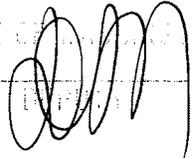


No. 41499-6-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
BY 

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JO-ANN FULTON

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

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APPELLANT'S REPLY BRIEF

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**ORIGINAL**

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## **Introduction**

This appeal reduces to a single question: Does the Washington Law Against Discrimination (WLAD) permit a state agency to fill, on a permanent basis, a WMS position with a male through an informal hiring mechanism that excludes from consideration a qualified woman who has expressed an interest in that specific position? For the reasons set forth below and in her opening brief, Jo-Ann Fulton (Ms. Fulton) submits that the answer to the question is “no.”

## **ARGUMENT**

**Contrary to applicable case law, DSHS appears to believe that this country’s and this state’s laws against discrimination in the work place do not apply to non-overt forms of discrimination.**

In her opening brief in this appeal, Ms. Fulton devoted considerable attention to the evolving nature of employment discrimination in this country. Again, it is common knowledge that prior to the advent of Title VII of the Civil Rights Act of 1964, entire groups of American citizens were largely precluded from occupying or being considered or even applying for, a variety of jobs in both the private and public sectors. For example, “Negroes-need-not-apply” and “women-need-not-apply” hiring rules for certain jobs were

commonplace. Otherwise, there would have been no need for Title VII or its Washington counterpart, the WLAD. As, among other cases, *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11<sup>th</sup> Cir. 1984), *EEOC v. Metal Service Co.*, 892 F.2d 341 (3<sup>rd</sup> Cir. 1990), reveal, the disappearance of “Negroes-need-not-apply” and “women-need-not-apply” hiring rules did not end discriminatory hiring and promotion practices in American work places. Ignoring that reality, in its brief DSHS focuses on distinguishing *Carmichael*, et al., from the case that is before this Court. The efforts to distinguish this case do not, however, answer the question that Ms. Fulton identifies in the Introduction above.

The absence of “women-need-not-apply” signs in the work place does not mean that employment discrimination cannot occur in decisions as to whom to hire or to promote. In *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001), the Washington Supreme Court made clear that it comprehends that reality:

Direct, “smoking gun” evidence of discriminatory animus is rare, since “there will seldom be 'eyewitness' testimony as to the employer's mental processes,” *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983), and “employers infrequently announce their bad motives orally or in writing.” *deLisle v. FMC Corp.*, 57 Wn. App. 79, 83, 786 P.2d 839 (1990). Consequently, it would be improper to require every plaintiff to produce “direct evidence of discriminatory intent.” *Aikens*, 460 U.S. at 714 n.3. Courts have thus repeatedly stressed that “[c]ircumstantial, indirect

and inferential evidence will suffice to discharge the plaintiff's burden.” *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 860, 851 P.2d 716, review denied, 122 Wn.2d 1018, 863 P.2d 1352 (1993). “Indeed, in discrimination cases it will seldom be otherwise . . . .” *deLisle*, 57 Wn. App. at 83.

*Id.* at 179-180.

Accordingly, the Court reiterated its adoption of the familiar *McDonnell-Douglas* formulation. That formulation required Ms. Fulton to produce evidence that (1) she is a woman; (2) she applied and was qualified for the position of Operations Manager; (3) she was not offered the position; and (4) the position went to a male. *See Kuyper v. Dept. of Wildlife*, 79 Wn. App. 732, 735, 904 P.2d 793 (1995). DSHS implicitly concedes that Ms. Fulton satisfied elements (1), (3) and (4). There is nothing in the Brief of Respondent that suggests otherwise. Further, as to element (2) there is no dispute that Ms. Fulton was qualified to hold the position of Operations Manager: She had done so for a period of several months prior to her receiving a promotion to the position of temporary Office Chief.

**Applicable case law makes clear that in order to satisfy the *McDonnell Douglas* formulation Ms. Fulton did not have to produce evidence that she applied for the position of Office Chief.**

Generally, in a failure-to-promote case under the *McDonnell Douglas* formulation, a plaintiff must demonstrate, among other things, that she applied for a specific position, but the position went to a similarly qualified male. In *Velez v. Janssen Ortho, LLC*, 467 F.3d 802, 808 (1<sup>st</sup> Cir. 2006), the court explained the rationale behind this general requirement in failure-to-hire and failure-to-promote cases:

This specificity requirement is sensible and fair. An open-ended request for employment should not put a burden on an employer to review an applicant's generally stated credentials any time a position becomes available, at the risk of a Title VII claim. If we were to find such a general request the legal equivalent of an application, we would require employers to answer for their failure to hire individuals who did nothing more than express a desire to be employed. *Cf. Brown*, 163 F.3d at 710 (stating that general expressions of interest cannot be sufficient to state a Title VII claim because such a result would “unfairly burden” employers by requiring them “to keep track of all employees who have generally expressed an interest in promotion and consider each of them for any opening for which they are qualified but did not specifically apply”). . .

..

As the First Circuit explained in *Velez*, one can appreciate the costs an employer would incur if it had to ensure that any of its employees who had at any time expressed in any form an interest in “moving up” be considered for a promotion, even if the employee did not apply for a specific position at issue. The U.S. Supreme Court has been clear,

however, that the *McDonnell-Douglas* formulation was never intended to be applied in a rigid, mechanistic fashion:

The central focus of the inquiry in [employment discrimination] case such as this is always whether the employer is treating “some people less favorably than others because of their race, color, religion, sex, or national origin.” *Teamsters v. United States, supra*, at 335 n. 15. The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic.

*Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed.2d 957 (1978).

That need for flexibility manifests in a variety of circumstances, including one in which an employer has filled a vacant position without (a) informing its employees that it intended to do so and (b) giving all interested employees an opportunity to apply for the position. *Paxton v. Union National Bank*, 688 F.2d 552 (8<sup>th</sup> Cir. 1982), exemplifies such a circumstance.

In that case, Jerry Riley (Mr. Riley), a Black male had, for a period of approximately two and one-half years, worked as a “control clerk” in the computer department of the defendant bank. During that time he had expressed his interest in “advancing” in the computer center to the computer center’s manager. He did not, however, identify a specific position in which he had an interest. In July 1979, the bank promoted a

white female (Ms. White) in the computer center to the position of “lead control clerk.” The promotion occurred even though the bank had not advertised the position. As a result, Mr. Riley had not applied for it. Regardless, subsequently, Mr. Riley alleged that the bank had discriminated against him on the basis of race by promoting Ms. White instead of him. *Id.* at 568.

The Eighth Circuit applied the *McDonnell-Douglas* formulation to Mr. Riley’s claim. In doing so the court determined, for example, that by expressing to the computer center manager his interest in advancing in the computer center, Mr. Riley had placed his employer, the bank, on notice of his interest in the position that Ms. White obtained. The Court reasoned that the position of “lead control clerk” was the next logical step up for someone who held the position of “control clerk” in the computer center. Further, the Court noted that because the bank had not advertised it, Mr. Riley was not aware of the availability of the “lead control clerk” position until after the bank had promoted Ms. White to the position. Accordingly, a rigid application of the *McDonnell-Douglas* formulation’s requirement that a plaintiff show he had applied for a specific position was inappropriate. *Id.*

Although in *Paxton* the court did not address explicitly why the rationale behind the “specificity” rule did not apply to Mr. Riley’s failure-

to-promote discrimination claim, it is clear that relaxing the rule did not undermine the rationale. That is, Mr. Riley did not come within a potentially broad group of the bank's employees who, at one time or another, might have expressed an interest in "employment opportunities" at the bank. Instead, he came within a subset of those employees, in that he had expressed an interest in advancing, logically, to the very position into which the bank promoted Ms. White. Had, prior to promoting Ms. White, the bank considered Mr. Riley and all other persons who had expressed an interest in advancing to "lead control clerk" position, very little cost would have attended such an expansion of the promotion process. Or, more generally, in the words of the court in *Velez*,

[f]or example, if, as a matter of standard procedure, a company never advertises specific positions that are available for promotion or employment, it might be inappropriate to require the identification of specific positions in a job application.

*Velez v. Janssen Ortho, LLC*, 467 F.3d at 808, n. 6.

On the other hand, had the bank advertised the "lead control position" and had Mr. Riley chosen not to apply, application of the *McDonnell-Douglas* formulation's rule requiring the plaintiff to show that he applied for the position in question would have been appropriate. Otherwise, any non-white female employee of the bank's computer center who had expressed a general interest in "employment opportunities" at the

bank could conceivably establish a *prima facie* case of employment discrimination any time a white female employee in the computer center received a promotion.

The court's ruling in *Paxton* comports with the rule that the 11<sup>th</sup> Circuit has applied in failure-to-promote cases where the plaintiff did not apply for the position at issue. Specifically,

[t]he plaintiff need not show he applied for a promotion to satisfy the *prima facie* case if the employer uses an informal promotion system that does not post openings or take applications *Jones v. Firestone Tire and Rubber Co., Inc.*, 977 F.2d 527, 533 (11th Cir. 1992). Under these circumstances, the plaintiff need only show that the employer had some reason or duty to consider the plaintiff for the promotion. *Id.*

*Watkins v. Napolitano*, 401 Fed. Appx. 461, 466 (11<sup>th</sup> Cir. 2010).

DSHS contends that Mr. Covington based his decision to appoint Mr. Haire “on the results of the formal, open, competitive, process utilized to select the permanent Office Chief.” There is no dispute that DSHS utilized a “formal, open, competitive process’ to select the Office Chief. But, clearly Mr. Covington used an informal process to select the Operations Manager. As in *Paxton*, DSHS did not advertise the Operations Manager position. In addition, Ms. Fulton did put her employer on notice that she was interested in the Operations Manager position. She did so when she held that position on temporary

appointment. When Ms. Eberle asked Ms. Fulton if she would be willing to assume the Office Chief position on a temporary appointment basis, Ms. Fulton indicated her willingness to do so, but expressed a desire to return to the Operations Manager position at the end of her tenure as Office Chief. CP 124. Combined with the rationale that undergirds the “specificity” requirement, as the court in *Velez* explained, that reality compels a conclusion that Ms. Fulton’s “failure” to apply for the Office Chief position does not defeat her claim of proscribed sex discrimination.

DSHS contends explicitly that Ms. Fulton did not express to Mr. Covington her interest in the Operations Manager position before he appointed Mr. Haire to that position on a permanent basis. Implicit in the contention is an argument that because Ms. Fulton did not express her interest in the Operations Manager position to Mr. Covington, DSHS had no notice of her interest in the position. The only evidence in the record as to Ms. Fulton’s expression of interest in the specific position of Operations Manager is her statement in her declaration that she informed Ms. Eberle, as noted above. DSHS makes light of this evidence by referring to Ms. Eberle as an “employee” of the agency. The implication is that Ms. Fulton’s informing Ms. Eberle of her interest in the Operations Manager position did not constitute notice to the agency. As Ms. Eberle notes in her declaration, however, at the time she appointed Ms. Fulton to the

temporary Office Chief position, Ms. Eberle held the position of Interim Director of the Division of Program Support “which included oversight of the Office of Claims Processing.” CP 74. Consequently, at the time of the subject conversation between Ms. Fulton and Ms. Eberle, Ms. Eberle had supervisory responsibility over Ms. Fulton. Thus, relative to Ms. Fulton, Ms. Eberle was, at a minimum, in a position analogous to that which the manager of the computer center held relative to Mr. Riley in *Paxton*.

Accordingly, DSHS had notice of Ms. Fulton’s interest in the Operations Manager position when Ms. Fulton expressed her interest in returning to the Operations Manager position to Ms. Eberle. In her declaration, Ms. Eberle does not deny that Ms. Fulton expressed an interest in returning to the Operations Manager position. CP 73-76. Nor is there any other evidence in the record on this issue.

In addition to contending that Ms. Fulton’s circumstances should not excuse her failure to apply for the Office Chief position, DSHS implicitly advances a brief “opening-the-floodgates” argument.

Specifically, in footnote 49, the agency contends as follows:

Based on Fulton’s characterizations of the law, her two acting appointments would subject the Department to jury trials on discrimination claims brought under RCW 49.60.180 by other individuals who had expressed interest in these two positions if they were different from Ms. Fulton in terms of age, gender, marital status, sexual

orientation, race, religion, national origin, military status, or disability.

At least two points are worthy of mention in response to the contention above. First, the case before the Court involves a failure-to-promote to a permanent position at DSHS. Consequently, a ruling in Ms. Fulton's favor would have immediate implications for agency practices in the context of decisions regarding whom to hire or promote to permanent positions. Second, even if a ruling in Ms. Fulton's favor had implications for an agency's temporary promotion practices, the class of potential plaintiffs would be much smaller than DSHS suggests. Specifically, that class could potentially encompass no more than those persons who had put the agency on notice of their interest, who were qualified to hold the position, and whom, despite the notice and qualifications, the agency did not consider for the position. As Ms. Eberle explained in her declaration, at the time she was appointed to the position of acting Office Chief, Ms. Fulton was the only person in the Claims Processing Office who had management experience. That is, Ms. Fulton was the only person in that unit who had the qualifications to hold the Office Chief position on a temporary basis.

In sum, similar to what obtained in *Paxton*, DSHS did not advertise the Operations Manager position prior to Mr. Covington's

decision to appoint Mr. Haire to fill that position on a permanent basis. Second, DSHS had notice of Ms. Fulton's interest in that position well-prior to Mr. Covington's decision to appoint Mr. Haire. *Hill, Paxton, and Velez* teach that under those circumstances Ms. Fulton need not show that she applied for the advertised Office Chief position in order to satisfy the *McDonnell-Douglas* formulation for establishing a *prima facie* case of sex discrimination. As explained above, notwithstanding DSHS's "floodgates" argument, there is no policy reason that compels a different result.

**Mr. Covington's ostensible lack of knowledge of Ms. Fulton's interest in the Operations Manager position does not defeat her *prima facie* case of sex discrimination.**

In another argument that appears in another footnote, DSHS contends three cases support a ruling that because Mr. Covington did not know of Ms. Fulton's interest in the Operations Manager position, as the person who made the decision to appoint Mr. Haire, he could not have discriminated against Ms. Fulton in doing so. In *Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791 (11<sup>th</sup> Cir. 2000), the court addressed, among other things, a plaintiff's claim that her employer had discharged her in retaliation for her filing a claim for leave under the Family Medical Leave Act. After noting that the employer's decision

maker was unaware that Ms. Brungart had requested the leave the court explained,

In order to show the two things were not entirely unrelated, the plaintiff must generally show that the decision maker was aware of the protected conduct at the time of the adverse employment action. . . . That requirement rests upon common sense. A decision maker cannot have been motivated to retaliate by something unknown to him.

*Id.* at 799.

*Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 115 P.3d 1065 (2005), involved a claim by a former general manager that his employer had discharged him on the basis of his age and his religion. As to the age claim, Mr. Griffith was able to articulate only that he believed his age to be a factor in the decision to discharge him because he couldn't think of another reason. This court ruled that Mr. Griffith's amorphous age claim did not satisfy the requirements of the *McDonnell Douglas* formulation. As partial support for his religious discrimination claim, Mr. Griffith alleged that management personnel told "polygamy" jokes that were aimed at him. Yet, the company decision maker who terminated Mr. Griffith's employment was not one who told the alleged jokes. It was in that limited context that this court determined that "evidence regarding non-decision makers is not relevant." Specifically,

Likewise not imputable to Schnitzer Steel were the distasteful polygamy jokes told at company management

functions by another general manager. Griffith does not assert that this individual was involved in the decision to demote and fire him. In fact, Griffith specifically testified that those individuals he believed to be the decision makers, Leonard Schnitzer, Philip, and Robinovitz, had never shown him any disrespect for his religious faith. And also telling is Griffith's admission that the jokes were a "total taboo" at Schnitzer Steel, contrary to company policy, and had been disavowed by the company's in-house counsel. 9 RP (July 2, 2003) at 1777. Griffith's own testimony conclusively established that the jokes were not attributable to the company or those who decided to terminate his employment.

Moreover, even if the jokes shed light on the work environment at Schnitzer Steel, <sup>12</sup> Griffith had to establish a nexus between the jokes and his employment by demonstrating that the jokes were probative of how Schnitzer Steel viewed Griffith as an employee. *Rubinstein v. Adm'rs of Tulane Educ. Fund*, 218 F.3d 392, 400-01 (5th Cir. 2000); *Kirby*, 124 Wn. App. at 467 n.10. If workplace comments do not pertain to an individual's qualifications as an employee, they are "stray remarks" that have no bearing in a claim for employment discrimination. . . . Here, although the polygamy jokes were unquestionably inappropriate, they were not an indictment of Griffith's abilities to serve as a Schnitzer Steel employee. Thus, even if the jokes were probative as to Schnitzer Steel's work environment, they were not proof of Griffith's discriminatory firing claim.

*Id.* at 457-458.

Finally, similar to *Griffith*, *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004), involved, among other things a claim of discrimination grounded in "stray remarks." In contrast to *Griffith*, the "stray remarks" in *Kirby* arose in the context of a failure-to-promote case. A Tacoma police officer, Mr. Kirby, alleged that a former chief of

the Tacoma Police Department had once referred to him as “part of the ‘old guard’” and had made other comments about Mr. Kirby’s age.

After Mr. Kirby did not get a promotion, he claimed that the decision not to promote him was, among other things, a result of age discrimination, as evidenced by the comments about his age allegedly made by the former chief. Consistent with its analysis in *Griffith*, this Court addressed the probative value of the alleged “stray remarks” and arrived at the same result that obtained in *Griffith*:

Kirby cites Arreola's references to older officers as the “old guard” and getting “gray-haired old captains to leave.” But Arreola was no longer working for the TPD when it promoted the two other officers and he was not involved in the promotion decisions. <sup>9</sup> Arreola's comments, therefore, cannot impute discriminatory intent to the City. <sup>10</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S. Ct. 1775, 1805, 104 L. Ed. 2d 268 (1989) (O'Connor J. concurring) (finding that statements by non-decision makers are insufficient to establish discriminatory intent).

*Id.* at 467-468.

Thus, *Brungart*, *Griffith*, and *Kirby* all involved circumstances that bear little resemblance to the factual circumstances of Ms. Fulton’s case: Ms. Fulton did not allege that Mr. Covington failed to promote her in retaliation for some protected activity in which she engaged. Nor did she allege that Mr. Covington directed gender-based comments towards her prior to his decision to appoint Mr. Haire to the Operations Manager

position. Nor do those cases have any bearing on whether Ms. Fulton established a *prima facie* case under the *McDonnell Douglas* formulation. The only question as to that formulation focuses on the general requirement that a plaintiff applied for a specific position. Again, for the reasons set forth above, Ms. Fulton's case qualifies as one in which courts have relaxed that requirement. Consequently, she satisfied the requirements of a *prima facie* case as articulated in *McDonnell Douglas* and its progeny.

**As the primary legitimate non-discriminatory reason for its failure to promote Ms. Fulton DSHS cites the very process that excluded her from being considered for the position of Operations Manager. That reason is legally insufficient as a justification for the failure to promote Ms. Fulton.**

In a failure-to-promote case, once the plaintiff has met her burden of production as to the *prima facie* case, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse action that it took. If the employer satisfies that burden, the plaintiff may counter by producing evidence that shows, for example, the employer's "reasons are insufficient to motivate the adverse employment [action]." *Chen v. State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997). DSHS's primary reason for not promoting Ms. Fulton focuses on the process that

Mr. Covington utilized to select Mr. Haire. As Ms. Fulton stated in the introduction to this brief, the central issue in her case involves the legitimacy of that process.

Numerous cases stand for the implicit proposition that in order to protect against the incidence of covert, or subtle, forms of proscribed discrimination, hiring and promotion processes must be competitive and open to all persons who have expressed an interest in the position in question. For example, *Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377 (11<sup>th</sup> Cir. 1983), involved a claim of race discrimination in connection with a school board's decision to hire a white man into a position as a coach. The selection process was informal and not openly advertised to all persons who might have been interested in the position. Consequently, Mr. Moore, an African-American, who had an interest in a coaching position did not apply. As justification for its decision not to hire Mr. Moore the employer asserted that it did not know that Mr. Moore was interested in the position. In assessing that allegedly legitimate, nondiscriminatory reason the court noted that the very selection process that resulted in the failure to hire Mr. Moore resulted, as well, in Mr. Moore's not applying for the job.

The situation in which the Board placed itself is caused by the selection process utilized. Under such a procedure, no legitimate reason can be shown. Moore never had the

opportunity to apply for the head coach position at Jones Valley, and therefore, never was brought into competition for the position with white coaches. The reason given by the Board thus became legally insufficient and illegitimate.

*Id.* at 1383.

A clear articulation of this rule in the failure-to-hire or failure-to-promote context appears in *Jones v. Firestone Tire and Rubber Co., Inc.*, 977 F.2d 527, 533 (11<sup>th</sup> Cir. 1992):

Accordingly, a plaintiff makes out a prima facie case -- that is, he creates a presumption of discrimination and forces the employer to articulate legitimate reasons for his rejection -- as long as he establishes that the company had some reason or duty to consider him for the post. The employer cannot avoid a Title VII violation by showing that it incorrectly assumed that the plaintiff was uninterested in the job. When the plaintiff had no notice of or opportunity to apply for the job, such a reason for rejection is “legally insufficient and illegitimate.”

Application of the teaching of *Harris* and *Jones* here is straightforward. When Ms. Fulton indicated her interest in the Operations Manager position to Ms. Eberle, she placed DSHS on notice of that interest. Consequently, the agency had “some reason” to consider her for the position in a permanent capacity. Yet, she had neither notice of nor the opportunity to apply for the permanent Operations Manager position: The agency never indicated that in order to be considered for the Operations Manager position, one would have to apply for the Office Chief position. Similar to what transpired in *Harris*, the process that Mr.

Covington utilized to appoint Mr. Haire to the Operations Manager position placed DSHS in the situation of effectively claiming that the agency did not know of Ms. Fulton's interest in the position.

Consequently, as in *Harris*, the "process" reason for not promoting Ms. Fulton is "legally insufficient and illegitimate."

**At a minimum, whether Mr. Covington determined that Ms. Fulton was not the "best candidate" for the position of Operations Manager prior to his decision to appoint Mr. Haire to that position is a question of fact.**

The second allegedly legitimate nondiscriminatory reason that DSHS articulates for its failure to promote Ms. Fulton ostensibly derives from Mr. Covington's assessment of her qualifications for the Operations Manager position:

Even if Ms. Fulton had applied, Mr. Covington did not believe she was the best candidate for the position.

Resp. Br. at 29. That assertion is problematic for several reasons. First, it rests on a contention that as her supervisor, Mr. Covington had observed that "Ms. Fulton did not deal well with stressful situations and had poor people and problem solving skills." At a minimum there is conflicting evidence in the record as to whether Mr. Covington actually observed Ms. Fulton in "stressful situations" during the approximately three-week

period when he functioned as her supervisor. As she noted in her opening brief, in her declaration Ms. Fulton stated that she had no one-on-one interactions with Mr. Covington during that three-week period. Nor did he actually “observe” her during that period.

Second, in *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1298 (D.C. Cir. 1998), the court noted that

although employers may of course take subjective considerations into account in their employment decisions, courts traditionally treat explanations that rely heavily on subjective considerations with caution. . . . [W]e observed in *Fischbach v. D.C. Department of Corrections*, 318 U.S. App. D.C. 186, 86 F.3d 1180, 1184 (D.C. Cir. 1996), that an employer's heavy use of “highly subjective” criteria, such as “interpersonal skills,” could support an inference of discrimination. *See generally Perfetti v. First Nat. Bank of Chicago*, 950 F.2d 449, 457 (7th Cir. 1991) (discussing “the ease with which employers may use subjective factors to camouflage discrimination”) (citation omitted); *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1506 (4th Cir. 1988); Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 BERK. J. EMP. LAB. L. 183, 218-24 (1997) (discussing the difficulties presented by the “personality” rationale for employment decisions). . . .

There is no evidence in the record that Mr. Covington ever conducted a performance review of Ms. Fulton prior to coming to his conclusion that she “did not deal well with stressful situations” and that she had “poor people skills.” Ms. Fulton submits that Mr. Covington’s apparently post-hoc subjective judgment implicates the kind of concern surrounding

subjective judgments about which the *Aka* court warned. For this and the other reasons set forth above, Ms. Fulton submits that she has satisfied her burden of production as to the pretext stage of the *McDonnell Douglas* formulation.

### **Conclusion**

Under a rigid application of the *McDonnell Douglas* framework a woman who alleged that discrimination motivated her employer's decision not to promote her would always have to demonstrate that she had applied for the specific position that forms the basis for her complaint. Under that application of the *McDonnell Douglas* formulation, an employer's decision maker who wished not to hire a particular woman because of his ostensible subjective belief that she "did not handle stress well" or had "poor people skills" could simply not make the woman aware that he intended to fill the position. Whether Ms. Fulton was the "best qualified" person to fill the Operations Manager position on a permanent basis, one cannot know: The informal process that Mr. Covington used to appoint Mr. Haire denied Ms. Fulton, a woman who had placed DSHS on notice of her interest in the position, the opportunity to compete for it. For the reasons set forth above, Ms. Fulton submits that the WLAD does not permit such a circumstance.

Respectfully submitted this 1<sup>st</sup> day of June, 2011.

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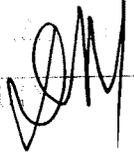
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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON



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JO-ANN FULTON

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

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CERTIFICATE OF SERVICE

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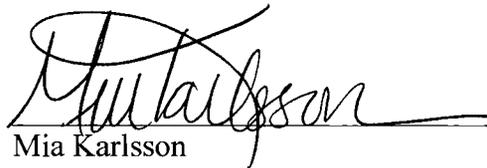
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