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

MARNIE L. SIMMONS,
Appellant,

v.

MICROSOFT CORPORATION,
Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE CASE	2
A.	Ms. Simmons.....	2
B.	Ms. Simmons’ Performance from 2008 to 2011	3
C.	Ms. Simmons Becomes Bret Arsenault’s EA	4
D.	Ms. Simmons’ Job Responsibilities	6
E.	Ms. Simmons’ Documented, Ongoing Performance Issues from 2011 to 2013.....	8
F.	Procedural History.....	17
IV.	ARGUMENT	18
A.	Ms. Simmons’ Burden on Summary Judgment.....	18
B.	The Burden Shifting Analysis	19
C.	Microsoft Met Its Burden	22
D.	Ms. Simmons Cannot Establish Pretext or Create a Triable Issue of Material Fact	23
1.	Ms. Simmons’ Performance Issues	24
2.	Ms. Simmons’ Replacement by a Younger Employee Does Not Create a Triable Issue of Material Fact	28
3.	The “Real Kahuna” Comment Does Not Create a Triable Issue of Material Fact	31
V.	CONCLUSION	33

TABLE OF AUTHORITIES

Cases

<u>Bd. of Trustees v. Sweeney</u> , 439 U.S. 24 (1978).....	20
<u>Becker v. Cashman</u> , 128 Wn. App. 79, 114 P.3d 1210 (2005).....	19, 21
<u>Chen v. State</u> , 86 Wn. App. 183, 937 P.2d 612 (1997).....	25
<u>Clarke v. Shoreline Sch. Dist.</u> 106 Wn.2d 102, 720 P.2d 793 (1986)	19
<u>Coghlan v. Am. Seafoods Co., LLC</u> , 413 F.3d 1090 (9th Cir. 2005).....	22
<u>Cole v. Red Lion</u> , 92 Wn. App. 743, 969 P.2d 481 (1998)	27
<u>Crownover v. Dep’t of Transp.</u> , 165 Wn. App. 131, 265 P.3d 971 (2011)	21
<u>Danny v. Laidlaw Transit Servs., Inc.</u> , 165 Wn.2d 200, 193 P.3d 128 (2008).....	27
<u>Domingo v. BECU</u> , 124 Wn. App. 71, 98 P.3d 1222 (2004)	21
<u>Douglas v. Anderson</u> , 656 F.2d 528 (9th Cir. 1981)	19
<u>Ebel v. Fairwood Park II Homeowners’ Assoc.</u> , 136 Wn. App. 787, 150 P.3d 1163 (2007)	28
<u>Fulton v. Dep’t of Soc. & Health Serv.</u> , 169 Wn. App. 137, 279 P.3d 500 (2012).....	19, 20, 21, 25
<u>Gatewood v. Columbia Pub. Sch. Dist.</u> , 415 F.Supp.2d 983 (8th Cir. 2006)	27
<u>Goodson v. Triumph Composite Sys.</u> , 2014 U.S. Dist. LEXIS 169566 (E.D. Wash.).....	21
<u>Griffith v. Schnitzer Steel Indus.</u> , 128 Wn. App. 438, 115 P.3d 1065 (2005).....	21, 25, 29
<u>Grimwood v. Univ. of Puget Sound</u> , 110 Wn.2d 355, 753 P.2d 517 (1988)	20
<u>Heath v. Uruga</u> , 106 Wn. App. 506, 24 P.3d 413 (2001).....	19

<u>Henderson v. Ford Motor Co.</u> , 403 F.3d 1026 (8th Cir. 2005).....	27
<u>Hill v. BCTI Income Fund-I</u> , 144 Wn.2d 172, 23 P.3d 440 (2001)...	20, 22, 24, 29
<u>Johnson v. Gen. Bd. of Pension & Health Benefits of the United Methodist Church</u> , 2012 U.S. Dist. LEXIS 24918 (N.D. Ill.)	28
<u>Kirby v. City of Tacoma</u> . 124 Wn. App. 454, 98 P.3d 827 (2004).....	21
<u>Kirst v. Grays Harbor Cmty. Hosp.</u> , 2015 U.S. Dist. LEXIS 9355 (W.D. Wash.).....	21
<u>Lakey v. Puget Sound Energy, Inc.</u> , 176 Wn.2d 909, 296 P.3d 860 (2013)	18
<u>Lee v. State of Minn. Dep't of Commerce</u> , 157 F.3d 1130 (8th Cir. 1998)	28
<u>Lodis v. Corbis Holdings, Inc.</u> , 172 Wn. App. 835, 292 P.3d 779 (2013)	22
<u>McClarty v. Totem Elec.</u> , 157 Wn.2d 214, 137 P.3d 844 (2006).....	20
<u>McDonnell Douglas Corp. v. Green</u> , 411 U.S. 792 (1973)	19
<u>McKinley v. Skyline Chili, Inc.</u> , 2012 U.S. Dist. LEXIS 114020 (S.D. Ohio).....	28
<u>Milligan v. Thompson</u> , 110 Wn. App. 628, 42 P.3d 418 (2002)	20
<u>Overton v. Consol. Ins. Co.</u> , 145 Wn.2d 417, 38 P.3d 322 (2002).....	18
<u>Sheehan v. Cent. Puget Sound Reg'l Transit Auth.</u> , 155 Wn.2d 790, 123 P.3d 88 (2005)	18
<u>Snyder v. Med. Serv. Corp.</u> , 145 Wn.2d 233, 35 P.3d 1158 (2001).....	21
<u>Stout v. Yakima Hma, Inc.</u> , 2013 U.S. LEXIS 20275 (E.D. Wash.).	21, 22, 29
<u>Texas Dept. of Comm. Affairs v. Burdine</u> , 450 U.S. 248 (1981).....	20, 23
<u>White v. State</u> , 131 Wn.2d 1, 929 P.2d 396 (1997).....	18
<u>Young v. Key Pharma., Inc.</u> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	19

Rules

CR 56(c)..... 18

I. INTRODUCTION

Appellant Marnie Simmons, a former executive assistant at Microsoft, challenges the trial court's entry of summary judgment in favor of Microsoft in this age and race discrimination lawsuit. In seeking reversal, Ms. Simmons offers no evidence – disputed or otherwise – to show her termination of employment for ongoing, well-documented performance issues was actually motivated by her age (43) or race (Pacific Islander). Instead, she misconstrues the relevant legal standards, misstates the record, omits critical facts while focusing on immaterial ones, and relies on inadmissible evidence. While Ms. Simmons' claims would fail under any standard, they fall particularly short in this case because the supervisor who terminated her employment for poor performance is the same one who hired her two years earlier. In other words, her claims are subject to the “same actor” inference of non-discrimination, which is extraordinarily difficult to overcome. For these reasons, Microsoft respectfully submits that this Court should affirm the trial court's decision.

II. ASSIGNMENTS OF ERROR

1. Did the trial court properly grant summary judgment as to Ms. Simmons' age and race discrimination claims when Microsoft provided a legitimate, non-discriminatory reason for the termination of her

employment, and she failed to rebut that reason with any facts showing pretext? Yes. (Assignment of Error No. 1)

2. Did the trial court properly grant summary judgment as to Ms. Simmons' age discrimination claim when (i) the record shows her employment was terminated for performance issues and (ii) the only evidence she relies upon to establish pretext and create a triable issue of material fact is her replacement is younger than she is? Yes. (Assignment of Error No. 1)

3. Did the trial court properly grant summary judgment as to Ms. Simmons' race discrimination claim when (i) the record shows her employment was terminated for performance issues and (ii) the only evidence she relies upon to establish pretext and create a triable issue of material fact is her own testimony that, about 15 months before her separation, her manager made a positive comment about a Pacific Islander employee he was hiring for a leadership position on his team? Yes. (Assignment of Error No. 1)

III. STATEMENT OF THE CASE

A. Ms. Simmons

Ms. Simmons was born in California in October 1969. CP 18 at 15-16; CP 20 at 11-12. Her family moved to the Seattle area when she was about 13 or 14, and she attended Newport High School in Bellevue.

CP 19 at 19-20; CP 20 at 13-24. She identifies as Pacific Islander because her mother was born in Hawaii. CP 20 at 25; CP 21 at 1-3; CP 22 at 22-25; CP 23 at 1. Her father was not Pacific Islander. CP 20 at 25; CP 21 at 1.

In July 2006, Ms. Simmons began working for Microsoft. CP 37 at 15-18; CP 139 at 23-25; CP 140 at 1-5. Her employment was at-will, meaning it could be terminated at any time with or without cause or notice and for any reason other than an unlawful reason. CP 139 at 22-25; CP 140 at 1-7; CP 229 at ¶ 2.

B. Ms. Simmons' Performance from 2008 to 2011

In 2008, Ms. Simmons became an executive assistant (“EA”) reporting to Rosanna Ho. CP 35 at 17-18. Ms. Simmons generally performed well in certain aspects of her job, but also had ongoing problems in her communications and interactions with coworkers. In March 2009, Ms. Ho noted this in Ms. Simmons’ mid-year review and encouraged her to improve her skills so they would not become an obstacle in her career:

I think the areas where I would like to see you work on are all around interpersonal and communication skills. You sometimes become angry quickly, and it is not acceptable at the EA levels; regardless of whether you are right or wrong. You have a bright future ahead of you at Microsoft because you are very smart and capable. I suggest that you

work on your communications skills so they don't become obstacles in your career.

CP 51 at 10-21; CP 76-94.

In September 2009, Ms. Simmons received her annual performance review. Ms. Ho again identified Ms. Simmons' interpersonal challenges and encouraged her to pay closer attention to the details of her job:

(1) Improve tone in verbal and written communication and ensure clarity in your communications when working with other[s]; (2) You produced a lot of work and always push yourself to be on time. Because of that, you sometimes forget to get all the details right. Slow down a bit and doublecheck [sic], particularly when you have to rely on other people.

CP 49 at 23-25; CP 50 at 1-7; CP 58-75.

In March 2010, Ms. Ho noted Ms. Simmons had shown improvement but urged her to continue working on these critical issues.

CP 52 at 8-25; CP 95-104.

C. Ms. Simmons Becomes Bret Arsenault's EA

In 2010, Mr. Arsenault was Microsoft's Chief Information Security Officer and leader of the Information Security Risk Management (ISRM) group. CP 34 at 3-7; CP 38 at 11-14; CP 232-233 at ¶ 3. In this role, Mr. Arsenault is responsible for enterprise-wide information security, compliance, and business continuity efforts and leads a global team of

security professionals with a strategic focus on information protection, assessment, awareness, governance, and enterprise business continuity. CP 232-233 at ¶ 3. He oversees hundreds of employees and regularly interacts with senior-level Microsoft executives, including the CEO. Id. He also presents to Microsoft's and external companies' Boards of Directors on information risk issues and frequently delivers security-related speeches around the world. Id.

In 2011, Mr. Arsenault needed to hire a full-time EA. CP 233 at ¶ 5. Ms. Simmons applied for the position. CP 36 at 14-18. Mr. Arsenault was involved in selecting four candidates, including Ms. Simmons, for interviews. CP 233 at ¶ 5.

In March 2011, Ms. Simmons interviewed with some members of Mr. Arsenault's group. CP 36 at 14-18; CP 53 at 10-15; CP 233 at ¶ 6. She was recommended for hire, but concerns were raised regarding her interpersonal skills which were consistent with the concerns Ms. Ho had raised in the 2009 and 2010 performance reviews. CP 233 at ¶ 6. One interviewer, for example, wrote:

If I have concerns about Marnie, it would be that she seemed less than interested when I spoke with her to talk about her challenges or in being self-critical in herself or her performance. I found that she seemed ready to push back when I even suggested that she may have areas for growth or self-investment, which makes me worry a bit when I encounter it that [sic] lack of self-criticality in a

FTE....Areas or capabilities that I found less than positive with Marnie: Lack of self-criticality exhibited when asked to talk about 'weak spots'; Confidence may come across as arrogance and inflexibility; came across as 'I know how it works' already, so may be less than 'coachable' when it comes to a new organization.

CP 233 at ¶ 6; CP 240-243.

Mr. Arsenault then interviewed Ms. Simmons. CP 53 at 10-15; CP 233 at ¶ 7. While he had concerns based on the feedback from other interviewers, he felt she was a good candidate for the job. CP 233 at ¶¶ 6-7; CP 240-243.

Mr. Arsenault's first choice for the position was a temporary employee who had worked as his interim EA for about a year. CP 233 at ¶ 7. When she could not take the position, he offered the job to Ms. Simmons. CP 36 at 24-25; CP 233 at ¶ 7. In May 2011, Ms. Simmons accepted and began reporting to Mr. Arsenault as his EA. CP 233 at ¶ 7. She was hired as a Level 56. CP 33 at 5-6.

D. Ms. Simmons' Job Responsibilities

As Chief Information Security Officer, Mr. Arsenault has significant demands on his time. CP 43 at 17-19; CP 232 at ¶ 3. Ms. Simmons' job was to support Mr. Arsenault by handling his scheduling, logistical, and administrative needs so as to maximize his time for high value work. CP 43 at 13-25; CP 44-48; CP 49 at 1-22. This required,

among other things, excellent time-management skills (CP 44 at 5-7), proactively managing his calendar (id. at 8-9), prioritizing requests based on shifting business priorities (CP 45 at 3-6), allocating and shifting appropriate amounts of time for meetings (id. at 7-12), ensuring all meeting details were accurate (id. at 13-15), and coordinating travel for industry events and his other domestic or international travel (CP 46 at 17-22). Ms. Simmons was also expected to demonstrate diplomacy and professionalism when communicating with external and internal partners. CP 46 at 23-25; CP 47 at 1-8. This included treating people fairly, being respectful, and working cooperatively with others on the team. CP 48 at 18-20; CP 49 at 9-15. She needed to be efficient, respond to Mr. Arsenault in a timely manner, and meet deadlines. CP 48 at 10-17; CP 49 at 1-2. Failure to meet these expectations and to work seamlessly with others on the team resulted in unnecessary drains on Mr. Arsenault's time. CP 233 at ¶ 4. When such issues occurred, Ms. Simmons was expected to acknowledge her mistakes, be accountable, not blame others, and accept feedback. CP 48 at 21-25; CP 49 at 16-19.

In September 2011, Mr. Arsenault gave Ms. Simmons a "2" rating on her annual performance review. (The ratings at that time were from "1" to "5" with "1" being highest and "5" lowest.) CP 108 at 11-25; CP 109 at 1-2; CP 110 at 2-7; CP 149-154; CP 233-234 at ¶ 8. This favorable

rating was based largely on her performance in her previous position and to some extent the time she had been in this new role. CP 233-34 at ¶ 8. Based on what he had seen over the first few months, Mr. Arsenault felt Ms. Simmons was a “great hire” but noted the same types of concerns regarding her interpersonal skills that Ms. Ho had identified in 2009 and 2010 and that were raised during the interview process in March 2011:

Additionally, a competency that we might spend time on as part of her development plan will be interpersonal awareness. Marnie has a very direct approach which my team and I value. How that lands with some people can be negative and it is important she be aware of the impact that may be having on others. I want to encourage the direct approach, while being cognoscente [sic] of the impact that may have on others performance, productivity and reflection on our team. Marnie is a great hire and has a very bright future with ISRM and I look forward to working with Marnie on her professional development plan.

CP 108 at 11-25; CP 109 at 1-2; CP 110 at 2-7; CP 149-154; CP 233-234 at ¶ 8.

E. Ms. Simmons’ Documented, Ongoing Performance Issues from 2011 to 2013

In September 2011, Mr. Arsenault hired Ken Sexsmith as the group’s Business Manager. CP 234 at ¶ 9. As the Business Manager, Mr. Sexsmith was responsible for aligning the ISRM group’s strategic and financial objectives, workforce plan, and rhythm of business. Id. Consistent with the significance of his role and responsibilities, Mr.

Sexsmith was hired at a Level 64 (which was eight levels higher than Ms. Simmons). Id.

Ms. Simmons was on the interview team and thought Mr. Sexsmith was a good match for the job. CP 39 at 22-24; CP 40 at 4-9. After Mr. Sexsmith was hired, however, Ms. Simmons had difficulty working with him, and the two began a strained relationship that continued for the rest of Ms. Simmons' employment. CP 41 at 22-25; CP 42 at 1-2, 19-22; CP 234 at ¶ 10.

In January 2012, Mr. Arsenault emailed Ms. Simmons and Mr. Sexsmith about their relationship, making clear his expectation that they resolve their difficulties and work together effectively:

I have had time to review both of your feedback on working relationship [sic] you have in ISRM. As I pointed out in those sessions and previously the working relationship between the leader, admin and business is cornerstone to an overall strong leadership team. You both have some work to do to improve your working relationship and ***it is my expectation that you will focus on this area to ensure you can collaborate and partner effectively.*** I am happy to meet with you and provide coaching.

CP 111 at 22-25; CP 112 at 1-10; CP 155-156 (emphasis added). Mr. Arsenault asked each of them to draft three requests they had of the other and three commitments they could make to improve the relationship. CP 156.

When Ms. Simmons responded to Mr. Arsenault's email, he was disappointed with her proposed commitments and sought guidance from Microsoft's Human Resources department on how best to proceed:

I don't see much in the notes about what she would do differently. It just states she will continue to do what she did since October, but is open to feedback....The overall tone is 'you don't know how to do your job' vs. what she needs....Overall I don't feel that Marnie is grasping the Flexible, Situational Awareness feedback from the last two weeks. She is at least willing but it doesn't seem to be landing so I will see if there is another approach to help her out.

CP 111 at 22-25; CP 112 at 1-10; CP 155-156; CP 234 at ¶ 10; CP 244-47.

In January 2012, Mr. Arsenault met with Ms. Simmons to discuss his concerns about her interactions with others on the team. He advised that she needed to show immediate and sustained improvement to succeed in her role. CP 113 at 12; CP 157-164 at pp. 7-8; CP 234 at ¶ 11.

Ms. Simmons initially showed some improvement, but it did not last. CP 234 at ¶ 11. In March 2012, Mr. Arsenault again addressed her performance issues and set forth his expectations moving forward:

As noted in the annual review Marnie can have a very direct approach. I have received feedback and personally witnessed the "how" she engages with people is inconsistent and does have a negative impact on productivity and perception. After we discussed this in January I saw improvement which demonstrates she can take the feedback and act on it, however we need to be sure it is sustained. Being adaptable will be a key area for Marnie to address in H2. There were some misses on

managing my calendar and Marnie has been accountable for these....We will monitor the consistency in approach and proactive load balancing in H2 as these will be inhibitors to her success in this role.

CP 113 at 12; CP 157-164 at pp. 7-8; CP 234 at ¶ 11.

Despite Mr. Arsenault's direct feedback and coaching, Ms. Simmons did not sustain her improvement. CP 234-235 at ¶ 12. Over the next few months she continued to underperform, refuse to take accountability for her actions, and have conflict with others. Id. As a result, Mr. Arsenault spent an inordinate amount of time away from his own tasks in an effort to address these issues and manage her performance. Id. During one of Mr. Arsenault's business trips, for example, rather than accept his directive for her to meet with Mr. Sexsmith, Ms. Simmons embroiled Mr. Arsenault in a 20-minute instant message conversation explaining why she should not be required to do so. CP 119 at 20-21; CP 176-178. See also, e.g., CP 114 at 3-10; CP 165-168 (complaining to Human Resources about an action item from Mr. Arsenault); CP 115 at 3-8; CP 169-170 (refusing to perform her tasks); CP 116 at 18-25; CP 117 at 1-3; CP 171 (refusing to accept responsibility and complaining to Human Resources about Mr. Arsenault's requests).

In June 2012, Mr. Arsenault again asked Human Resources for guidance on how to address these issues with Ms. Simmons and help her

meet these basic performance expectations. See, e.g., CP 118 at 22; CP 172-175; CP 235 at ¶ 14.

Thereafter, Mr. Arsenault continued to work with Ms. Simmons and Mr. Sexsmith in an effort to improve their relationship. See, e.g., CP 120 at 22-25; CP 121 at 1-4; CP 179-181; CP 235 at ¶ 15.

In August 2012, Mr. Arsenault met with Ms. Simmons again to discuss her performance and reiterated how critical it was that she be able to work cooperatively with Mr. Sexsmith. CP 235 at ¶ 16. In a follow up email he summarized his main concerns:

As I mentioned in our previous 1:1 and again in this months [sic], I am concerned about the importance of being able to partner with the Business manager role as it is critical to the success of the organization. This core requirement for your role was something we made clear upon your arrival and you are not meeting expectations...

CP 122 at 18-24; CP 182-183. In response, Ms. Simmons denied she had any issues and instead blamed Mr. Arsenault and Mr. Sexsmith. CP 182-183.

Later that day, Mr. Arsenault reminded Ms. Simmons there had been little improvement in her performance and advised her to reflect on why:

To be clear marnie [sic] I am just following up on our 1 on 1. I am not sure what you're referring to on staff and pcn but it has no correlation to this message. I have never blamed this 100% on you and have specifically corrected

you on that perspective before and remind you again that is not now nor has never been my assertion. Ken has a part to play and as his manager I deal directly with him on that. However, this is feedback to you re my expectations of your role. On options, we have tried various iterations with little improvement as you acknowledged in the last two 1 on 1's. The last feedback I asked for took over a month to get a response and only with continual reminders. I want to be sure you understand that your partnering assertions are not shared by all in isrm or with our partners. It would behoove you to seek to understand why rather than be defensive as there could be key learning's to help drive interpersonal awareness.

CP 182.

Despite Mr. Arsenault's frank feedback, Ms. Simmons continued to have issues working cooperatively with Mr. Sexsmith. CP 235 at ¶ 16.

In September 2012, Mr. Arsenault provided Ms. Simmons with her annual performance review, this time giving her a "5", which is the lowest rating. CP 124 at 14-25; CP 125 at 1-8; CP 235 at ¶ 17. The review reflected his frustrations and concerns with Ms. Simmons' ongoing performance issues. CP 235 at ¶ 17. In the review, Mr. Arsenault stated:

Marnie's results in FY12 against commitments, how the work was accomplished, and overall impact to the business were below expectations....This lack of accountability is a common theme in the feedback regarding resolution to issues raised...Lastly I was concerned how Marnie would shut down and shut others out. She was on occasion demeaning to others and would isolate others from decision making and information. There were several complaints about people being removed from message threads and then not updated on the final outcome. In addition she was quick to point out what was wrong in others people [sic]

work without engaging in 'how' to fix it. This behavior drained the energy and inadvertently created a fear of directly engaging with Marnie on sensitive issues. Marnie's 'how' had significant impact on her FY12 review. This coupled with inconsistent 'what' delivery combine for the rating relative to expectations and her peers. You need to demonstrate significant improvement in your performance for you to meet expectations and be successful in your role and at Microsoft.

CP 123 at 8-25; CP 184-203.

Ms. Simmons disagreed with Mr. Arsenault's assessment of her performance and refused to sign her review. CP 125 at 7-25; CP 126 at 1-24; CP 127 at 4-25. Indeed, she rejected the idea that she had any performance issues at all. CP 136 at 25; CP 137 at 1-7.

Nevertheless, Mr. Arsenault still hoped Ms. Simmons would take his feedback to heart and improve her performance. CP 235 at ¶ 17. To this end, in September 2012 he asked her to create a performance plan and suggested she take a training class on interpersonal awareness. CP 128 at 24-25; CP 129 at 1-10; CP 134 at 5-8; CP 235 at ¶ 17.

Meanwhile, through the remainder of 2012 and into January 2013, Ms. Simmons' performance issues continued. See, e.g., CP 130 at 2-10; CP 208-216 (not working as a team); CP 130 at 24-25; CP 131 at 1-12; CP 217-220 (wasting Mr. Arsenault's time with unclear communications); CP 236 at ¶¶ 23-24; CP 135 at 10-17; CP 225-227 (untimely communications).

In late January 2013, Mr. Arsenault again reminded Ms. Simmons of certain previously-identified areas for improvement, reiterated his expectations, and in summarizing his concerns stated:

The above [set of concerns] has been an ongoing pattern of behavior from FY12 and continues into FY13. I was explicit during your performance review on FY13 expectations for your role. This continuing behavior of lack of initiative to increase your capability expected in your role deprives you of the ability to course correct when you are receiving feedback not only from me but others that may also provide it to you. I expect you to be able to take, understand and incorporate feedback continuously to demonstrate improvement and meet expectations for your role. You are not meeting expectations for your role.

CP 132 at 23-25; CP 133 at 1-4; CP 221-224.

By late January 2013, Ms. Simmons still had not provided the performance plan Mr. Arsenault requested from her after her September 2012 performance review. CP 237 at ¶ 28. Therefore, Mr. Arsenault emailed Ms. Simmons, stating:

You have failed to deliver your performance plan after 4 months....This is another miss on delivering your plan but more importantly an example of where you are not taking the feedback and working on the agreed upon deliverable....Marnie I have not seen any improvement relative to the feedback in your annual review nor any concerted effort to address the concerns raised despite resources being offered from various HR personnel and LT members. I have been explicit regarding expectations for your role and deliverables. You continue not to meet expectations for your role.

CP 132 at 23-25; CP 133 at 1-4; CP 221-224.

Throughout this time, other team members voiced concerns about Ms. Simmons to Mr. Arsenault and Human Resources, and Mr. Arsenault continued to work with Human Resources in his effort to manage and improve Ms. Simmons' performance. See, e.g., CP 236-237 at ¶¶ 25-27; CP 249 at ¶ 8; CP 251-254.

Ms. Simmons' performance issues continued into February 2013. See, e.g., CP 135 at 10-17; CP 225-227 (failing to respond to Mr. Arsenault; untimely and verbose communications); CP 237 at ¶ 29.

At this point, Mr. Arsenault consulted with Human Resources and concluded he was going to terminate Ms. Simmons' employment. CP 237 at ¶ 30. As Mr. Arsenault's EA, Ms. Simmons' role was to provide administrative support so he could work as efficiently and effectively as possible in meeting his multiple commitments and demands on his time. Id. Instead, Ms. Simmons prevented him from working efficiently as he had to spend inordinate amounts of time debating with her about her performance issues and seeking to resolve conflicts involving her. Id. Unfortunately, Mr. Arsenault did not see the improvement he expected or any indication she would improve sufficiently in the near future. Id. Ms. Simmons' ongoing performance issues, coupled with the demands of the business, drove the need for change. Id. On February 11, 2013, Mr. Arsenault and a Human Resources representative met with Ms. Simmons

to advise her of his decision to terminate her employment. CP 137 at 25; CP 138 at 1-12; CP 228; CP 237 at ¶ 30.

When Ms. Simmons' employment ended, so, too, did the issues and conflicts Mr. Arsenault repeatedly had to address when she was his EA. CP 237 at ¶ 32.

Shortly after Ms. Simmons' separation, Sara Young, a Business Administrator in Mr. Arsenault's group who had worked directly with Ms. Simmons, started managing Mr. Arsenault's calendar. CP 237-238 at ¶¶ 33-34. In approximately March 2013, Ms. Young began working as his interim EA. CP 238 at ¶ 34. In the meantime, he posted the EA position and interviewed multiple candidates, including Ms. Young. CP 238 at ¶ 34.

In May 2013, following an open hiring process, Mr. Arsenault hired Ms. Young as his fulltime EA. She is still in the position and has performed well. CP 238 at ¶ 34.

F. Procedural History

In September 2014, Ms. Simmons filed this lawsuit. On July 1, 2015, Microsoft moved for summary judgment on all claims. On July 20, 2015, Ms. Simmons responded to Microsoft's motion for summary judgment. On July 24, 2015, Microsoft filed its reply in support of summary judgment. On July 29, 2015, the parties attended a summary

judgment hearing. On July 31, 2015, the trial court summarily dismissed Ms. Simmons' claims.

IV. ARGUMENT

A. Ms. Simmons' Burden on Summary Judgment

The sole issue on appeal is whether the trial court properly granted summary judgment in favor of Microsoft. This Court reviews such orders de novo. Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 922, 296 P.3d 860 (2013). As explained below, the decision to grant summary judgment was entirely proper. Indeed, if ever there was a case where summary judgment is appropriate, this is it. The trial court's ruling should be affirmed.

Summary judgment shall be granted "if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Sheehan v. Cent. Puget Sound Reg'l Transit Auth., 155 Wn.2d 790, 797, 123 P.3d 88 (2005); CR 56(c). The opposing party must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Speculation and conjecture are not enough. See, e.g., Overton v. Consol. Ins. Co., 145 Wn.2d 417, 430-31, 38 P.3d 322 (2002) ("Ultimate facts or conclusions of fact are insufficient. Likewise,

conclusory statements of facts will not suffice.”); Heath v. Uruga, 106 Wn. App. 506, 513, 24 P.3d 413 (2001) (“The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value.”). If the nonmovant “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the [] court should grant the motion.” Young v. Key Pharma., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

B. The Burden Shifting Analysis

Discrimination claims like the ones presented here are analyzed pursuant to the “shifting burdens” analysis originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Fulton v. Dep’t of Soc. & Health Serv., 169 Wn. App. 137, 148-150, 279 P.3d 500 (2012); Becker v. Cashman, 128 Wn. App. 79, 85-86, 114 P.3d 1210 (2005). A major purpose of the analysis is to “identify meritless suits and to stop them short of full trial.” Douglas v. Anderson, 656 F.2d 528, 535 (9th Cir. 1981).¹

To initiate the burden shifting analysis, Ms. Simmons must first prove: (i) she is in a protected class regarding age (i.e., 40 or older) and

¹ Washington courts look to federal discrimination law in interpreting the WLAD. Clarke v. Shoreline Sch. Dist. 106 Wn.2d 102, 118, 720 P.2d 793 (1986).

race (i.e., of Pacific Islander descent); (ii) her employment was terminated; (iii) she was performing satisfactorily at the time; and (iv) she was replaced by someone significantly younger or not of Pacific Islander ancestry. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 188, 23 P.3d 440 (2001) overruled on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006) (age); Milligan v. Thompson, 110 Wn. App. 628, 636, 42 P.3d 418 (2002) (race).

If Ms. Simmons can establish a prima facie case, the burden of production, not persuasion, then shifts to Microsoft to present evidence that Ms. Simmons' employment was terminated for a legitimate, non-discriminatory reason. Fulton, 169 Wn. App. at 149. Significantly, Microsoft's "burden is satisfied if [it] simply explains what [it] has done or produces evidence of legitimate non-discriminatory reasons." Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 256 (1981), quoting Bd. of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1978).

The burden of persuasion, not production, then reverts to Ms. Simmons. Fulton, 169 Wn. App. at 149; Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 363, 753 P.2d 517 (1988). To survive dismissal, she must present specific, admissible evidence beyond that presented in her prima facie case upon which a jury could reasonably conclude the stated reason for her discharge is unworthy of belief and instead a pretext

for unlawful discrimination. Becker, 128 Wn. App. at 86; Griffith v. Schnitzer Steel Indus., 128 Wn. App. 438, 456, 115 P.3d 1065 (2005) (summary judgment granted and affirmed where replacement was younger than plaintiff); Stout v. Yakima Hma, Inc., 2013 U.S. LEXIS 20275 at *25 (E.D. Wash. 2013), citing Griffith, supra, at 454 (“Washington case law explicitly states that a plaintiff ‘cannot rely on simply presenting a prima facie case of discrimination and rebutting the justifications proffered for [her] termination.’”). In other words, she must show Mr. Arsenault was motivated not by the concerns identified above but rather by animus towards her because she was 43 years old and/or because of her Pacific Islander heritage.

Contrary to Ms. Simmons’ contention (Appellant’s Brief (“AB”) at 8), courts routinely grant summary judgment in employment discrimination cases where, as here, there is no genuine issue of material fact evidencing pretext.² This is especially so in this case because, while

² See, e.g., Snyder v. Med. Serv. Corp., 145 Wn.2d 233, 35 P.3d 1158 (2001) (summary judgment affirmed on all claims, including disability discrimination); Fulton, supra, 169 Wn. App. 137 (summary judgment of gender claim affirmed); Crownover v. Dep’t of Transp., 165 Wn. App. 131, 265 P.3d 971 (2011) (summary judgment of retaliation and hostile work environment claims affirmed); Becker, supra, 128 Wn. App. 79 (summary judgment affirmed as to accommodation and disability discrimination claims); Kirby v. City of Tacoma, 124 Wn. App. 454, 98 P.3d 827 (2004) (summary judgment of disability discrimination claim affirmed); Domingo v. BECU, 124 Wn. App. 71, 98 P.3d 1222 (2004) (summary judgment affirmed as to race, national origin, gender, and age claims); Kirst v. Grays Harbor Cmty. Hosp., 2015 U.S. Dist. LEXIS 9355 (W.D. Wash.) (summary judgment of accommodation, discrimination, and retaliation claims granted); Goodson v. Triumph Composite Sys., 2014 U.S. Dist. LEXIS 169566 (E.D. Wash.) (summary judgment granted as to disability discrimination, accommodation, and

Ms. Simmons' claims fail under any standard, she faces an especially difficult burden since the person (Mr. Arsenault) who hired her in May 2011 is the same person who terminated her employment in February 2013. "When someone is both hired and fired by the same decision makers within a relatively short period of time, there is a strong inference that he or she was *not* discharged because of any attribute the decision makers were aware of at the time of hiring." Hill, *supra*, 144 Wn.2d at 189-90.³ This same actor inference can only be defeated by an "extraordinarily strong showing of discrimination." Stout, 2013 U.S. LEXIS 20275 at *23, quoting Coghlan v. Am. Seafoods Co., LLC, 413 F.3d 1090, 1097 (9th Cir. 2005) (explaining that "rarely" is a plaintiff's evidence sufficient to overcome the same actor inference).

C. Microsoft Met Its Burden

Ms. Simmons cannot meet the third prong of her prima facie case because, as explained above, she was not performing her job satisfactorily. Regardless, Microsoft plainly had a legitimate, non-discriminatory reason for the termination decision, i.e., poor performance. Significantly, Ms.

retaliation); and other cases cited herein.

³ In Hill, the Supreme Court further stated, "For a plaintiff to prevail under such circumstances, the evidence must answer an obvious question: if the employer is opposed to employing persons with a certain attribute, why would the employer have hired such a person in the first place?" *Id.* See also, e.g., Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 853, 292 P.3d 779 (2013) ("Washington courts apply the same actor inference in WLAD discrimination claims.").

Simmons does not dispute that Microsoft presented a reason for her separation. AB at 11. This admission should end the discussion and shift the burden back to Ms. Simmons. See, e.g., Texas Dept. of Comm. Affairs, supra, 450 U.S. at 256. Instead, however, she attacks Microsoft's proffered reason and the notion she had any performance issues at all. See, e.g., AB at 3-6, 11-12. By making this argument, Ms. Simmons is conflating Microsoft's burden of production to present a legitimate, non-discriminatory reason for termination with her burden of persuasion to establish the reason given is pretextual. In other words, it is not Microsoft's job to persuade the Court that the reason for termination is *not* merely a pretext, but rather it is Ms. Simmons' burden to persuade the Court that it *is*. As explained below, she falls far short of meeting her burden.

D. Ms. Simmons Cannot Establish Pretext or Create a Triable Issue of Material Fact

Given Microsoft plainly met its burden, Ms. Simmons' real challenge in surviving summary judgment comes at the pretext stage of the burden-shifting analysis. The WLAD is an anti-discrimination statute. Accordingly, she must produce evidence sufficient to create a reasonable inference that race or age discrimination was a substantial factor motivating Mr. Arsenault's termination decision and, in this case, also

overcome the same actor inference (Hill at 189-90). In an attempt to do so, Ms. Simmons makes one argument that applies both to her age and race claims (i.e., that she did not have performance issues), one argument specific to her age claim (i.e., she was replaced by a younger employee (Ms. Young)), and one argument specific to her race claim (i.e., Mr. Arsenault's alleged "real Kahuna" comment indicates racial animus motivating his termination decision). All three of these arguments fail under the relevant facts and law. None presents a genuine issue of material fact that Mr. Arsenault's stated legitimate, non-discriminatory reason for termination was instead a pretext for unlawful discrimination based on animus towards Ms. Simmons because of her age and/or race.

1. Ms. Simmons' Performance Issues

Ms. Simmons challenges on three separate bases the notion she had performance issues. Each is factually incorrect, legally irrelevant, and falls far short of establishing pretext.

First, Ms. Simmons claims the termination of her employment was unexpected (and unlawful) given her "overwhelmingly positive" performance reviews and absence of negative feedback.⁴ AB at 3-4, 11-

⁴ Ms. Simmons also vaguely alleges Mr. Arsenault "judged" her performance differently than that of younger or non-Pacific Islander employees. AB 16. This argument should be stricken as there is nothing in the record about how Mr. Arsenault evaluated the performance of other employees, none of whom was similarly situated to her in any event.

12. This argument ignores reality and does not withstand even the mildest scrutiny. Mr. Arsenault could not have been clearer with Ms. Simmons as to her ongoing performance issues and looming termination. She may not have liked his evaluation of her performance, but her opinion is legally irrelevant, as a plaintiff's "disagreement with her supervisor's assessment of her job performance does not demonstrate pretext or give rise to a reasonable inference of discrimination."⁵

Microsoft does not dispute Ms. Simmons had strengths and performed certain aspects of her job well. That does not negate the undisputed performance issues which eventually formed the basis for Mr. Arsenault's termination decision. The record reflects that even before Ms. Simmons took the job as Mr. Arsenault's EA, she had problems communicating and collaborating with others in the manner expected of administrative support personnel. In 2009 and 2010, Ms. Simmons' manager, Ms. Ho, noted Ms. Simmons' interpersonal and communication skills issues and urged her to improve in these critical areas. In her March 2011 interviews for Mr. Arsenault's EA position, concerns were identified and expressed regarding these same issues. While recognizing these

⁵ Fulton, *supra*, 169 Wn. App. at 162. See also, e.g., Griffith, *supra*, 128 Wn. App. at 447, ("employee's subjective beliefs and assessments as to his performance are irrelevant" to show pretext); Chen v. State, 86 Wn. App. 183, 191, 937 P.2d 612 (1997) ("An employee's assertion of good performance to contradict the employer's assertion of poor performance does not give rise to a reasonable inference of discrimination.").

concerns, Mr. Arsenault gave Ms. Simmons the benefit of the doubt and hired her for the role. Ms. Simmons' job was to support Mr. Arsenault and enable him to be more efficient and effective in his executive role. CP 43 at 13-25; CP 44-48; CP 49 at 1-22. Yet she continued to struggle with her interpersonal, communication, and collaboration skills and had ongoing conflicts with the group's Business Manager (Mr. Sexsmith) and others.

Despite extensive feedback, coaching, and counseling, Ms. Simmons refused to take ownership of these issues and instead continually placed the blame elsewhere. Even now she continues to shirk accountability. She totally ignores, for example, the numerous performance-related emails among Mr. Arsenault, Mr. Sexsmith, human resources, and her beginning in January 2012 and continuing through the termination of her February 2013 employment. She also glosses over Mr. Arsenault's comment in her 2012 check-in that her direct approach had a negative impact on the team and she needed to demonstrate and sustain improvement in that area. Finally, she ignores the fact she received a "5" performance rating (the lowest score available), which was a clear warning her job might be in jeopardy, a full five months before her employment was terminated.

Ultimately, after 21 months, Mr. Arsenault concluded he needed to make a change and that termination of Ms. Simmons' employment was appropriate. CP 237 at ¶ 30. To claim she was surprised by his decision is either disingenuous or another example of the lack of interpersonal awareness so thoroughly documented in the record. Regardless, again, Ms. Simmons was an at-will employee,⁶ and courts are not supposed to second-guess the wisdom of an employer's personnel decisions.⁷

Second, Ms. Simmons tries to demonstrate pretext by contending Microsoft has provided inconsistent reasons for her separation. AB at 12-13. This, too, is incorrect. There is no genuine mystery here, especially since Mr. Arsenault provided Ms. Simmons with repeated written notice of his concerns and opportunities to improve. Further, the reasons given have always focused on aspects of Ms. Simmons' performance and its impact on the business, particularly her communication style and difficulty working with others.

⁶ Danny v. Laidlaw Transit Servs., Inc., 165 Wn.2d 200, 207, 193 P.3d 128 (2008) (may be fired for any reason); Cole v. Red Lion, 92 Wn. App. 743, 750, 969 P.2d 481 (1998) (may be fired for any or no reason).

⁷ See, e.g., Gatewood v. Columbia Pub. Sch. Dist., 415 F.Supp.2d 983, 1003 (8th Cir. 2006), citing Henderson v. Ford Motor Co., 403 F.3d 1026, 1034 (8th Cir. 2005) (courts do not have "authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.").

Third, Ms. Simmons points to positive comments about her performance (e.g., from the Kudos Award and 360 review, i.e., anonymous comments from employees she asked to participate) from persons other than Mr. Arsenault. AB at 6. This argument also fails as a matter of law. Simply put, co-workers' opinions of Ms. Simmons' performance are legally irrelevant.⁸ Mr. Arsenault was her supervisor and it is his view that matters. In addition to being immaterial, the 360 Review and Kudos award are also inadmissible hearsay.⁹

2. Ms. Simmons' Replacement by a Younger Employee Does Not Create a Triable Issue of Material Fact

Against this backdrop, Ms. Simmons' attempt to create a material issue of fact specific to her age claim fails as a matter of law. As a preliminary matter, it is undisputed Mr. Arsenault did not know Ms. Simmons' age (CP 238 at ¶ 35), and she admits there is nothing Mr. Arsenault said or did to suggest any age bias toward her. CP 21 at 13-25; CP 22 at 1-7; CP 28 at 9-11. Moreover, her heightened burden based on

⁸ See, e.g., Lee v. State of Minn. Dep't of Commerce, 157 F.3d 1130, 1135 (8th Cir. 1998) (personal opinions by non-decisionmakers do not support reasonable inference of discrimination); Johnson v. Gen. Bd. of Pension & Health Benefits of the United Methodist Church, 2012 U.S. Dist. LEXIS 24918 at *22-23 (N.D. Ill.) (and cases cited therein) (former coworkers' personal opinions irrelevant); McKinley v. Skyline Chili, Inc., 2012 U.S. Dist. LEXIS 114020 at *17-18 (S.D. Ohio) (and cases cited therein) (former coworkers' personal opinions do not create genuine issue of material fact or establish pretext).

⁹ Ebel v. Fairwood Park II Homeowners' Assoc., 136 Wn. App. 787, 792, 150 P.3d 1163 (2007).

the same actor inference discussed above applies even more forcefully here because Mr. Arsenault is in the same protected class (40 and over) and indeed seven years older than Ms. Simmons.¹⁰ Mr. Arsenault was 48 and she was 41 when he hired her, and he was 50 and she was 43 when he terminated her employment. CP 18 at 15-16; CP 232 at ¶ 2.

Other than the performance-related arguments above, the only evidence Ms. Simmons relies upon in an effort to prove her age claim is that in 2012, Ms. Young (who is younger than Ms. Simmons) was hired into the group and later became Mr. Arsenault's EA following an open hiring process after Ms. Simmons left. AB at 5, 13-14. See also CP 29 at 17-25; CP 30; CP 31 at 1-4; CP 106 at 9-25; CP 107; CP 108 at 1-9; CP 146-148. Nothing about this provides a basis for Ms. Simmons' claim to survive summary judgment.

First, as the trial court properly recognized, the mere fact Ms. Simmons was replaced by a younger employee (Ms. Young) does not evidence "pretext" supporting an age discrimination claim. See, e.g., Griffith, supra, 128 Wn. App. at 456; Stout, supra, 2013 U.S. LEXIS at

¹⁰ See, e.g., Hill, supra, 144 Wn.2d at 190 (decision-maker's age undermines discriminatory inference); Stout, supra, 2013 U.S. LEXIS at *24 (decision-maker's "membership in the protected class strengthens the same actor inference").

*25-26.¹¹ This is also common sense. Were it otherwise, every time an employer terminated someone from one protected class and then hired someone from another protected class, there would need to be a trial on a discrimination claim.

Second, it was entirely logical Ms. Young was selected for Mr. Arsenault's EA position. She had been in the ISRM group since 2012 and thus familiar with the business, had performed well in her prior role working for Mr. Hildenbrand, and performed well as Mr. Arsenault's interim EA for nearly two months before the selection was made. CP 238 at ¶ 34. As noted above, in 2011, Mr. Arsenault initially offered the EA position to the person filling the role on an interim basis. He did the same in 2013. CP 233 at ¶ 7; CP 238 at ¶ 34.

Third, there is no connection whatsoever between Ms. Young's 2012 hire and Ms. Simmons' 2013 discharge. Chris Hildenbrand hired Ms. Young as his Business Administrator. CP 237-238 at ¶ 33. Mr. Arsenault had no involvement in that decision. Id. Meanwhile, Mr. Arsenault terminated Ms. Simmons' employment and Mr. Hildenbrand had no involvement in that decision. CP 237 at ¶ 31.

Fourth, Ms. Simmons' views regarding Ms. Young being hired in 2012 (AB at 5) are also immaterial, and she conveniently ignores the fact

¹¹ The trial court did not "inappropriately ignore[]" this fact as Ms. Simmons asserts. AB at 13; AB Appendix at 6 pp. 21:11-22:3.

that she felt Ms. Young could “no doubt do the job” and recommended her for hire. CP 106 at 9-25; CP 107; CP 108 at 1-9; CP 146-148.¹² Relatedly, Ms. Simmons’ assertion that her relationship with Mr. Arsenault changed in the fall of 2011, “when Sara Young, then aged 30, was hired into the ISRM group” (AB at 5) is immaterial and skews the facts. Ms. Young did not start until January 2012, and even then Ms. Simmons’ performance issues largely revolved around her dealings with Mr. Sexsmith as reflected in the undisputed material facts set forth above.

3. The “Real Kahuna” Comment Does Not Create a Triable Issue of Material Fact

Ms. Simmons also fails to demonstrate a triable issue of material fact regarding pretext as to her race claim. Again, other than insisting she had no performance issues, she relies entirely on her subjective (and objectively unreasonable) opinion about one statement Mr. Arsenault allegedly made¹³ about 15 months before her employment was terminated. AB at 16-17. See also CP 23 at 2-25; CP 24-25; CP 26 at 1-2; CP 27 at

¹² Ms. Simmons also fails to mention Ms. Young, unlike Ms. Simmons, is both a college graduate and a military veteran. CP 248 at ¶¶ 3-4.

¹³ Ms. Simmons contends that if the objective (rather than subjective) meaning of “real kahuna” is what matters, then Microsoft could subject her to “volumes” of racist and ageist comments. AB at 17-18. As this reasoning is contrary to the relevant law, it fails under any set of facts, but especially so here given Ms. Simmons has not alleged “volumes” of comments but rather just one.

10-13; CP 31 at 8-19.¹⁴ Specifically, Ms. Simmons claims in late 2011, when Mr. Arsenault hired Brian Fielder (who was from Hawaii) for a leadership position on his team, Mr. Arsenault (who had hired and worked with Mr. Fielder before and considered him a talented addition to his team) told Ms. Simmons he was “bringing in the real kahuna.” AB at 5. See also CP 23 at 2-25; CP 24-25; CP 26 at 1-2; CP 27 at 10-13; CP 31 at 8-19; CP 238 at ¶ 36.

Ms. Simmons did not ask Mr. Arsenault what he meant or otherwise discuss this alleged comment with him. CP 31 at 8-25; CP 32 at 1-6. Per the Oxford English Dictionary, “kahuna” is a Hawaiian word referring to “an expert or wise man.” Similarly, per the Miriam Webster Dictionary, “kahuna” refers to “a pre-eminent person or thing.” Even if Mr. Arsenault made this comment, its plain meaning is complimentary. Yet, incredibly, Ms. Simmons testified she interpreted this to imply she was a “halfbreed” Pacific Islander and thus not the “real kahuna” because her mother was from Hawaii but her father was not. CP 23 at 2-25; CP 24-25; CP 26 at 1-2; CP 27 at 10-13; CP 31 at 8-19. In other words, according to Ms. Simmons, by hiring and speaking favorably in 2011

¹⁴ Ms. Simmons also references Ms. Young as being “similarly situated” to her, “white”, and receiving “glowing reviews” from Mr. Arsenault. AB at 18. They were not similarly situated as they were in different jobs working for different supervisors. Further, nothing in the record indicates Ms. Young is “white” or Caucasian, and while there is evidence she performed her job well, there is nothing specifically about her performance reviews.

about someone who is Pacific Islander (and who remains an important part of Mr. Arsenault's leadership team), Mr. Arsenault showed racial animus toward her, and this, in turn, explains why he terminated her employment in 2013. This makes no sense, is sheer speculation on her part, and was properly rejected by the trial court. Indeed, it is undisputed Mr. Arsenault did not even know one of Ms. Simmons' parents was not Hawaiian (CP 238 at ¶ 35). If anything, Mr. Arsenault's decision to hire and retain Mr. Fielder completely undermines any suggestion of such animus.

V. CONCLUSION

The trial court thoughtfully and fully considered Ms. Simmons' age and race discrimination claims, and the record on appeal amply supports its summary dismissal of those claims, particularly in light of the "same actor inference." The Court should therefore affirm the trial court's decision.

DATED this 29th day of February, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

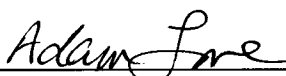
I certify that on this 29th day of February, 2016 I served a true and correct copy of the foregoing Brief of Respondent at the address stated below, via the method of service indicated below:

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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.

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