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

KIM TOSCH,

Appellant,

vs.

**YWCA PIERCE COUNTY,
a Washington Corporation,**

Respondent

BRIEF OF APPELLANT

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I. Introduction

Kim Tosch was a 58 year old Paralegal and Legal Advocate in the Legal Department of the YWCA Pierce County in 2012 and was the third and last remaining employee over age 50 to be fired in a 13-month period. At the time of her firing, Ms. Tosch was given no reason for the termination of her employment and neither the managers who made the decision to fire her, nor the Human Resources Department of the YWCA, have *any* contemporaneous notes which reference or explain the reason for the termination of Ms. Tosch's employment.

Ms. Tosch's supervisor, Hannah McLeod, age 31, testified that she made a "joint decision" with Legal Director Kevin Rundle, to fire Ms. Tosch. The employee who replaced Ms. Tosch submitted a sworn statement that Ms. McLeod referred to Ms. Tosch as an "older lady" when explaining why she did not learn quickly.

Just five work days before the termination of her employment Ms. Tosch had an annual performance review and while there were several areas marked "Needs Improvement" , Ms. Tosch's overall job performance was *not* rated as "Unsatisfactory" (which is a specific rating on the evaluation form).

After Ms. Tosch was terminated, YWCA Legal Director Kevin Rundle and Supervisor Hannah McLeod, both of whom had signed Ms.

Tosch's performance evaluation just days before firing Ms. Tosch, claimed that Ms. Tosch's job performance was exceptionally poor. Despite the performance evaluation he signed, Legal Director Kevin Rundle testified that Ms. Tosch was unable to perform *any* paralegal work in a suitable manner.

The evidence before the trial court regarding the reason for Ms. Tosch's firing was in conflict:

1. The Human Resources Director testified at her deposition that the only reason she was given for firing Ms. Tosch was the failure to present a document to the court in a timely manner;

2. In her Declaration in support of summary judgment, the Human Resources Director gave the reason for Ms. Tosch's firing as being a failure to "timely prepare a bench copy of a responsive brief";

3. Ms. Tosch submitted a Declaration in which she directly disputed that she had failed to timely prepare or submit a document to the court, giving specific details about the assignment and the fact that she had prepared and submitted the document precisely as directed.

Ms. Tosch also presented evidence that, as a result of a conversation, Legal Director Kevin Rundle had learned Ms. Tosch's age (58), reacted with surprise and thereafter treated her in a negative manner until firing her in August, 2012.

Ms. Tosch filed suit asserting a claim of age discrimination under RCW 49.60, the Washington Law Against Discrimination. The trial court dismissed the suit on summary judgment following oral argument and taking the case under advisement.

II. Assignment of Error

The trial court erred in entering the Order Granting Defendant YWCA Pierce County's Motion for Summary Judgment dated December 27, 2013, dismissing Kim Tosch's claims of wrongful termination based on her age.

Issues Pertaining to Assignment of Error

(1) Did Kim Tosch establish a *prima facie* case of age discrimination in submitting evidence that, as of the date she was fired, she was in the protected class, was replaced by a significantly younger employee, and was doing satisfactory work?

(2) Is evidence that the reasons given for Kim Tosch's discharge lack a factual basis sufficient to establish pretext?

III. Statement of the Case

Plaintiff Kim Tosch was hired by the YWCA on September 20, 2011, after working as a volunteer during the preceding summer months. At the time she was hired, Ms. Tosch was 57 years of age. CP 293. She was given a job as a Legal Advocate/Paralegal, working 30 hours, four days a week. Her immediate supervisor was Hannah McLeod, who was 31

years of age. CP 293.

Ms. Tosch's employment with the YWCA Legal Department was uneventful with no disciplinary action of any kind and no complaints of poor performance until 2012 when she had a conversation with Legal Director Kevin Rundle and, in response to a comment on his part indicating his belief that they were the same age, revealed that she was in fact 10 years older than him. According to Ms. Tosch, Mr. Rundle appeared to be stunned. CP 187. ***From that moment forward, Mr. Rundle's attitude and behavior toward Ms. Tosch changed and he became very negative and hostile.*** CP 188.

Mr. Rundle immediately changed Ms. Tosch's work assignments and began to overwhelm her with work. CP 188. On August 28, 2012, Mr. Rundle fired Ms. Tosch *without stating any reason. No contemporaneous documentation exists for the reasons for the termination of Ms. Tosch's employment.* Neither Mr. Rundle nor Ms. McLeod who ***jointly*** made the decision to fire Ms. Tosch, nor the Human Resources Director who discussed the reasons for firing Ms. Tosch with Mr. Rundle that morning, made any written record of the reasons for Ms. Tosch's termination.

Immediately after Ms. Tosch was fired, she wrote to YWCA Pierce County CEO Miriam Barnett and told her that she believed age

discrimination existed in the YWCA legal department. CP 198. Only then did the YWCA begin to create documentation to justify Ms. Tosch's firing. Mr. Rundle and Ms. McLeod wrote e-mails to Ms. Barnett in which they alleged that Ms. Tosch had a long history of substandard performance. CP 42-44. However, those claims directly conflicted with a performance evaluation that was signed by both Ms. McLeod and Mr. Rundle just five work days before Ms. Tosch was fired.¹ CP 62.

Furthermore, according to Human Resources Director Ryann Robinson, substandard performance was *not* the reason given to her for Ms. Tosch's termination. Ms. Robinson testified that Legal Director Kevin Rundle had never discussed firing Ms. Tosch until the day she was fired. Mr. Rundle told Ms. Robinson on that day that Ms. Tosch was being fired for failing to timely "present" documents to the Court in a family law matter:

Q Do you recall a discussion about firing Kim Tosch close to or on August 28, 2012, the day she was fired?

A I had a conversation surrounding her termination that morning.

Q To the best of your recollection, is that the first time anyone brought up the subject of firing Kim Tosch?

¹ The performance evaluation was completed on August 9, 2012. Ms. Tosch was fired on August 28, 2012, but due to her work schedule and a previously planned week off work, Ms. Tosch only worked 5 days between her performance evaluation and the termination of her employment. CP 189-190.

A Yes.

Q Who brought up the subject of firing Kim Tosch the morning of August 28, 2012?

A Kevin Rundle.

Q Did you document your conversation with Mr. Rundle about his reasons for wanting to terminate Ms. Tosch?

A No.²

* * *

Q What do you recall being the reason that Kim Tosch was fired?

A Not presenting documents in a timely manner to the court.

Q Did you say not presenting?

A Yes.

Q Did you independently verify that the documents had not been timely presented to the court?

A I did not.³

YWCA Pierce County moved for summary judgment of dismissal and submitted a two page declaration from Human Resources Director Robinson in which she stated that the *only* reason she was given for Ms. Tosch's termination was her failure "to timely prepare a bench copy of a

² CP 207.

³ CP 204.

responsive brief she had failed to properly calendar". CP 71. This claim was factually disputed and contradicted by Ms. Tosch. CP 191-195.

In response to Ms. Tosch's complaint of age discrimination, in which she cited the fact that she was the third employee over the age of 50 to be fired in the past year (and *only* employees over the age of 40 had been fired in the legal department since 2006), CEO Miriam Barnett claimed that an "internal investigation" revealed no evidence of age discrimination. CP 47.

Human Resources Director Ryann Robinson conducted the "internal investigation." Not only did she fail to verify whether the stated reason for Ms. Tosch's discharge was true, but she interviewed no one:

Q Did you investigate an allegation of age discrimination made by Kim Tosch?

A Yes.

Q Who did you interview in the course of your investigation of age discrimination made by Kim Tosch?

A I did not interview anyone.⁴

* * *

Q Did you look at the allegation of age discrimination at the YWCA in your capacity as HR director in terms of disparate impact?

A I didn't.⁵

⁴ CP 205.

Supervisor Hannah McLeod, who made the “joint decision” to fire Ms. Tosch, was completely unaware that any “investigation” into Ms. Tosch’s firing ever occurred:

Q Were you ever told that there was an investigation occurring into age discrimination at YWCA?

A I don't think so, no.

Q To the best of your knowledge, at least if there was an investigation, you weren't a participant in it?

A Correct.⁶

* * *

Q If one wanted to investigate age discrimination at the YWCA legal department, given your position, do you believe it would be appropriate to talk to you?

A I don't see why not.

Q Well, you had input into both the hiring and the firing of a number of people while you have been a manager there; correct?

A That's true.⁷

* * *

Q Are there any other managerial employees, other than you and Kevin Rundle, within the YWCA legal department?

A No.

⁵ CP 205-206.

⁶ CP 216.

⁷ CP 217.

Q And so both you and Kevin Rundle jointly, as you said a number of times during this deposition, make decisions about hiring and firing; correct?

A I would say he takes my input, but it's his main decision. But, yeah.

Q And therefore, if one wanted to know if age was a factor in the hiring or firing process at the YWCA legal department, talking to the two managerial employees there would be pretty fundamental, wouldn't it?

A I suppose so.⁸

Had Ms. Robinson interviewed Renda Wilson, who replaced Ms. Tosch, she would have learned that Supervisor Hannah McLeod, *who participated in the decision to fire Ms. Tosch*, told Ms. Wilson that Ms. Tosch did not learn quickly on the job, explaining that "She was a nice lady ***but she was older.***"⁹ Associating Ms. Tosch's ability on the job with her age is clear evidence of discriminatory animus and is direct evidence of a discriminatory motive in terminating Ms. Tosch's employment.¹⁰

The YWCA moved for summary judgment, primarily relying upon the "same actor inference" to argue in favor of dismissal. The Court granted summary judgment dismissing Ms. Tosch's claims after hearing argument and taking the case under advisement, providing no explanation

⁸ CP 217.

⁹ CP 201.

¹⁰ Both Ms. Robinson and Legal Director Kevin Rundle conceded at their depositions that associating an employee's age with job performance would be illegal and evidence of discrimination. CP 211-212.

for its ruling.

IV. Argument

A. Employment Discrimination Cases Should Rarely Be Dismissed on Summary Judgment

The Washington Supreme Court has acknowledged that the purpose of the Washington Law Against Discrimination is to eradicate discrimination in Washington which is a public policy of the highest priority. *Martini v. Boeing Co.*, 137 Wn. 2d 357, 364, 971 P.2d 45 (1999); *Marquis v. City of Spokane*, 130 Wn. 2d 97, 108, 922 P.2d 43 (1996).

Washington appellate courts have recognized that “summary judgment in favor of employers is seldom appropriate in employment discrimination cases.” *deLisle v. FMC Corp.*, 57 Wn. App. 79, 84, 786 P.2d 839 (1990)(summary judgment reversed). *See also Frisino v. Seattle School Dist. No. 1*, 160 Wn. App. 765, 777, 249 P.3d 1044 (2011)(summary judgment reversed: “In discrimination cases, summary judgment is often inappropriate because the WLAD mandates liberal construction.”); *Johnson v. Chevron, U.S.A.*, 159 Wn. App. 18, 27, 244 P.3d 438 (2010)(“In discrimination cases, summary judgment is often inappropriate because the WLAD mandates liberal construction and the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury.”).

Two important considerations come into play when an employer moves for dismissal of an employment discrimination claim. The first is the fundamental rule that *all* evidence and *all* reasonable *inferences* from the evidence must be interpreted in the light most favorable to the non-moving party. *Peterson v. Kitsap Community Federal Credit Union*, 171 Wn. App. 404, 287 P.3d 27 (2012). This rule is of critical importance because the Washington Supreme Court has recognized that:

“Direct, ‘smoking gun’ evidence of discriminatory animus is rare, since ‘[t]here will seldom be ‘eyewitness’ testimony as to an 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 Wash. App. 79, 83, 786 P.2d 839 (1990).

Hill v. BCTI Income Fund-I, 144 Wn. 2d 172, 179, 23 P.3d 440 (2001).

Having pointed out the secretive nature of a discriminatory motive, the Washington Supreme Court has emphasized that plaintiffs almost invariably must rely on indirect evidence and the inferences from that evidence:

Courts have thus repeatedly stressed that “[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff’s burden.” *Sellstad v. Wash. Mut. Sav. Bank*, 69 Wash. App. 852, 860, 851 P.2d 716, *review denied*, 122 Wash. 2d 1018, 863 P.2d 1352 (1993). “Indeed, in discrimination cases it will seldom be otherwise....” *deLisle*, 57 Wash. App. at 83, 786 P.2d 839.

Hill v. BCTI Income Fund-I, 144 Wn. 2d at 179-180.

In light of the difficulty of obtaining direct evidence and the summary judgment standard in favor of the non-moving party, the Court of Appeals has warned trial courts to be cautious when considering summary judgment motions in employment cases:

Summary judgment in favor of the employer in a discrimination case is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury.

Davis v. West One Automotive Group, 140 Wn. App. 449, 456, 166 P.3d 807 (2007)(summary judgment in favor of employer reversed on appeal and case remanded for trial).

Finally, the Washington Legislature has expressly mandated that the Washington Law Against Discrimination "shall be liberally construed" in order to eradicate discrimination in the state of Washington. RCW 49.60.020.

B. Kim Tosch Established a Prima Facie Case of Age Discrimination Under the *McDonnell Douglas* Factors

In the absence of direct evidence of discrimination, Washington courts generally follow the non-exclusive factors set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), in which the plaintiff must make out a *prima facie* case of discrimination. Once a *prima facie* case of discrimination is made, discrimination is presumed unless the employer can produce evidence of legitimate.

non-discriminatory reasons for terminating the plaintiff's employment. If the employer satisfies its burden of production, the plaintiff must then produce evidence that the employer's reasons are a pretext and unworthy of belief.

In order to establish a *prima facie* case of age discrimination in employment, the plaintiff must present *some* evidence of each of the following elements:

1. The plaintiff belongs in the protected class;¹¹
2. The plaintiff was discharged;
3. The plaintiff was doing satisfactory work when the termination decision was made; and
4. The plaintiff was replaced by a younger employee.¹²

Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 86-87, 98 P.3d 1222 (2004); *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 2d 355, 362, 753 P.2d 517 (1988).

¹¹ Discharge over the age of 40 is an unfair practice if because of age. RCW 49.60.180(2); RCW 49.44.090(1); RCW 49.60.205. *Carle v. McChord Credit Union*, 65 Wn. App. 93, 827 P.2d 1070 (1992)(affirming verdict for plaintiff in age discrimination case).

¹² Typically, the fourth element in a discrimination case is that the plaintiff was replaced by someone not in the protected class but in age discrimination cases, such as the present case before the Court, the plaintiff "need only show that he was replaced by someone significantly younger." *Hill v. BCTI Income Fund-I*, 144 Wn. 2d at 188. Furthermore, the "element of replacement by a younger person or a person outside the protected age group is not absolute: rather the proof required is that the employer 'sought a replacement with qualifications similar to [her] own, thus demonstrating a *continued need* for the same services and skills.' *Loeb*, at 1013." *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 355, 363, 753 P.2d 517 (1988) (emphasis added).

Appellate courts have noted that the plaintiff's initial burden in establishing a *prima facie* case is a "low threshold" to meet. *See e.g., Schechner v. KPIX-TV*, 686 F.3d 1018, 1025 (9th Cir. 2012).

1. Three of the Four Factors Were Undisputed

There is no dispute that Kim Tosch was fired from her job with the YWCA and that, at age 58, she was in the protected class. It is also clear that her work was given to "significantly younger" employees.¹³

That leaves only the third element, i.e. whether Ms. Tosch was doing satisfactory work at the time of her discharge, in dispute. Even though Ms. Tosch was only required to show *some* evidence that she was doing satisfactory work at the time of her discharge to create a disputed issue of fact incapable of resolution on summary judgment, there is a significant amount of evidence that Ms. Tosch was in fact doing satisfactory work.

2. There is Conflicting Evidence About Kim Tosch's Job Performance, Precluding Summary Judgment

With respect to an assessment of job performance, a plaintiff cannot merely contest an employer's contention that the plaintiff was not

¹³ Mr. Rundle admitted at his deposition that immediately after she was fired, Ms. Tosch's work was re-assigned to younger employees, including Ms. McLeod (age 31) and Ms. Alvarado (age 24). CP 213. According to Ms. McLeod, Renda Wilson, age 49, replaced Ms. Tosch as Legal Advocate/Paralegal. CP 213.

performing in a satisfactory manner by giving their own subjective *conclusions* about their work performance. Instead, a plaintiff must bring forth *facts* which render the satisfactory nature of his or her work to be a genuine issue of fact that must be resolved at trial:

Here, defendant's affidavit sets forth facts leading to plaintiff's termination. The memoranda attached to the affidavits set forth specific events, occurrences, things that were claimed to exist in reality. They stated that plaintiff did this or did not do that. On the other hand, plaintiff's affidavit in opposition presented only his conclusions and opinions as to the significance of the facts set forth in defendant's affidavit, e.g., that was "petty," this was a "pretext," that was "an exaggeration," or a fact set forth was "much ado about nothing." It is apparent that these phrases do not describe an event, an occurrence, or that which took place.

Equally deficient are plaintiff's statements in his affidavit that he was not uncooperative, and that his job performance was not substandard. These are conclusions. As such, they do not counter defendant's statements of noncooperation based upon specific incidents. *It would be different if plaintiff had claimed the incidents did not occur; for example, had he said that he had, in fact, completed all employee evaluation forms when defendant said he did not, an issue of fact would have existed.*

Grimwood v. University of Puget Sound, Inc., 110 Wn. 2d 355, 360, 753 P.2d 517 (1988).

In the present case, there is substantial evidence above and beyond Ms. Tosch's description of her own work performance which creates a genuine issue of material fact.

First, there is *no record* of any disciplinary action taken against Ms. Tosch for *any* unsatisfactory work performance at any time during her employment. Why is this important? Because the YWCA's disciplinary

policy specifically makes substandard performance a disciplinary offense.

CP 221-222. Moreover, the YWCA Legal Department did in fact take formal disciplinary action against employees who engaged in unsatisfactory work performance. CP 223-224.

YWCA Disciplinary Action policy 4.1.4 specifically provides for disciplinary action to “correct substandard work performance”:

The YWCA provides discipline to correct *substandard work performance*, work rule violations, or behavior.¹⁴

The purpose of the Disciplinary Action policy is set forth in the policy:

The purpose of this process is to assist the employee in *achieving an acceptable standard of* conduct and *job performance*.

Furthermore, the Defendant uses a specific form entitled “Disciplinary Notice” when an employee receives disciplinary action and it serves to clearly identify when disciplinary action has been imposed.

Human Resources Director Ryann Robinson testified to the use of the form:

Q I can go get one if necessary, but the YWCA appears to have a form that has at the top, “Disciplinary Notice.”

A Right.

Q You’re familiar with that form?

A Yes.

¹⁴ CP 221-222.

Q Is that form supposed to be used when an employee is disciplined and received formal disciplinary action?

A Yes.¹⁵

No such form can be found anywhere in Ms. Tosch's personnel

file. Human Resources Director Ryann Robinson specifically advised managers at the YWCA that they were to document disciplinary action, including even verbal warnings:

Q The disciplinary action policy for the Y[WCA] discusses various types of disciplinary action, including verbal warning.

A Uh-huh.

Q You're familiar with that?

A Yes.

Q And a verbal warning is when the employee is orally advised of a conduct violation or performance deficiency; correct?

A Yes.

Q But the Y[WCA]'s policy says the supervisor may place a note in the employee file to document the conversation took place; correct?

A Correct.

Q Do you recommend that they do that?

A I do.

Q That's good HR practice, isn't it?

¹⁵ CP 209.

A Yes.

Q In the course of your education and training in the HR field, have you been taught that documenting disciplinary action is good practice?

A Yes.

Q Would you agree that it eliminates later disputes about whether someone had received disciplinary action or not received disciplinary action?

A Yes.

Q Have you communicated to managers at the YWCA that if they impose verbal warnings, that they should document that?

A Yes.¹⁶

The absence of *any* documentation of disciplinary action, either verbal or written, pertaining to Ms. Tosch for substandard performance is itself strong evidence that neither Mr. Rundle nor Ms. McLeod ever truly believed Ms. Tosch's performance to be substandard before she was fired.

Second, even apart from any disciplinary action, the YWCA cited no specific evidence, much less any contemporaneous record, documenting substandard performance in support of its motion for summary judgment. CP 24.

Third, Ms. Tosch's performance evaluation included a rating of "needs improvement" in several categories but indicated that she met expectations

¹⁶ CP 210.

in every other category. The performance evaluation contains an "Overall Performance Rating" category. One of the possible ratings is "Unsatisfactory". Ms. Tosch's job performance on August 9, 2012, just five work days before she was fired, was *not* rated as "Unsatisfactory" by either Mr. Rundle or Ms. McLeod.

Furthermore, with respect to the categories rated as "needs improvement", Ms. Tosch stated in her Declaration that she disagreed with the assessment upon receiving it but was specifically told by her supervisor Hannah McLeod *not* to contest it with Legal Director Kevin Rundle because he reacted negatively to any employee disagreement. CP 189. However, YWCA Human Relations Director Ryann Robinson verified that Ms. Tosch did in fact dispute the evaluation upon receiving it:

Q Did Ms. Tosch tell you that she didn't think the performance evaluation was entirely fair or accurate?

A I don't recall those - her using those words.

Q All right. I'm not necessarily suggesting those were the specific words that she used, but was the gist of what Ms. Tosch was communicating to you was that she had a problem with the evaluation because she didn't think it was accurate?

A Correct.¹⁷

Fourth, Human Resources Director Ryann Robinson specifically

¹⁷ CP 206.

told Ms. Tosch. *after* Ms. Tosch's performance appraisal had been completed and signed by Mr. Rundle and Ms. McLeod, and just days before Ms. Tosch was fired, *that based upon her performance the YWCA had "no reason" to fire her.*¹⁸

Fifth, it was only after Ms. Tosch was fired and wrote to Defendant's CEO complaining of age discrimination that Mr. Rundle and Ms. McLeod first alleged any unsatisfactory performance as a reason for Ms. Tosch's discharge. The *post*-firing assessments from Mr. Rundle and Ms. McLeod, after Ms. Tosch complained of age discrimination, not only vary greatly from the performance appraisal conducted of Ms. Tosch *only 5 working days earlier*, they are entirely conclusory and devoid of any specific support. Unlike the declaration of Ms. Tosch, the declarations of Mr. Rundle and Ms. McLeod contain generalities and do not include *any* references to specific clients or cases or matters associated with any alleged poor performance.

In his deposition, Mr. Rundle was unable to provide any specificity to his post-firing rationalization, relying on a general claim of poor performance which was completely undocumented:

Q Well, that was a reason for firing her; correct?

¹⁸ CP 190. Although she filed two declarations supporting the YWCA's motion for summary judgment, Ms. Robinson did *not* dispute this fact.

A Not the way you phrased the question. Ms. Tosch was terminated because of a 15-month period of virtually no improvement in the ability to perform the basic tasks of the job **and just for consistent poor work performance.** That, using your words earlier, you called it the last straw or the final straw, and I didn't use those words. You did.¹⁹

* * *

Q Okay. Did you ever document the poor performance that you're complaining about of Ms. Tosch anywhere?

A Did I ever do any writings? No. I mean, did I ever do write-ups? No, I didn't do any write-ups. I guess the first would have been - I don't think I ever did a write-up, because Hannah took over as manager actually and I don't remember when that happened.²⁰

Mr. Rundle claimed in his post-firing e-mail to CEO Miriam Barnett that Ms. Tosch “was unable to ... perform any paralegal work in a suitable manner”.²¹ Yet, nothing remotely supporting that claim can be found in Ms. Tosch’s performance appraisal signed by Mr. Rundle.

Contrast the present facts before the Court with those in *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 2d 355, 364-365, 753 P.2d 517 (1988), in which the Washington Supreme Court emphasized the long history of documented unsatisfactory performance on the part of the plaintiff:

Over a long period of time the employer had called job deficiencies

¹⁹ CP 211.

²⁰ CP 211.

²¹ CP 43.

to plaintiff's attention *in writing*, suggested ways he could improve his performance, and expressed a willingness to assist him in correcting the problems. The legitimacy of defendant's reasons for discharging the plaintiff are bolstered by the fact that *the complaints were stated in writing long before plaintiff's termination*, by the fact that some *complaints about his performance came from those under plaintiff's supervision rather than only from the person with authority to discharge*, and by the fact that defendant relied, in part, on *objective events*, such as plaintiff's repeated failure to complete personnel evaluation forms for employees under his supervision, as reasons for discharging him. *Defendant had also warned plaintiff 6 months before his termination that continued substandard performance in the designated areas would be cause for dismissal.*

In the present case, the *first* notice of any complaint about job performance came on August 9, 2012, in Ms. Tosch's first annual performance appraisal which accompanied a memo about "client communications" which was entitled: "Area that needs improvement: Communications with clients".²² CP 68. No other areas of improvement were mentioned.

According to the YWCA's own Human Resources Director, a rating of "Needs Improvement" in the annual performance appraisal does not support Ms. Tosch's termination. Ms. Robinson testified that numerous employees who receive a rating of "Needs Improvement" are not terminated:

²² The memo made no reference to the YWCA's disciplinary policies for substandard performance and was not entitled "Disciplinary Notice". There is nothing in the memo that suggests it was intended to be disciplinary in nature nor has the YWCA claimed that Ms. Tosch was fired because of any deficiency in "client communications".

Q This is a general question for the organization as a whole: Have you ever seen a performance evaluation where an employee receives a rating of "Needs improvement"?

A Yes.

Q Are there any employees currently working at the YWCA who at one time received a performance evaluation that said, "Needs improvement"?

A I am sure that there are.

Q Okay. In other words, receiving a "Needs improvement" on an annual performance evaluation does not automatically lead to the termination of that employee?

A No, it does not.

Q All right. And are there employees that you can recall who have received a "Needs improvement" one year and have brought that up to "Meets expectations" the following year?

A Yes.²³

Ms. Robinson also admitted at her deposition that there had been *no complaints at all about Ms. Tosch's work performance from clients or her fellow employees*, which is difficult to conceive if, as alleged by Mr.

Rundle, Ms. Tosch had been "unable to ... perform any paralegal work in a suitable manner" during her entire fifteen months of employment.²⁴

Although the post-firing justification for Ms. Tosch's termination was poor work performance, Human Resources Director Robinson testified

²³ CP 208.

²⁴ CP 209.

that the only reason she was given for Ms. Tosch's firing was the failure to prepare and submit a document to the Court.²⁵

In her Declaration, Ms. Tosch *specifically disputed* the allegation that she was responsible for either the late filing or late delivery of a document to the Court. Ms. Tosch asserted that she was given a specific deadline by Legal Director Rundle and that she prepared the response by the date that Mr. Rundle directed her to accomplish the task. Thus, unlike cases in which a plaintiff merely offers a conclusory assessment of his or her own performance,²⁶ Ms. Tosch provided specific *facts* disputing the after-the-fact undocumented allegations made by the YWCA for the termination of her employment.²⁷

There is substantial evidence that Ms. Tosch's work performance was satisfactory at the time she was fired and she presented evidence in support of all of the elements of a *prima facie* case.

C. There is Ample Evidence That the Reasons Given for Terminating Kim Tosch's Employment Were Pretextual

A plaintiff can show pretext by producing "circumstantial and

²⁵ CP 207.

²⁶ *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 355, 363, 753 P.2d 517 (1988).

²⁷ Ms. McLeod also admitted at her deposition that even if a Legal Department employee is responsible for the late filing of a document, the outcome is not termination of employment. CP 216.

inferential evidence²⁸ of any of the following:

1. That the proffered justifications have no basis in fact;
2. That the termination was based on unreasonable grounds;²⁹
3. That the employer changed its proffered reason for the employment decision over time;³⁰
4. That the basis for termination was not a motivating factor in employment decisions for other similarly-situated employees;³¹
5. That the reasons for the employer's action are insufficient to motivate the adverse employment decision.³²

There is substantial evidence of pretext in Ms. Tosch's case. Human Resources Director Ryann Robinson stated at her deposition, as well as in her declaration, that she was given only one reason for Ms. Tosch's termination of employment. At her deposition, Ms. Robinson testified that she was told that Ms. Tosch had failed to "present" documents in a timely manner to the court.³³ In her declaration, Ms. Robinson still claimed that she was only given one reason for Ms. Tosch's firing but it had changed to a failure to "timely prepare a bench copy of a responsive brief". Ms. Tosch disputed both contentions *as a matter of fact* and set forth specific facts

²⁸ *Hill v. BCTI Income Fund-I*, 144 Wn. 2d 172, 23 P.3d 440 (2001).

²⁹ *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 115 P.3d 1065 (2005).

³⁰ *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 115 P.3d 1065 (2005).

³¹ *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 115 P.3d 1065 (2005).

³² *Chen v. State*, 86 Wn. App. 183, 937 P.2d 612 (1997).

³³ See page 3 above.

describing what actually happened in her declaration.³⁵

Even if, for purposes of argument, it were true that Ms. Tosch was responsible for a late filing of a client's response or the delivery of a bench copy to the Court, termination of employment would be unreasonable or, at the least, insufficient to motivate a decision-maker to fire Ms. Tosch.

First, because even Mr. Rundle admitted that "no harm came to the client".³⁶ But, equally important, Ms. McLeod admitted that she, too, has been responsible for the late filing of documents.³⁷ There is no indication that Ms. McLeod has suffered any adverse employment action, much less been terminated for the same alleged conduct. Nor did the YWCA offer any instance of any other employee being fired for a single instance of failing to timely prepare a document to be filed or delivered to court.

It is clear that the YWCA has changed its justification for Ms. Tosch's termination of employment over time. Once Ms. Tosch raised the issue of age discrimination, Mr. Rundle then changed the reason to fire Ms. Tosch yet again, claiming that she was "unable to perform ... any paralegal work in a suitable manner" for fifteen months despite his failure to evaluate Ms. Tosch's work performance as "unsatisfactory" just days earlier.

The lack of *any* contemporaneous documentation of the reasons for

³⁵ CP 191-194.

³⁶ CP 87. See also CP 44 ("no harm came to the client").

³⁷ CP 216.

terminating Ms. Tosch's employment, the lack of *any* contemporaneous documentation of Ms. Tosch's alleged poor performance during the length of her fifteen month employment, as well as the general and non-specific reasons offered in the post-firing assessments of her performance which are *at variance with the assessment just five working days earlier*, is strong evidence of pretext.

It is also relevant for purposes of pretext that Defendant purported to "investigate" Ms. Tosch's claim of age discrimination, following the firing of three employees all over the age of 50, and specifically informed Ms. Tosch that the "internal investigation" found no age discrimination.³⁸ By her own admission, Ms. Robinson did *not interview a single person* and did not determine whether Mr. Rundle or Ms. McLeod were motivated by Ms. Tosch's age.³⁹

Ms. Robinson also admitted that she did not even attempt to verify whether Mr. Rundle's claim that Ms. Tosch had submitted a document late to the Court was true.⁴⁰ Nor did Ms. Robinson ever speak to Ms. Tosch about Mr. Rundle's claim that she had failed to timely prepare or present a document:

³⁸ CP 47 ("[A]n internal investigation was completed. This investigation found that age was not a factor in any of the terminations.")

³⁹ CP 205.

⁴⁰ CP 205.

Q Did you ever go to Ms. Tosch and ask her what had happened?

A I did not.⁴¹

It is further evidence of pretext when an employer falsely claims to have "investigated" an allegation of discrimination in an attempt to exonerate itself.

D. There is Direct Evidence of Age Discrimination

Independent of the *McDonnell Douglas* factors, a *prima facie* case of discrimination can be established through direct evidence of discriminatory intent. *Kastanis v. Educ. Employees Credit Union*, 122 Wn. 2d 483, 859 P.2d 26 (1993). Unlike cases which have been dismissed on summary judgment because they involved claims of age discrimination which consisted of nothing more than the fact that the plaintiff could think of no other reason to explain his or her termination (and in the absence of any "ageist" comments by anyone in management who participated in the decision to fire the plaintiff), Ms. Tosch has direct evidence of discrimination.⁴²

⁴¹ CP 210.

⁴² *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 455, 115 P.3d 1065 (2005) ("Griffith recognized as much when he testified that he brought the age discrimination case because 'I don't have anything I can lay a tangible hold on as to why I was released.'; "Nor is there evidence that Robinovitz or anyone else at Schnitzer Steel had made derogatory ageist comments. . . ."). *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 2d 355, 361, 753 P.2d 517 (1988) ("I don't feel I was given sufficiently good

In the present case before the Court, Ms. Tosch can point to evidence of discriminatory intent by virtue of “ageist” comments and/or reaction. Comments alone are sufficient to establish direct evidence of discriminatory intent. *Alonso v. Qwest Communications Co., LLC*, ____ Wn. App. ____, 315 P.3d 610 (2013)(summary judgment in favor of employer reversed); *Johnson v. Express Rent & Own. Inc.*, 113 Wn. App. 858, 862-863, 56 P.3d 567 (2002)(summary judgment in favor of employer in age discrimination case reversed). The Ninth Circuit Court of Appeals has ruled that even a single remark can be sufficient to establish an inference of discriminatory intent. *Cordova v. State Farm Insurance Co.*, 124 F.3d 1145, 1149 (9th Cir. 1997).

First, Ms. McLeod's statement to Renda Wilson that Ms. Tosch "was an older lady" in explaining why Ms. Tosch did not learn quickly *on the job* is direct evidence of a discriminatory motive. By her own admission, *Ms. McLeod participated in the decision to fire Ms. Tosch* and now claims it was due to Ms. Tosch's job performance. Associating Ms. Tosch's job performance to her age and firing her on that basis is direct evidence of age discrimination.

Second, evidence of age discrimination can be found in the fact that

reason for my termination so I feel it has to be fundamentally another reason and that's all I can come up with.”).

Mr. Rundle's attitude and behavior toward Ms. Tosch changed after he brought up the subject of age and learned Ms. Tosch's true age. It is also noteworthy that Ms. Tosch was the third employee of the YWCA legal department over the age of 50 to be fired in one year (and that *only* employees over 50 have been fired in the past 7 years).⁴³ Ms. Tosch's declaration sets forth the negative reaction and treatment she received from Mr. Rundle when he learned her age which is direct evidence of discrimination.

In *Riehl v. Foodmaker, Inc.*, 152 Wn. 2d 138, 94 P.3d 930 (2004), the Washington Supreme Court emphasized that a plaintiff has the burden at trial to show that a discriminatory intent was a substantial factor in the employer's actions. But "to survive summary judgment [the plaintiff] need only show that a reasonable judge or jury *could* find [the plaintiff's protected status] was a substantial factor motivating [the employer's] adverse actions. . . . This is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence." *Riehl*, 152 Wn. 2d at 149 (emphasis in original). Ms. Tosch met her burden of production.

In *Rice v. Offshore Systems, Inc.*, 167 Wn. App. 77, 272 P.3d 865

⁴³ "Statistics showing a general pattern of discrimination are probative on the question of whether the reasons given for a particular action are pretextual." *Shannon v. Pay 'N Save Corporation*, 104 Wn. 2d 722, 735, 709 P.2d 799 (1985)(quoting *Bauer v. Bailar*, 647 F.2d 1037, 1045 (10th Cir. 1981).

(2012), the Court of Appeals reversed a summary judgment in favor of the employer based upon facts similar to the present case. In *Rice*, the employer fired the employee for allegedly trying to cut the lines of a vessel on fire. The employee then received a letter of dismissal that alleged new grounds for his termination, to include poor treatment of other employees, setting a poor example, creating bad relations with customers and being intoxicated on the job. In reversing summary judgment, the Court of Appeals pointed out that the plaintiff had offered evidence that his actions were reasonable and that he denied attempting to cut the vessel's lines, thereby creating genuine issues of fact for resolution at trial.

The Court also cited the lack of any declarations or deposition testimony from customers claiming the plaintiff had harmed relations with the employer and that even though the employer claimed the plaintiff had mistreated employees and had been repeatedly counseled about it, his personnel file contained only one written reprimand. The Court of Appeals stated:

We conclude the record contains reasonable but competing inferences of discriminatory intent because OSI's reasons are called into question by the inconsistent reasons given and evidence rebutting their accuracy and credibility.⁴⁴

The lack of contemporaneous documentation pertaining to Ms.

⁴⁴ *Rice v. Offshore Systems, Inc.*, 167 Wn. 2d at 92.

Tosch's alleged poor work performance is inherently suspect because it allows the YWCA to make generalized negative comments without any ability on the part of Ms. Tosch to dispute specific claims of poor performance.

In his declaration, Mr. Rundle, who never documented any alleged substandard performance on the part of Ms. Tosch, states that he ultimately concluded that she was “**a bad fit for Legal Services.**”⁴⁴ A claim that an employee was “not a good fit”, combined with the lack of any documented disciplinary issues, led the Court of Appeals to reverse a summary judgment against the plaintiff in *Estevez v. Faculty Club of UW*, 129 Wn. App. 774, 120 P.3d 579 (2005), stating:

Prior to her termination, Estevez received only positive feedback and was not reprimanded or disciplined. The Faculty Club initially failed to provide Estevez with any other reasons for termination other than her “stressful vibe” and their opinion that **she was not a “good fit.” [Managers] did not describe to her the other incidents they now claim motivated their decision. They admit they made no notes of these incidents,** and they do not provide any written performance evaluations or other evidence of the claimed prior disciplinary conduct.⁴⁵

E. The Same Actor Inference Does Not Apply

In moving for summary judgment, the YWCA primarily relied on the “same actor inference”, claiming that Legal Director Rundle, who was over

⁴⁴ CP 87.

⁴⁵ Emphasis added.

the age of 40, both hired and fired Ms. Tosch. The evidence is to the contrary.

Hiring decisions in the YWCA Legal Department are often made by a group of people, not by a single individual, undermining the YWCA's claim that Mr. Rundle is the "same actor" for purposes of hiring and firing employees. Mr. Rundle admitted that multiple people are involved in the hiring process:

Q And you participate in the hiring of employees in the hiring of employees in the legal department?

A I do.

Q In general, tell me how that process works.

A The posting is put out. Resumes are solicited. Human resources does the first screening. Then - I'm trying to make sure - then I review the resumes that have gone through human resources, because I don't do a lot of it. And then I believe human resources arranges - I think human resources might do an interview, and then I think I become involved in the second interview. I believe this is accurate, because I don't do it all. Then we at one point had staff participating in the process - we still kind of do it - where staff gets an opportunity to participate in the interview process. Then a decision is made. Then when the candidate is picked, human resources takes over again and does whatever human resources does, and then the person has a start date.⁴⁶

Although the YWCA claimed that Kevin Rundle alone fired the other employees over the age of 40 in order to bolster its assertion of the

⁴⁶ CP 212.

"same actor inference". that claim was contradicted by the sworn testimony of Supervisor Hannah McLeod:

Q And who made the decision to fire Ms. Barreiro?

A I believe it was a joint decision.

Q Who made the joint decision?

A I think it was me and Kevin.⁴⁷

* * *

Q And who made the decision to fire Ms. Wilson?

A That was a joint decision.

Q And who -

A Kevin. It was me. It was Miriam Barnett. It was Ryann [Robinson].⁴⁸

* * *

Q And so both you and Kevin Rundle jointly, as you said a number of times during this deposition, make decisions about hiring and firing; correct?

A I would say he takes my input, but it's his main decision. But, yeah.⁴⁹

With regard to Ms. Tosch, the evidence is clear that Mr. Rundle was *not* the sole decision-maker in terminating her employment. Ms. McLeod testified to the joint nature of the decision to fire Ms. Tosch, and that she

⁴⁷ CP 217.

⁴⁸ CP 218.

⁴⁹ CP 218.

participated in the decision:

Q Do you know why the decision was made on August 27, 2012, to fire Ms. Tosch?

A Essentially, I believe it was because her mistakes were just starting to affect our clients' cases and there just didn't seem to be a lot of improvement happening, and, you know, *we* had to make a decision.⁵⁰

Even more important is that the “same actor inference” is not appropriate in the context of this case. Under the law it is discriminatory to replace an employee in the protected class with a younger employee, even if the younger employee is also in the protected class. This recognizes that one can be a victim of illegal age discrimination because of a preference for a younger employee, even when the younger employee is over the age of 40. Although Mr. Rundle may have assumed that Ms. Tosch was in the protected class when she was hired, he did *not* know her actual age and believed her to be approximately 10 years younger than her actual age. CP 187-188. Unlike race or gender in many instances, it is not necessarily apparent whether or not an applicant is in the protected class with respect to age *or where, within the class, the applicant falls*. Ms. Tosch stated in her declaration that Mr. Rundle reacted with surprise and *began treating her differently once Mr. Rundle learned her true age*. Mr. Rundle filed two declarations supporting the YWCA’s motion to dismiss but did not dispute

⁵⁰ CP 218 (emphasis added).

Ms. Tosch's assertion that he was shocked when he learned her true age. Instead, in reply, the YWCA took two positions. First, it claimed that Mr. Rundle's shock "even if true....could just as likely be a societal nicety".⁵¹ In making this argument, the YWCA was asking the court, contrary to law, to construe Mr. Rundle's reaction in *its* favor.

Second, the YWCA, in an explicit acknowledgment that Mr. Rundle's reaction to learning Ms. Tosch's age supported a reasonable inference of discriminatory motive, asserted that his reaction was "ambiguous" ("The events are ambiguous and *depend on inference or presumption in order to support discrimination*").⁵² But under the law, that is precisely what Ms. Tosch is entitled to: All reasonable inferences in her favor.

Likewise, under the law, the trial court was required to accept as true that Mr. Rundle's behavior toward Ms. Tosch immediately changed upon learning that she was 10 years older than he had believed:

Immediately, from that moment forward, Mr. Rundle's attitude toward me changed and he began treating me in a very different, and negative, manner.

Shortly after that conversation, I was moved into the office of my direct supervisor, Hannah McLeod. I was immediately re-assigned paralegal cases, in addition to the Advocacy clients, creating an overwhelming caseload given my limited hours each week. I was not allowed to work any overtime. However, Ms.

⁵¹ CP 228.

⁵² CP 228 (emphasis added).

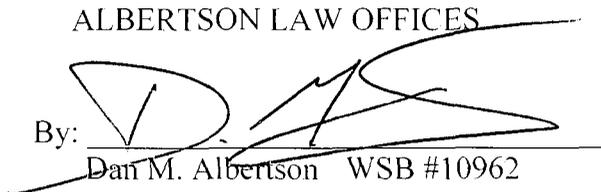
McLeod often stayed late to catch up on her files, as did some of the legal advocates. In response to this immense amount of work, Mr. Rundle was standoffish and made himself, for all practical purposes, unavailable to me. He would snap at me if I went into his office to ask a question (in contrast to his earlier socializing) and would often be short and act irritated with me. [CP 188]

V. Conclusion

The legislature has declared that it is the public policy of the state of Washington to eliminate discrimination. Kim Tosch presented a *prima facie* case of age discrimination under the *McDonnell Douglas* factors, as well as direct evidence of discriminatory motive. Accepting the evidence Ms. Tosch produced as true, as the trial court was required to do, and all reasonable inferences from that evidence, Ms. Tosch presented a *prima facie* case, as well as evidence of pretext. The trial court erred in dismissing her claims and Ms. Tosch respectfully requests this Court to reverse and remand this case for trial.

Respectfully submitted this 7th day of April, 2014.

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By: 

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Attorney for Appellant Kim Tosch

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

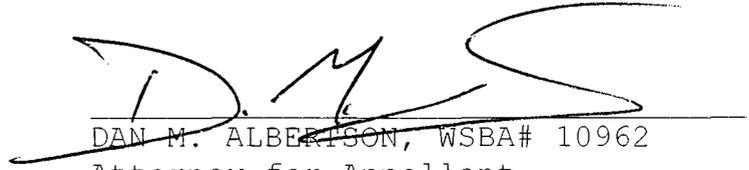
KIM TOSCH,)
)
 Appellant,) NO. 45820-9-II
)
 vs.)
) DECLARATION OF SERVICE
 YWCA PIERCE COUNTY)
 a Washington Corporation)
)
 Respondent.)
 _____)

Dan M. Albertson declares as follows:

I am over the age of eighteen years and have first-hand knowledge of the facts recited herein. On April 7, 2014, I delivered a copy of the Brief of Appellant via email and to ABC Legal Messengers for delivery to counsel for the Respondent Diana Blakeny at Tierney & Blakney, P.C., 2955 80th Ave., SE, Suite 205, Mercer Island, WA 98040.

This declaration made under penalty of perjury under the laws of the state of Washington this 7th day of April, 2014, at Tacoma, Washington.

ALBERTSON LAW OFFICES

A large, stylized handwritten signature in black ink, appearing to read 'D.M.S.', is written over a horizontal line.

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