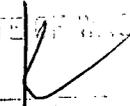


COURT OF APPEALS
DIVISION II
2014 JUL-2 11:14
STATE OF WASHINGTON
BY 

No. 45820-9-II

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

KIM TOSCH,

Appellant,

vs.

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

Respondent

REPLY BRIEF OF APPELLANT

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I. Introduction

The YWCA Pierce County begins its responsive brief by claiming that the "applicable query" is: "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?"

The answer to the question, in this case, is that the person who hired Ms. Tosch was *not* aware of the "certain attribute" (i.e. her *actual* age) and *it is uncontested* that when he became aware of it, he changed his behavior toward Ms. Tosch and began to treat her in a negative manner. In addition, one of the decision makers in firing Ms. Tosch *specifically referenced her age in criticizing* her ability to do her job. Those *facts* fundamentally distinguish this case from the cases relied upon by the YWCA Pierce County and support a reversal of the summary judgment of dismissal granted by the trial court.

There are really two "applicable queries" in this case:

1. Is there direct evidence of discriminatory animus? The answer is "yes" because:
 - a. Kevin Rundle reacted with surprise upon learning Ms. Tosch's age (and despite filing two declarations, Mr. Rundle did not deny this *fact*) and then *changed his behavior* toward her; and
 - b. Hannah McLeod specifically referred to Ms. Tosch

as being a "nice lady but she was older" in criticizing Ms. Tosch's job performance.

2. Is there evidence, upon which a jury could find, that Ms. Tosch was performing her job in a satisfactory manner when she was fired? The answer is "yes" because:

a. Ms. Tosch's job performance was *not* rated as unsatisfactory in an annual performance evaluation by the very supervisors who decided to fire her just five working days after the evaluation;

b. Human Resources Director Ryann Robinson specifically told Ms. Tosch, *after* her performance evaluation, that her job performance was *not* a reason to terminate her employment;

c. Human Resources Director Ryann Robinson testified that she was *never* told that substandard performance was the reason for Ms. Tosch's firing; and

d. There are *disputed facts* regarding the alleged precipitating event that Kevin Rundle claimed was the basis to terminate Ms. Tosch's employment.

II. Reply to Statement of the Case

1. Who Fired Kim Tosch?

YWCA Pierce County spends much of its Statement of the Case attempting to establish that Kevin Rundle was the sole decision maker in

hiring and firing personnel for YWCA Pierce County Legal Services, including Kim Tosch. The purpose of this effort is to fit the case into the "same actor inference" argument made later in the brief (and argued to the trial court during the summary judgment proceeding). The *facts*, however, do not support the "same actor inference" argument for two primary reasons.

First, the *undisputed* evidence is that Kevin Rundle was *not* aware of Ms. Tosch's actual age at the time she was hired and he has never denied that he was surprised to learn, after she was hired, that Ms. Tosch was ten years older than he believed her to be. CP 187-188. There are no *facts* cited in the YWCA Pierce County's brief to the contrary.

Second, although the YWCA Pierce County asserts in its brief that Kevin Rundle was the sole decision maker in firing Ms. Tosch, the *facts* do not support that claim. Ms. McLeod, who did *not* make the decision to hire Ms. Tosch, testified repeatedly that *firing* decisions in the YWCA Pierce County Legal Services Department were *joint* decisions involving both her and Mr. Rundle:

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.*¹

* * *

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].²

* * *

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.*³

Ms. McLeod also admitted that the decision to fire Ms. Tosch was a joint decision that included her:

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.⁴

¹ CP 217 (emphasis added).

² CP 218 (emphasis added).

³ CP 218 (emphasis added).

⁴ CP 218 (emphasis added).

At a minimum, for purposes of summary judgment, Ms. McLeod's testimony raised a genuine issue of material fact precluding the application of the same actor inference.

2. Why Was Kim Tosch Fired?

The YWCA Pierce County also attempts to supply the reasons for Ms. Tosch's firing in its Statement of the Case, claiming that Ms. Tosch:

- a. Had problems with multitasking, time management, accepting feedback and communicating with clients;⁵ and
- b. Was responsible for a "late" responsive pleading.⁶

Despite these assertions, the *facts* are that:

1. There are no contemporaneous records documenting what the YWCA Pierce County now alleges to be substandard performance during the entire tenure of Ms. Tosch's employment. Although specifically referenced in Ms. Tosch's opening brief, the YWCA Pierce County does not even attempt to address its own policy, YWCA Disciplinary Action policy 4.1.4, *requiring* written disciplinary notices to be issued for substandard performance - *none of which were ever created or issued to Ms. Tosch before she was fired.*

⁵ Brief of Respondent at page 7.

⁶ Brief of Respondent at pages 8-9. The YWCA Pierce County does not identify the nature of what was "late", having previously claimed first that the filing with the court was late and later that the delivery of a bench copy to the court was late. CP

2. Ms. Tosch was given no reason for the termination of her employment at the time she was fired;⁷

3. The performance evaluation completed just five working days before Ms. Tosch was fired did *not* rate her performance as "unsatisfactory" with respect to her overall job performance;

4. As Ms. Tosch pointed out in her declaration submitted to the trial court:

Ms. McLeod also alleges in her Declaration that I "lost important client emails, would make mistakes using the database, or would be late completing a declaration and frequently would blame this on [my] computer". Nowhere does Ms. McLeod identify any "important client email" that I supposedly lost, what "mistakes" I made using the database or any document that I was supposedly late in completing. Ms. McLeod's Declaration flatly contradicts her own assessment of me in my Performance Appraisal on August 9, 2012, which both she and Mr. Rundle signed and which specifically states that I met expectations in the category of "Accountability /Dependability":

Takes personal responsibility for the quality and timeliness of work and achieves results with little oversight.⁸

and

5. It is *undisputed* that Human Resources Director Ryann Robinson specifically told Ms. Tosch, *after* Ms. Tosch's performance evaluation had been completed and signed by Mr. Rundle and Ms. McLeod

⁷ CP 191.

⁸ CP 196.

just days before Ms. Tosch was fired, *that based upon her performance the YWCA had "no reason" to fire her.*⁹

III. Reply to Argument

A. The Facts Do *Not* Support the Same Actor Inference

In arguing that Kevin Rundle was the sole decision maker in hiring and firing Kim Tosch, despite the evidence to the contrary cited above, the YWCA Pierce County completely ignores the *undisputed fact* that Kevin Rundle expressed shock and surprise when he learned that Kim Tosch was ten years older than he had previously believed her to be.

In seeking summary judgment of dismissal, the YWCA Pierce County had attempted to minimize Mr. Rundle's reaction by arguing that it should be "interpreted" as "his way of responding when Tosch was fishing for a compliment" .¹⁰ The YWCA Pierce County's argument violated the fundamental and strict requirement that all reasonable inferences must be made against the moving party and in favor of the non-moving party. In recognition of that requirement before this Court, the YWCA Pierce County chose to simply ignore the evidence and offer no explanation or justification

⁹ CP 190. Although the YWCA filed multiple reply declarations contesting the facts set forth in Ms. Tosch's declaration in opposition to the motion for summary judgment, it did not submit a declaration from Ms. Robinson disputing this fact.

¹⁰ CP 233.

in its brief.¹¹

Once Mr. Rundle learned Ms. Tosch's actual age, 10 years more than he believed it to be, everything changed for the worse. Ms. Tosch described in her declaration to the trial court what happened next:

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 work hours each week. I was not allowed to work any overtime. However, Ms. 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.¹²

The YWCA Pierce County attempts to circumvent this evidence by citing cases addressing the "same actor inference", with no similarity to the facts in this case, starting with *Coughlan v. American Seafoods Company, LLC*, 413 F.3d 1090 (9th Cir. 2005). *Coughlan* involved a claim of national-origin discrimination and Coughlan's nationality was known to the employer at the time of hiring, thereby giving rise to the inference that the

¹¹ It is noteworthy that Kevin Rundle submitted a declaration, in reply to Ms. Tosch's declaration setting forth his reaction to learning her age, but remained silent and did not offer any denial or alternative explanation for his reaction.

¹² CP 188.

employer was not biased when it demoted Coughlan. The fact that Kevin Rundle did *not* know Kim Tosch's age at the time she was hired, and was *not* the sole decision maker in firing Ms. Tosch, distinguishes the present case from *Coughlan*.

The YWCA Pierce County also cites *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 115 P.3d 1065 (2005), which is simply another example of a plaintiff filing suit for discrimination because, in the words of the plaintiff in that case, "I don't have anything that I can lay a tangible hold on as to why I was released." Notwithstanding his speculation, the court found that Griffith presented "no evidence of discrimination". Unlike the present case, in which *no clients and no fellow employees ever complained about Kim Tosch's job performance*.¹³ Griffith's employer presented evidence that one of its largest customers had lodged complaints against Griffith and the facility he managed had lost more than \$5 million for two consecutive years. *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. at 449.

The YWCA Pierce County also relies upon an unpublished United States District Court for the Eastern District of Washington opinion, *Stout v. Yakima HMA, Inc.*, 2013 WL 587569 (E.D. Wash.), but in *Stout*, the

¹³ CP 208-209.

District Court acknowledged that there was "absolutely no evidence of *any ageist remarks* or other arguably discriminatory *behavior* directed toward Stout." *Stout v. Yakima HMA, Inc.*, 2013 WL 587569 at 11 (emphasis added). Here, the evidence is that an ageist remark was made by Ms. McLeod ("but she was older") and that Mr. Rundle's behavior did change once he learned Ms. Tosch's true, and substantially older, age.¹⁴

Finally, the YWCA Pierce County relies on *Hill v. BCTI Income Fund-I*, 144 Wn. 2d 172, 23 P.3d 440 (2001), which provides a stark contrast to the present case with respect to the same actor inference. In *Hill*, the court phrased the issue in a manner which highlights the difference with the present case before this Court: "When someone is both hired and fired by the same decisionmakers within a relatively short period of time, there is a strong inference that he or she was *not* discharged **because of any attribute the decisionmakers were aware of at the time of hiring.**" *Hill v. BCTI Income Fund-I*, 144 Wn. 2d at 189 (italics in original).

In this case, Kevin Rundle was *not* aware of Ms. Tosch's actual age and when he did become aware of it, his behavior toward her changed for the worse and ultimately led to her discharge. Under these circumstances, the same actor inference simply doesn't apply.

¹⁴ CP 187-188.

B. Kim Tosch Supplied Direct Evidence of Discriminatory Motive

1. The "Stray Remarks" Doctrine Does Not Apply

YWCA Pierce County argues that Hannah McLeod's statement that Kim Tosch was "older" to explain her job performance does not constitute direct evidence of discriminatory motive, instead characterizing it as a "stray remark".¹⁵ To support its argument, the YWCA cites three Ninth Circuit cases and a Seventh Circuit case: *Mangold v. California Pub. Utils. Comm'n*, 67 F.3d 1470 (9th Cir. 1995); *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325 (7th Cir. 1989); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434 (9th Cir. 1990); and *Nesbit v. Pepsico, Inc.*, 994 F.2d 703 (9th Cir. 1993).

Following the issuance of the opinions in the cases cited by the YWCA Pierce County, the Ninth Circuit has essentially abandoned the "stray remarks" doctrine. Beginning in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 152-153, 120 S.Ct. 2097, 147 L.Ed. 2d 105 (2000), the Supreme Court held that the Fifth Circuit Court of Appeals committed error when it reversed a jury verdict in favor of an employee and ignored biased remarks made by a decision maker. In doing so, the Supreme Court ruled that the Court of Appeals had "impermissibly

¹⁵ Brief of Respondent at page 22.

substituted its judgment concerning the weight of the evidence for the jury's". *Reeves*, 530 U.S. at 153.

Reeves is instructive because the United States Supreme Court reversed the Fifth Circuit Court of Appeals and reinstated a jury verdict in an age discrimination case despite the following facts, which echo the YWCA Pierce County's arguments in this case:

1. The age-based comments were not made in the context of the plaintiff's termination;
2. There was no evidence that two other managers who recommended that the plaintiff be fired were motivated by age;
3. Two of the decision makers who were involved in the discharge of the plaintiff were over the age of 50; and
4. Several of the managers were over the age of 50 at the time of the plaintiff's termination of employment.¹⁶

Following the *Reeves* decision, the Ninth Circuit has ruled that even remarks made by *non-decision maker* managerial employees can be imputed to the employer and are evidence of a discriminatory motive:

Team Electric contends that Loughary and Walsh's comments are not direct evidence of pretext because they are not "clearly sexist...insulting, humiliating, intimidating...derogatory...[or] threatening in any way." and did not "unreasonably interfere with

¹⁶ *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 139-140.

Davis's work performance." *Cf. Dominguez-Curry*, 424 F.3d at 1038. This is not an unreasonable interpretation of the comments, but it would also be reasonable for a jury to infer otherwise. On summary judgment all inferences must be drawn in favor of the non-moving party. *See id.* at 1038-39. If the statements are not direct evidence of pretext, they are at the least circumstantial evidence from which a jury could infer pretext. "[A] single discriminatory comment by a plaintiff's supervisor or decisionmaker is sufficient to preclude summary judgment for the employer." *Dominguez-Curry*, 424 F.3d at 1039. Team Electric also argues that the "stray comments" were unrelated to any decision-making process. *See, e.g., Vasquez v. County of L.A.*, 349 F.3d 634, 640 (9th Cir. 2003). Although there is no evidence Walsh and Loughary were involved in Davis's firing, both submitted affidavits admitting involvement in her work assignments.¹⁷

In any event, Ms. McLeod's comment about Ms. Tosch's age was hardly a "stray remark" as it went directly to Ms. McLeod's belief that Ms. Tosch's *age* affected her ability to do her job.¹⁸ In light of the fact that Ms. McLeod was Ms. Tosch's supervisor and, at a minimum, "involved" in the decision to fire Ms. Tosch, her comments are admissible and may be imputed to the YWCA Pierce County as her employer.¹⁹

¹⁷ *Davis v. Team Electric Co.*, 520 F.3d 1080, 1092, n. 7 (2008).

¹⁸ The YWCA Pierce County admitted in its Reply to the trial court that Ms. McLeod's remark was, at the least, "ambiguous". It further argued that: "Even if McLeod believed in hindsight that *Tosch's performance issues were due to her age*, there is no evidence McLeod thought that at the time of the termination or shared her belief with Rundle." CP 234 (emphasis added). Of course, for summary judgment purposes, Ms. Tosch was entitled to the benefit of *all* reasonable inferences from the evidence.

¹⁹ *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001).

2. Rundle's Change In Behavior After Learning Kim Tosch's Age Is Direct Evidence of a Discriminatory Motive

The YWCA Pierce County acknowledges that Ms. Tosch was able to cite three specific changes that occurred once Kevin Rundle learned that Ms. Tosch was a decade older than he believed, and asserts to this Court that:

The events are ambiguous and depend on inference or presumption in order to support discrimination.²⁰

Evidence that a manager learned an employee's true age to be ten years older than originally thought by the manager (which is undisputed in this case) and that the manager then changed his behavior toward the employee in specific, and negative, ways is direct evidence of a discriminatory motive. Furthermore, in a summary judgment proceeding, if evidence is "ambiguous", i.e. capable of more than one reasonable interpretation, a trial court is obligated to interpret all such evidence in favor of the non-moving party.

C. Kim Tosch Established a *Prima Facie* Case of Age Discrimination

In claiming that Ms. Tosch cannot establish a *prima facie* case of age discrimination, the YWCA Pierce County argues that "Tosch's opinion of

²⁰ Brief of Respondent at page 21.

discrimination.²¹ the YWCA Pierce County argues that "Tosch's opinion of her own performance is the sole support she presents as evidence that she was doing satisfactory work."²² The YWCA Pierce County's argument is simply false and Ms. Tosch presented substantial evidence to the trial court, independent of her own assessment of her job performance, that she meet the element of satisfactory work:

1. The *fact* that Human Resources Director Ryann Robinson told Ms. Tosch, just days before she was discharged, that the YWCA Pierce County "had no reason to fire her" based upon her job performance;

2. The *fact* that Ms. Tosch's performance was not rated as "unsatisfactory" in her evaluation;

3. The *fact* that Ms. Tosch had never received any disciplinary action for substandard work performance, despite a policy mandating disciplinary action in the event of substandard performance;

4. The *fact* that there are no "write-ups" or documentation of substandard work performance.

Furthermore, the YWCA Pierce County cites *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 2d 355, 753 P.2d 517 (1988), to

²¹ The four elements being: (1) membership in the protected class; (2) discharge from employment; (3) satisfactory work; and (4) replacement by a younger employee. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973).

²² Brief of Respondent at page 25.

support its argument that Ms. Tosch cannot rely on her own opinions and conclusions about her work to defeat summary judgment.²³ But Ms. Tosch did nothing of the kind. In addressing the claim that she was responsible for either the late filing or delivery of a bench copy, as alleged by Kevin Rundle, Ms. Tosch provided a specific factual recitation of what actually happened in that particular case, including the fact that she had warned Mr. Rundle multiple times of the impending deadline and advised him of the location of the document on the day it was due which he said "was fine".²⁴

Under the circumstances, the YWCA Pierce County's reliance on *Grimwood* is simply misplaced. *Grimwood* stands for the proposition that a plaintiff must do precisely what Ms. Tosch did here, i.e. address allegations of substandard work performance with *facts* in order to raise a genuine issue of material fact necessary for resolution at trial. It is not enough for a discharged employee to offer a mere opinion, unsupported by facts, of her own performance. But where, as here, the employee can point to specific *facts* that contradict or raise doubts about an employer's claim of substandard performance, summary judgment is inappropriate. *Rice v. Offshore Systems, Inc.*, 167 Wn. App. 77, 272 P.3d 865 (2012).

²³ Brief of Respondent at pages 25-26.

²⁴ CP 191-192.

The only other argument made by the YWCA Pierce County in support of its claim that Ms. Tosch failed to make out a *prima facie* case of age discrimination can be found on a single page in which it asserts that "the evidence supporting the claim she was replaced by significantly younger employees is weak" but conceding that Washington courts generally view age differences of ten or more years as significant.²⁵ The only requirement is that the replacement be "significantly younger". *Hill v. BCTI Income Fund-I*, 144 Wn. 2d at 188.

The record establishes that Ms. Tosch's work was originally given to Ms. McLeod, age 31 and Ms. Alvarado, age 24.²⁶ Ms. Tosch's work was then given to Renda Wilson, age 49, who was 10 years younger than Ms. Tosch, according to the YWCA Pierce County's own evidence.²⁷ The only law cited by the YWCA Pierce County on this point is *Oliver v. Spokane County Fire Dist. 9*, 2013 WL 3990813, another unpublished United States District Court for the Eastern District of Washington opinion which relies upon an unpublished Washington Court of Appeals opinion (cited by the

²⁵ Brief of Respondent at page 26.

²⁶ CP 150.

²⁷ CP 293. This document was produced by YWCA Pierce County in discovery. Under the category of "Age Now", it lists Ms. Tosch as being age 59 and her birth date as 1953 and Ms. Wilson (seventh name from top, initials R.W.) as being age 49 with a birth date in 1963. The document was submitted to the trial court with the names redacted, except for Ms. Tosch, to protect the privacy of the other employees.

YWCA Pierce County as *McKee v. Lehman*, 137 Wn. App. 1017 (2007)) which contains the exact language found in YWCA Pierce County's brief: "courts generally view age differences of 10 or more years as significant".²⁸ The *Oliver* case actually involved a six *months* difference in age between the discharged employee and his replacement. *McKee*, the unpublished Washington Court of Appeals, relied upon by the federal district court in *Oliver*, and quoted without attribution by the YWCA Pierce County, involved a 13 year difference (which was found to be sufficient to establish a *prima facie* case).

D. There is Strong Evidence of Pretext

1. Rundle's Shock At Kim Tosch's Age

The YWCA Pierce County argues that it would be "outrageous" to deny the YWCA Pierce County the benefit of the same actor inference just because Kevin Rundle did not know Ms. Tosch's "precise" age or had failed to "correctly" guess it. Furthermore, the YWCA Pierce County argues that Mr. Rundle's shock in learning Ms. Tosch's age is not evidence of pretext.²⁹

In her opening brief, Ms. Tosch pointed to the fact that the YWCA Pierce County has offered differing and changing justifications for Ms.

²⁸ Brief of Respondent at page 26.

²⁹ Brief of Respondent at page 31.

Tosch's discharge as evidence of pretext, as well as the insufficiency of the reasons used to justify the firing, and the false claim of an investigation absolving the YWCA Pierce County of age discrimination. The YWCA Pierce County only addressed arguments at two of these areas: (1) discrepancies in the reasons for termination of Ms. Tosch's employment; and (2) the false claim of an investigation into age discrimination.³⁰

2. There Are Discrepancies In The Reason For Discharge

The YWCA Pierce County admits that "shifting" reasons for an employee's discharge demonstrates pretext and then tries to fit all of the various and changing reasons for Ms. Tosch's firing under the single, all-encompassing label of "performance" in order to deny that there were any changes in reasons for the termination of Ms. Tosch's employment.³¹ The *facts* present a very different picture.

The record establishes that Human Resources Director Ryann Robinson was given one reason, and only one reason, for firing Ms. Tosch on the day of her discharge: Failure to "present" documents to the court.³² At her deposition, however, Ms. Robinson testified that the reason was the

³⁰ Brief of Respondent at pages 34-38.

³¹ Brief of Respondent at page 34.

³² CP 5.

failure to "timely prepare a bench copy".³³ Furthermore, Ms. Robinson testified that Kevin Rundle had *never* previously discussed firing Ms. Tosch.³⁴ Contrast that testimony with Mr. Rundle's assertion under oath at his deposition that "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."³⁵

The lack of *any* contemporaneous documentation also supports a finding of pretext. *See, Rice v. Offshore Systems, Inc.*, 167 Wn. 2d at 92. *Cf. Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 2d at 364-65 ("legitimacy of [employer's] reasons for discharging the plaintiff are bolstered by the fact that the complaints were stated in writing long before plaintiff's termination").

3. The YWCA False Claim of Investigation

In one page of argument, the YWCA Pierce County dismisses the assertion that it falsely claimed to have conducted an investigation of Ms. Tosch's complaint of age discrimination by Human Resources Director Ryann Robinson "and CEO Barnett" as not raising any inference of pretext

³³ CP 71.

³⁴ CP 207.

³⁵ CP 211.

merely because it "was not as comprehensive as Tosch believes it should have been." The record undermines Ms. Barnett's claim that any "investigation" at all took place following Ms. Tosch's discharge.

First, Ms. Barnett acknowledged at her deposition that she was unaware of the very investigation that she allegedly ordered:

Q Do you know whether or not anyone in HR has ever investigated whether people over the age of 40 are treated the same as people under the age of 40 in the legal department?

A I do not know.³⁶

Second, Ms. Robinson admitted that she spoke to *no one* in the course of her alleged "investigation".³⁷ Not a single piece of paper pertaining to any investigation into age discrimination was ever produced by the YWCA Pierce County in discovery or to the trial court. Nor was any such documentation attached to the declarations of Ms. Barnett or Ms. Robinson.³⁸

Finally, Hannah McLeod, who participated in the firing of at least three employees over the age of 49 (and none younger than that age) admitted that she was completely unaware of any "investigation" into age

³⁶ CP 219.

³⁷ CP 205.

³⁸ CP 33-47:70-81.

discrimination in the Legal Services Department but would have expected to have been interviewed had any such investigation been conducted.³⁹

Ms. Barnett's claim to Kim Tosch that there was no age discrimination in the Legal Services Department because an "internal investigation found that age was not a factor in any of the terminations " is evidence of pretext because it is unworthy of belief.

IV. Conclusion

The YWCA Pierce County's arguments consistently attempt to do precisely what is not allowed in the context of a summary judgment motion: Construe the facts in favor of the moving party. Kim Tosch presented evidence to the trial court of all of the elements of a *prima facie* case.

Ms. Tosch presented evidence that she was treated differently once her supervisor learned her true (and older) age. This evidence defeats the YWCA Pierce County's primary defense of the same actor inference.

Kim Tosch also presented direct evidence of discrimination in the statement by her manager, Hannah McLeod, that referenced her age in the context of her job performance and in receiving negative treatment from Kevin Rundle once he knew her age.

Finally, Kim Tosch presented evidence of pretext in the differing

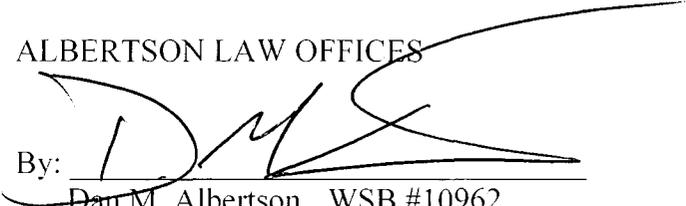
³⁹ CP 217.

reasons offered for her discharge, the lack of contemporaneous documentation, and the false claim of an investigation into age discrimination.

The trial court erred in dismissing Ms. Tosch's case and she respectfully requests this Court to reverse the trial court's order of dismissal and remand the case for trial.

Respectfully submitted this 30th day of May, 2014.

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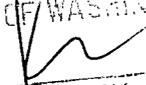
By: 

Dan M. Albertson WSB #10962
Attorney for Appellant Kim Tosch

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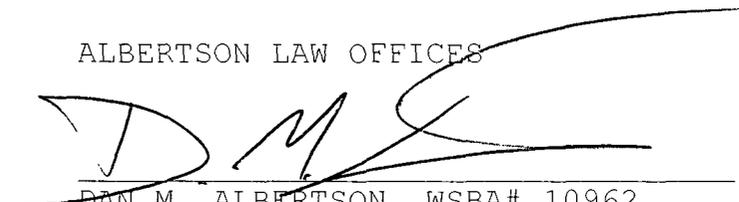
KIM TOSCH,)
)
 Appellant,) NO. 45820-9-II
)
 vs.)
) DECLARATION OF SERVICE
 YWCA PIERCE COUNTY)
 a Washington Corporation)
)
 Respondent.)
 _____)

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 June 2, 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 2ND day of June, 2014, at Tacoma, Washington.

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A handwritten signature in black ink, appearing to read 'D M A', is written over a horizontal line. The signature is stylized and extends to the right of the line.

DAN M. ALBERTSON, WSBA# 10962
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Tacoma, WA 98402
(253)475-2000