and unfair employment practices. *See, e.g , Mackay,* 127 Wash.2d at 309–10, 898 P.2d 284; *Wilmot,* 118 Wash.2d at 70, 821 P.2d 18; *Allison,* 118 Wash.2d at 94, 821 P.2d 34 (substantial factor test is based more on policy considerations than on the factual inquiry of the "but for" test.)" *Sharbono v. Universal Underwriters Ins. Co.* 139 Wash.App. 383, 419, 161 P.3d 406, 420 (Wash.App. Div. 2, 2007).

In its motion for summary judgment, the College repeatedly cited federal court authority, including rulings from outside the Ninth Circuit, discussing the construction of federal discrimination law as though such caselaw controls in interpreting Washington law. Federal court cases construing federal discrimination statutes are not controlling authority for construing the WLAD, particularly given Washington's strong policy

statement of eliminating discrimination and the substantial factor test employed by Washington's Supreme Court. *See Brown v. Scott Paper Worldwide Co* , 143 Wn.2d 349, 358-59, 20 P.3d 921 (2001)(interpretation of federal antidiscrimination statutes is not persuasive where the provisions in those statutes differ from those in chapter 49.60 RCW). Washington courts may follow federal authority, but only "those theories and rationales which best further the purposes and mandates of our state statute." *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988).

3. There is a question of fact as to whether Scrivener's age was a substantial factor in Clark College's failure to select her for one of the two tenure track positions

Scrivener has more than met her burden under the WLAD of raising a genuine issue of material fact that her age was a substantial factor in the College's refusal to hire her to a tenured position. "It has been noted that summary judgment should rarely be granted in employment discrimination cases. *deLisle v FMC Corp* , 57 Wash.App. 79, 84, 786 P.2d 839 (reversing summary judgment in age discrimination case due to issues of fact), *review denied,* 114 Wash.2d 1026, 793 P.2d 974 (1990)." *Johnson v D S.H S.*, 80 Wash.App. 212, 226, 907 P.2d 1223, 1231 (Div.

II, 1996). Ultimately, the question of discriminatory intent, of whether age was a substantial factor in a hiring decision, is "pure question of fact" to be submitted to the fact finder. *Johnson,* 80 Wash.App at 229. The Washington Supreme Court has held that "the existence of discrimination in violation of RCW 49.60 was a question of fact." *Phillips v City of Seattle*, 111 Wash.2d 903, 909, 766 P.2d 1099 (1989)(*internal cite omitted*).

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* Ageist comments help raise a question of fact so as to defeat a summary judgment motion in age discrimination cases. *Johnson v. Express Rent & Own, Inc* , 113 Wn. App. 858, 862-63, 56 P.3d 567 (Div. II, 2002) (in denying summary judgment against age discrimination claim, Court of Appeals cited evidence that supervisor told discharged employee that employee did not fit the image of the company, all of whose

employees save one were described as "well under the age of 40, and all very much fit a youthful, fit 'GQ' looking mold.").

a. The decision maker's explicit public comments indicate that age was a consideration in hiring decisions

Here Scrivener has introduced evidence from which a jury could reasonably infer that age was a substantial factor in the College's decision to hire two younger, less-experienced applicants for the tenure track positions instead of Scrivener. The final interview was conducted by the College's then-President Branch with Vice President Thornburg, and the ultimate hiring decision was made by President Branch. *CP 2-3 (Dec. of Branch, ¶7)*. Ms. Thornburg was effectively an extension of Mr. Branch in the hiring process, having been appointed interim Vice President of Instruction by him, participating little if at all in the interview questioning of Scrivener and appearing to defer to President Branch throughout the interview. *CP 107-108 (Scrivener Depo. 50:16-51:1, Ex 1 to Dec. of McCulloch*). Then-President Branch, the ultimate decision-maker in hiring for the tenure track positions Scrivener sought, had publicly and formally stated in his oral and printed State of the College address in January 2006, his desire to hire "younger talent." *Appendix A-1, CP 24 (Ex. 3, p 10, to Dec. of Branch*). He had also noted in a public forum

discussion of hiring that he did not want to set any minimum experience requirement for the tenure-track positions, leading to the reasonable inference that he wanted to hire younger applicants. President Branch indulged in some inappropriate "clowning" during Scrivener's interview, making Scrivener feel that he was not taking her seriously. *CP 107 (Scrivener Depo. 50.3-15, Ex.1 to Dec. of McCulloch*).

In his declaration in support of Defendant's motion, ex-President Branch stated that his choice of who to hire was based on who he thought was the "best fit." *CP 4 (Dec of Branch, ¶13)* Such an ambiguous assertion not only fails to negate the inference of age discrimination, but leaves open the reasonable inference that age may well have been a substantial factor in how that "best fit" was determined. President Branch's public opposition to posting any minimum experience requirement for applicants for these tenure track positions supports the reasonable inference that he was seeking younger applicants. Further, this statement by Branch in support of the summary judgment that he made the hiring decision based on "best fit" presents 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 Riley v. Andres,* 107 Wash.App. 391, 395, 27 P.3d 618 (2001).

b. Less experienced applicants under 40 were hired instead of Scrivener

The College identified Scrivener as one of the top applicants for the positions. She was one of four sent from the hiring committee to the final interview. *CP 8-10 (Ex. 1 to Dec. of Branch).* She was a much more experienced instructor than either of the younger applicants hired and had been performing most of the duties of the positions as a temporary employee. *CP 46-57 ((Ex 5 to Dec of Williams); CP 101 (Dec. Of Scrivener, ¶2).* Of the finalists for the tenure track positions, only Scrivener had the desired "distance education" experience qualification sought in the recruiting announcement, yet she was passed over in favor of two applicants under 40. *CP 8-10 (Ex. 1 to Dec. of Branch); CP 37 (Ex. 1, p.2, to Dec. of Williams).*

c. The College hired predominantly applicants under 40 for permanent positions during Branch's tenure

The hiring pattern during President Branch's tenure with the College also supports the inference that age was an impermissible factor in the College's hiring decisions during this period. According to

information compiled by the College's Associate Director of Human Resources, Sue Williams, there were 17 faculty positions filled in 2005-06, four temporary positions and 13 tenure-track *CP 43-44 (Ex 4 to Dec. of Williams)*. Of the four temporary positions, three of the hires were 40 or over. However, of the tenure track hires, only four out of 13 (approximately 30%) were over 40 or over. *Id.*

In its motion, the College attempted to distract from the question of whether the College impermissibly considered age in rejecting Scrivener for a tenure track position by pointing out that when she was initially hired she was in her 40's. However, Scrivener was not hired by President Branch nor was she hired for a tenure track position, which positions were predominantly filled by Branch with applicants under 40.

d. Statements in President Branch's formal State of the College address were not "stray comments"

The College suggested in its motion argument that President Branch's statements regarding seeking younger employees in his state of the College address were "stray" remarks insufficient to establish discrimination under *Merrick v. Farmers Insurance Group*, 892 F.2d 1434 (9th Cir. 1990). *Merrick* is distinguishable from this case at bar and has been distinguished by other Ninth Circuit and state court cases. *See, e.g.,*

Schnidrig v Columbia Mach. Inc. 80 F.3d 1406, 1411 (9th Cir. 1996) (summary judgment for employer reversed based on evidence that plaintiff rejected for promotion was told that company board of directors wanted someone younger for the job); *Mangold v. Californian Public Utilities Com'n*, 67 F.3d 1470, 1477 (9th Cir. 1995) (age-related remarks and other evidence held sufficient to support jury verdict in favor of plaintiff in age discrimination case). *See also, EEOC v. Pape Lift Co* , 115 F.3d 676, 684 (9th Cir. 1997) (age-related remarks were tied to decision to terminate the plaintiff and held sufficient to support jury verdict that employer discharged plaintiff in substantial part due to his age). The evidence found insufficient to avoid summary judgment in *Merrick* was an isolated comment by an executive after the hiring decision had been made that he chose the successful candidate because he was a "bright, intelligent, knowledgeable young man." In stark contrast, here ex-President Branch, who made the ultimate hiring decision, publically asserted in an address to the College community prior to the hiring process that Clark College had a "glaring need" to hire "younger talent," people under 40, people with "the Funk Factor." *Appendix A-1, CP 24 (Ex.3, p 10 to Dec. of Branch).* This was not a "stray comment" but a calculated, composed statement of intent in President Branch's formal public "state of the college" address given

during the search period for the tenure track positions and just a few months before Scrivener was rejected for the positions in question. Prior to the posting of the positions, Branch had also publicly stated his desire to eliminate any experience requirement from the position announcements. *CP 109-110 (Scrivener Depo 71:21-72:9, Ex. 1 to Dec. of McCulloch).* A jury could reasonably view this evidence as President Branch telegraphing his bias in favor of employing younger individuals, announcing a plan to favor individuals under 40 in hiring decisions and then implementing that plan in selecting two such persons instead of the more experienced Scrivener for tenure-track positions. The very afternoon that she interviewed with Branch and Thornburg, Scrivener was informed that she did not get either position and that other applicants had already been offered and accepted the positions. *CP 101 (Declaration of Scrivener).*

e. No evidence of long term planning as reason for rejecting Scrivener

In support of its motion for summary judgment, the College argued that long term planning goals may provide a legitimate reason for an employer to consider age. While that may be an accurate statement of the federal law cited by the College, the College produced no evidence whatsoever that President Branch made his decision to hire much younger applicants over Scrivener for long-term planning purposes. Ex-President

Branch stated in his declaration in support of the College's motion that long term planning was part of his responsibility as president and that succession planning involves analysis of demographics of the current workforce, *CP 3-4 (Dec of Branch, ¶11)*, but he did not state that such planning or analysis drove his hiring decision *CP 2-3 (Dec of Branch, ¶6-8)*. Further, the only cases Defendant cites in support of its argument that such planning may excuse consideration of age in hiring are from the conservative federal Fourth Circuit Court of Appeals, not controlled by the Washington Legislature's directive to interpret the WLAD liberally to achieve the goal of ending discrimination.

Here, the very nondiscriminatory reason put forth by the College, that Scrivener was not the "best fit" as determined by the ultimate decision maker, President Branch, itself raises a question of fact. In light of President Branch's State of the College speech articulating his belief that there was a "glaring need" for "younger talent" under forty on the faculty, there is a question of fact as to whether age was a substantial factor in his analysis of "fit." The College essentially argued that simply by asserting that ex-President Branch felt that applicants Chao and Darley-Vanis were the best fit for Clark College, the College foreclosed all question of fact. On the contrary, this argument simply begs the question of whether

Scrivener's age was a substantial factor in the decision to reject her in favor of two less experienced, considerably younger individuals . This is not a situation such as that cited by the College where "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." *Milligan v. Thompson*, 110 Wn.App. 628, 637, 42 P.2d 418, 423 (2002), *quoting Reeves v. Sanderson Plumbing Prods., Inc* , 503 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). In *Milligan*, summary judgment was affirmed where the plaintiff in a race discrimination case had no evidence of any race-related comments by the decision maker who removed him from an Indian Affairs job and the employer presented uncontroverted evidence that the it refused to return him to this job due to his repeated misconduct in handling Indian Affairs, even after warnings. *Milligan*, 110 Wn.App at 637-38. Here by contrast, there is evidence of formal, public age-related statements by the ultimate decision maker and Scrivener was admittedly an excellent instructor and a top applicant. Summary judgment must not be granted unless "reasonable persons could reach but one conclusion." *Vallandigham,* 154 Wash.2d at 26. That is not the case here. In this case, a jury could reasonably find from the evidence that Scrivener, who was as or more qualified than the

individuals chosen for the positions for which Scrivener applied and that age was a substantial factor in the College's decision not to hire her.

IV.

CONCLUSION

A clear question of fact exists regarding the whether or not Scrivener's age was a substantial factor in Clark College's refusal to hire her for a tenure-track position in violation of Washington anti-discrimination law. The public statements of then- President Branch who was the final decision maker regarding the hiring, as well as the overall pattern of hiring younger applicants throughout Branch's tenure as President of the College, lead to the reasonable inference that age was a substantial factor in his decision not to hire then 55 year old Scrivener for a tenure track position. 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 Wash.2d at 311. Viewing the evidence and the reasonable inferences in the light most favorable to Scrivener as the nonmoving party, a question of fact exists as to whether age was a substantial factor in the College's

refusal to hire Scrivener for a tenure track position and the trial court's Order granting summary judgment to the College must be overturned.

DATED this 4th day of June, 2012.

LAW OFFICES OF SUE-DEL MCCULLOCH LLC

By: _____
Sue-Del McCulloch, WSB No.: 32667
Attorney for Plaintiff Kathryn Scrivener

APPENDIX

Respect for Differences

Long before my arrival, the College held Respect for Differences as one of its core values. And that this value also become one of the College's mission imperatives by way of our Strategic Plan highlights the recognition that respect for differences is a skill essential to success in today's workforce. As Sylvia Thornburg, Acting Vice President for Instruction, put it during our last management team meeting, "Exposure to dealing with persons – student colleagues or staff - of different cultures or life experiences is of value. Conversely, the absence of such exposure to multi-cultural, multi-ethnic, multi-dimensional viewpoints is a gap in the education of anyone expected to operate successfully within an increasingly multicultural environment or a global economy."

And though 19% of our student body represents some form of ethnic diversity, only 12.2% of our workforce brings diversity to college community. And when we examine our faculty, only 9.6% of that critical aspect of the learning enterprise brings diversity to the experiences of student at Clark College. Yet perhaps the most glaring need for increased diversity is in our need for younger talent. 74% of Clark College's workforce is over forty. And though I have a great affinity for people in this age group, employing people who bring different perspectives will only benefit our college and community. There is also something here of critical importance to note. Clark College is an institution whose annual budget is over forty million dollars. This past year our total budget exceeded ninety million dollars. When the Columbian talks about the creative class and whether Vancouver has "the Funk Factor," we must also recognize the numbers of people who locate to our community because of the employment and educational opportunities available at Clark College.

If, ideally, this community is to embrace the principles expressed in a May 2004 *Columbian* article that quoted "National studies show that cultivating an environment that welcomes artists, writers, designers, architects, computer programmers and other creative workers strengthens the economy and builds jobs. A byproduct of that work force is often a vibrant downtown, something city leaders are working hard to achieve. But downtown redevelopment often focuses only on buildings creating new ones or giving existing structures a face-lift. Supporters of a creative economy say more emphasis needs to be placed on people." The question remains what will people find when they get here. To date there are mixed reviews.

CERTIFICATE OF FILING & SERVICE

I hereby certify that I filed: **APPELLANT'S OPENING BRIEF for SCRIVENER v. CLARK COLLEGE, COURT OF APPEALS CASE NO. 43051-7-II and SUPERIOR COURT CASE NO. 09-2-03120-1** in the Washington State Court of Appeals Division II and served the Notice on the following person(s):

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☒ by mailing to said person(s) a true copy thereof, contained in a sealed envelope, with postage paid, and deposited in the post office at Portland, Oregon, on said day, addressed to said person(s) as set forth above.

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DATED this 4th day of June, 2012

LAW OFFICES OF SUE-DEL MCCULLOCH LLC

By: _____
Sue-Del McCulloch, WSB #32667
Attorney for Plaintiff Kathryn Scrivener

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