No. 738496

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

MARNIE L. SIMMONS,

Appellant,

v.

MICROSOFT CORPORATION, A WASHINGTON CORPORATION,

Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

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). Plaintiffs in employment discrimination actions need produce very little evidence 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). 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); *see also 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) (finding that "employers infrequently announce their bad motives orally or in writing").

When the record contains reasonable but competing inferences regarding an employer's motivation, the trier of fact must be permitted to determine the true motive. *See Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 90, 272 P.3d 865 (2012). 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)).

Respondent's ability to cite cases wherein a state or federal court granted summary judgment on a variety of employment discrimination matters (Respondent's Brief ("RB") at 21) hardly disproves the extremely high standard employers face on summary judgment. Courts routinely dismiss employers' summary judgment motions where, as in the instant matter, the plaintiff established a prima facie case of discrimination and a genuine issue of material facts exists as to the employer's motive.[1] Because most employment claims are by their very nature based on circumstantial evidence, summary judgment is rarely granted under the *McDonnell Douglas* burden-shifting framework. *Id.*

A. Respondent's claim of Appellant's poor performance fails to establish a legitimate, nondiscriminatory reason sufficient to rebut the presumption of discrimination raised by Appellant's prima facie showing of age and race discrimination.

Surprisingly, Respondent argues that by merely presenting a non-discriminatory reason (i.e. performance) for termination that it

[1] *See, e.g., Scrivener v. Clark College*, 181 Wn.2d 439, 442, 334 P.3d 541 (2014) (en banc) (reversing summary judgment because genuine issue of material fact existed as to whether age was a substantial factor in termination decision); *Riehl v. Foodmaker, Inc.*, 152 Wn. 2d 138, 149-50, 94 P.3d 930 (2004) (affirming denial of summary judgment where employee's evidence was sufficient to establish that employer's articulated reason for termination could have been discriminatory); *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 167, 991 P.2d 674 (2000) (reversing summary judgment on hostile work environment claim); *Clark College, Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1208 (9th Cir. 2008) (summary judgment on ADEA claim reversed because of issue of fact regarding employee's performance).

automatically succeeds in rebutting the presumption created through the prima facie case of discrimination. *See* RB at 22-23. However, Respondent bears the heavy burden of not only articulating a legitimate, nondiscriminatory reason but of overcoming the presumption by meeting its burden of production. *See Hill v. BCTI Income Fund-1*, 144 Wn.2d 172, 181-82 (2001) (en banc). While evidence of poor performance can often be a legitimate reason that satisfies the burden, Respondent failed to produce sufficient evidence of poor performance in the instant matter to overcome the presumption of discriminatory intent.

Appellant received overwhelmingly positive performance evaluations throughout her seven years at Microsoft. CP 255. She received several promotions and was consistently considered to be very knowledgeable, having a strong work ethic, and willing to help others. CP 348, 409. The only negative feedback Appellant received occurred after Mr. Arsenault decided he needed to get rid of Appellant in favor of a much younger employee. CP 350-51.

Therefore, Respondent cannot automatically legitimize its proffered nondiscriminatory reason by offering claims that are wholly inconsistent with Appellant's overwhelmingly positive job performance. Because Respondent did not produce sufficient evidence of a legitimate reason in this specific matter, the trial court improperly granted Respondent's motion for summary judgment.

Even if Respondent does articulate a legitimate reason by establishing a genuine issue of material fact against the former presumption of discriminatory intent, such a finding does not dictate that *no* genuine issues of material fact exist at all. Rather, the finding merely reflects that Respondent rebutted any legal presumption of intentional discrimination. *See St. Mary's Honor Ctr. v. Hicks.*, 509 U.S. 502, 509 (1993). Should Respondent fail to meet its burden of production – introduce evidence which, taken as true, permits the conclusion of a nondiscriminatory reason – then defendant has failed to meet its overall burden. *Id.* At a minimum, Respondent failed to present evidence for a finding that no genuine issues of fact exist in its favor. *See Hill v. BCTI Income Fund-1*, 144 Wn.2d 172, 181-82 (2001) (en banc) (quoting *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 490, 859 P.2d 26 (1993)).

B. Appellant satisfied her burden of producing sufficient evidence to create a genuine issue of material fact as to whether race and/or age were motivating factors in Respondent's decision to terminate her employment.

To establish pretext at summary judgment, Appellant need only offer sufficient evidence to create a genuine issue of material fact either that (1) the employer's proffered reason is pretextual or (2) discrimination remained a substantial factor motivating the employer even if the proffered reason was legitimate. *Tosch v. YWCA Pierce Cnty.*, 185 Wn. App. 1061, 2015 WL 728302 (Div. II). Respondent, however, seeks to improperly

impose on Appellant the burden of disproving Respondent's proffered reason for termination. *See* RB at 24. "An employee is not required to disprove each of the employer's articulated reasons to satisfy the pretext burden of production." *Id.* at *5 (quoting *Scrivener v. Clark College*, 181 Wn.2d 439, 447, 334 P.3d 541 (2014). Because an employer may be motivated by both discriminatory and nondiscriminatory reasons, plaintiff need only offer sufficient evidence at summary judgment to create a genuine issue that discrimination was at least a motivating factor. *Id.* For this reason, "summary judgment in favor of employers is often inappropriate in employment discrimination cases." *See Id.*

Because "[c]ircumstantial, indirect, and inferential evidence is sufficient to discharge the plaintiff's burden," an employee can raise a genuine issue of material fact as to an employer's proffered reason for termination by presenting "comparator" evidence. *Chen v. State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997) (citing *Sellsted v. Wash Mut. Sav. Bank*, 69 Wn. App. 852, 860, 851 P.2d 716 (1993)); *Johnson*, 80 Wn. App. at 229 (quoting *Sischo-Nownejad v. Merced Comm'y Coll. Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991)).

Respondent replaced Appellant with a younger white employee and treated her worse than similarly-situated employees. CP 334. Sara Young, who replaced Appellant, was substantially-less qualified but given Appellant's job nonetheless. Mr. Arsenault also gave Sara Young glowing

reviews while subjecting Appellant to unwarranted and unnecessary heightened scrutiny. Mr. Arsenault made sure to create a document trail of poor performance merely to justify his discriminatory motive. When a 360 review was conducted of Appellant's job performance, only Mr. Arsenault gave Appellant poor ratings.

Mr. Arsenault also called Appellant a "real kahuna" in reference to Appellant's Hawaiian/Pacific Islander nationality. CP 347, 351. Whether or not the trial court subjectively determined calling Appellant a "real kahuna" as discriminatory as some other racially-charged comments, (MSJ Hr'g Tr. 20, July 29, 2015 (Appendix)), it does not change the fact that the evidence exists and that, together with all the other evidence, creates a reasonable inference of discriminatory intent.

Therefore, summary judgment was inappropriate as a reasonable trier of fact could draw the inference that age and race were "substantial factors" in the decision to terminate Appellant's employment. *See Sellsted*, 69 Wn. App. at 860; *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d, 302, 311, 898 P.2d 284 (1995).

IV. CONCLUSION

Respondent failed to meet its burden under the *McDonnell Douglas* burden shifting framework by not producing a legitimate, non-discriminatory reason for discharging Appellant. Viewing the evidence and the reasonable inferences in the light most favorable to Appellant as the

nonmoving party at summary judgment, Appellant also raised material questions of fact as to whether age and race were motivating factors in Respondent's decision to terminate Appellant's employment. For the foregoing reasons, Appellant Marnie Simmons respectfully requests that the decision of the trial court granting the motion for summary judgment be REVERSED and the case be REMANDED for further adjudication.

DATED April 13, 2016.

Respectfully submitted,

George O. Tamblyn
Attorney for Appellant
WSBA #15429

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 the Reply Brief for Appellant as follows:

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DATED this 12th day of April, 2016.

Advocates Law Group, PLLC

/s/ Heather Maloney
Heather Maloney