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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COA NO. 32252-1-III

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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PAT SCHOLZ, a married man,

Appellant

v.

SCAFCO CORPORATION, a Washington corporation,

Respondent

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

Plaintiff Patrick Scholz was employed with defendant SCAFCO Corporation from November 4, 2004 through January 18, 2013. He was employed as the company's controller. He received annual performance evaluations throughout his tenure of employment, all of which were exemplary. In March 2012, SCAFCO hired Patrick Palmer, a young man in his mid-30's. Mr. Palmer began to assume many of Scholz's responsibilities. SCAFCO discharged Mr. Scholz on January 18, 2013 because he "was not a good fit." Scholz was 59 years old at the time of his discharge.

Mr. Scholz brought this lawsuit against SCAFCO alleging wrongful termination premised on a claim of age discrimination under the Washington Law Against Discrimination (WLAD), RCW 49.60.180. On January 10, 2014, the Spokane County Superior Court granted Defendant's Motion for Summary Judgment and dismissed plaintiff's age discrimination claim. That decision was in error. The record demonstrates genuine issues of material fact concerning:

- (1) Whether defendant's proffered reason for discharge (performance issues) was pretextual; and

- (2) Whether plaintiff's age (59) was a substantial factor in defendant's discharge decision.

This court should reverse the decision of the trial court and remand this case for trial on the merits.

## **II. ASSIGNMENT OF ERROR**

1. The trial court erred in granting Defendant's Motion for Summary Judgment and dismissing plaintiff's age discrimination claim.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the plaintiff established a prima facie case of age discrimination under the WLAD?
2. Whether the record demonstrates genuine issues of material fact concerning whether defendant's proffered reason for discharge was pretextual?
3. Whether the record demonstrates a triable issue of fact concerning whether plaintiff's age was a substantial factor in defendant's discharge decision?

## **III. STATEMENT OF THE CASE**

Plaintiff Patrick Scholz was employed with defendant SCAFCO Corporation from November 1, 2004 through January 18,

2013. He was employed as the company's controller. (CP 76). Mr. Scholz was 59 years old at the time of his discharge. (CP 90).

As the company's controller Scholz reported directly to SCAFCO's Chief Financial Officer (CFO). He worked under four different CFO's during his employment with the company, Art Mell, Dan Jondal, Kurt Dehmer, and Jeffrey White. He received annual performance evaluations from his supervising CFO's. (CP 80-81). Every one of his performance evaluations was exemplary. (CP 135-140, 152-199).

Jeffrey White was SCAFCO's CFO and Mr. Scholz supervisor during Scholz's last year of employment with the company. (CP 107-108, 113-114). Mr. White provided Scholz with his last performance evaluation, dated February 27, 2012. (CP 112-114, 135-140). Mr. Scholz received scores of above average or excellent with respect to all categories evaluated, except two in the final performance evaluation. (CP 113-114, 135-140).

Mr. White testified that the purpose of the annual performance evaluations was to identify strengths and weaknesses of the employee, and make recommendations for improvements. He testified further that the performance evaluations are a tool to communicate with the employee about the status of his performance

and whether or not he is meeting the company's expectations. Finally, White testified that it was fair for the employee to rely on the performance evaluations as a measure of whether he is meeting the company's expectations with respect to performance. (CP 110-111).

All of Mr. Scholz's performance evaluations are in the record and they are all exemplary. (CP 135-140, 152-199). For example, Don Jondal was SCAFCO's CFO and Mr. Scholz's supervisor in 2009. Jondal prepared Scholz's 2009 evaluation, dated April 16, 2010 (CP 191-198). Out of 21 categories reviewed, Jondal rated Scholz "excellent" in 16 and "above average" in 5. In an explanatory note attached to the 2009 evaluation, dated April 16, 2010, Mr. Jondal stated:

I wanted to document my philosophy of completing the attached reviews. I noted in the past that almost all ratings were 4 or the top rating. I have filed out this form with the assumption that someone cannot be excellent in every category otherwise you cannot really indicate where they excel and where they might have an ability to improve. Thus I have used a rating of 3 to say the person is doing excellent work and used a 4 where I felt the person was exceptionally strong.

(CP 199). In Scholz's final performance evaluation dated February 27, 2012 Mr. White rated his performance "excellent" in 9



categories, “above average” in 10 and “satisfactory” in 2. (CP 135-142). Based on White’s testimony, Mr. Scholz had a right to rely on those performance evaluations as a measure of whether he was meeting the company’s expectations. These performance evaluations, and Mr. White’s testimony support a finding that Scholz’s performance as SCAFCO’s controller was well more than satisfactory throughout his tenure of employment with the company.

In March, 2012 SCAFCO hired Patrick Palmer as a “financial reporting manager.” Mr. Palmer is in his mid-30s. (CP 128). Mr. Scholz had some discussions with Mr. White about the company’s decision to hire Mr. Palmer. During these discussions White told Scholz that the two of them (White and Scholz) “were not getting any younger; we need to find some new talent out there.” (CP 92).

When Mr. Palmer was hired he began to assume a number of Mr. Scholz’s job duties. (CP 92-93). Soon after Palmer was hired Scholz discovered that he was being excluded from business meetings and social and business functions he had previously, routinely been invited to and attended. (CP 92-97). Palmer began

receiving credit for work that Scholz had actually performed. (CP 103-104).

On January 8, 2013 CFO White met with Mr. Scholz and told him that SCAFCO president and CEO Lawrence Stone had decided to terminate his employment. White told Scholz that Mr. Stone had been discussing terminating his employment for nine months, the period of time dating back to March 2012 when SCAFCO hired Patrick Palmer. (CP 88-89). Mr. Scholz testified that White told him the discharge was the result of an unspecified “personal conflict” between Scholz and Stone. (CP 89). There was no discussion of performance deficiencies as the reason for discharge. SCAFCO’s internal documentation relating to Mr. Scholz’s termination states the reason for discharge as: “Not a good fit.” (CP 200).

Plaintiff Scholz filed this lawsuit on April 8, 2013 alleging a claim of age discrimination under the WLAD. (CP 1-5). In pre-trial discovery, and in the Summary Judgment proceedings below, defendant SCAFCO raised, for the first time, a series of alleged performance deficiencies on the part of Mr. Scholz as the reason for his discharge. These alleged performance deficiencies include the following:

1. Mr. Scholz's failure to file a pre-lien notice on the "Kristofferson" project in 2010 (CP 54, 30-31, 203-204).
2. Scholz understatement of inventory at SCAFCO's Montana plant in March, 2012 (CP 48, 55, 202).
3. An issue involving an alleged B&O tax overpayment in 2010. (CP 55, 204).

The "Kristofferson" pre lien notice issue occurred in 2010, over two years prior to Mr. Scholz's discharge. Scholz testified he had prepared a pre-lien notice policy consistent with CEO Stone's directive. That policy was overridden by then CFO Dan Jondal. (CP 83-84). In April 2012, two years after the Kristofferson pre-lien notice issue, Scholz received an exemplary performance evaluation from CFO Jeff White. (CP 112-116). The record supports a finding that the Kristofferson pre-lien notice issue was remote and pretextual.

SCAFCO also raised the issue of an \$800,000 overstatement of inventory at its Montana location which occurred in March 2012. Notably, the trial court highlighted this issue in its written ruling granting defendant's Motion for Summary Judgment (CP 278: "Although the employee's evaluations generally note him as above average/excellent/satisfactory, his final evaluation in February of

2012 was prior to his second inventory gaffe, which occurred in March of 2012”) However, the record demonstrates factual questions about this particular issue. Mr. White testified that he discovered the inventory overstatement when he reviewed the company’s 2012 first quarter financial statements. (CP 121). White testified he caught the error and brought it to Mr. Scholz’s attention. (CP 122). He testified this conversation occurred in April or May, 2012, sometime after he gave Scholz his final performance evaluation on April 3, 2012. (CP 118).

Mr. Scholz testified much differently about the issue. First, Scholz testified unequivocally that his conversation with Mr. White about the inventory overstatement issue occurred prior to his April 2012 meeting with White when White presented him with his final performance evaluation. (CP 202). Second, Scholz testified that he was the one who identified the inventory overstatement in the financial statements and brought the error to Mr. White’s attention. (CP 202). Third, Scholz testified that the error was routinely corrected, resulting in no financial loss to the company. He discussed the issue with White. Mr. Scholz testified he was neither criticized nor disciplined for it. (CP 202).

Therefore the record demonstrates several factual questions about the significance of this inventory overstatement issue. First, who discovered it, White or Scholz? Second, when was the issue addressed, before or after Scholz's exemplary final performance evaluation? Third, was Mr. Scholz either criticized or disciplined for it? Unfortunately, the trial court improperly resolved these factual questions on summary judgment and concluded that the inventory overstatement issue reflected a performance deficiency which warranted discharge. This was clearly error.

Again, for the first time in the context of this litigation, SCAFCO raised a \$135,000 B&O tax overpayment that occurred in 2010. Similar to the Kristofferson pre-lien issue, this occurred over two years prior to Scholz's discharge. Mr. Scholz testified that the financial statements underlying this tax payment were reviewed and signed by Moss Adams, SCAFCO's outside accounting firm. (CP 204). He worked with the state and obtained a reimbursement of the overpayment, with interest. Scholz testified this B&O tax issue was over two years prior to his discharge, and well before his final, exemplary performance evaluation which he received in April 2012. (CP 204). It was not raised as a performance issue any time prior to this litigation. (Id). The evidence demonstrates that the B&O tax

issue was remote in time relative to Scholz discharge, and never a performance concern until after the litigation was commenced. This evidence supports a finding that the B&O tax issue was pretextual.

SCAFCO raised an additional issue regarding Mr. Scholz alleged failure to work effectively with out of state counsel on a collection matter. (CP 55). Mr. Scholz explained that this issue occurred early in his career at SCAFCO, in 2006 or 2007. This was 5-6 years prior to his discharge and was followed by at least 5 exemplary performance evaluations. (CP 204). Obviously defendant's efforts to justify Scholz's discharge by its reference to an incident that occurred six years previously is patently pretextual.

Defendant SCAFCO filed a Motion for Summary Judgment seeking dismissal of plaintiff's age discrimination claim on October 4, 2013. (CP 10-24). The trial court heard arguments on defendant's motion on November 15, 2013. (CP 276). On January 7, 2014 the court issued a letter ruling granting defendant's motion. (CP 276-279). A review of that letter ruling demonstrates that the trial court improperly weighed the evidence and resolved factual issues on summary judgment. (Id)

The court entered its formal order granting defendant's Motion for Summary Judgment on January 10, 2014. (CP 280-284). This appeal timely followed. (CP 285-291).

#### IV. ARGUMENT

1. The McDonnell-Douglas burden shifting protocol applies to age discrimination cases under the WLAD.

RCW 49.60.180 (2) makes it unlawful for employers "to discharge or bar any person from employment because of age...." The legislature has mandated that the Washington Law Against Discrimination (WLAD) "shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020. While employers deserve protection from frivolous lawsuits and from jury verdicts not reasonably supported by evidence, courts must carefully consider all allegations of unlawful discrimination, since the WLAD "embodies a public policy of the highest priority." *Xieng v. People's National Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993).

Courts have long recognized that direct, "smoking gun" evidence of discriminatory animus is rare, since, "there will seldom be eyewitness testimony as to the employer's mental process." *Hill v. BCTI Income Fund*, 144 Wn.2d 172, 179, 23 P.3d 440 (2001), quoting *United States Postal Service Bd of Governor v. Aikens*, 460 U.S. 711, 716, 103 S.Ct.

1478, 75, L.Ed.2d 403 (1983). Employers infrequently announce their bad motives orally or in writing. *Id.*; *deLisle v. FML Corp.*, 57 Wn. App. 79, 83, 786, P.2d 839 (1990). Consequently, courts do not require plaintiffs in discrimination cases to produce direct evidence of discriminatory intent. *Hill*, 144 Wn.2d, at 179. Circumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden. *Sellsted v. Wash. Mut. Savings Bank*, 69, Wn. App. 852, 860, 851 P.2d 716 (1993). "Indeed, in discrimination cases it will seldom be otherwise." *deLisle*, 57 Wn. App. at 83.

To accommodate this reality, the United States Supreme Court established an evidentiary burden-shifting protocol in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) to "compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989). The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence. *Sellsted v. Washington Mutual*, 69, Wn. App., at 864. The Washington court has adopted the federal burden shifting protocol in *McDonnell Douglas* for evaluating summary judgment motions in discrimination cases brought under the WLAD. *Hill v. BCTI Income Fund*, 144 Wn.2d, at 180;

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

The plaintiff bears the initial burden of setting forth a prima facie case of unlawful discrimination. *Hill*, 144 Wn.2d at 181. The classic prima facie case of age discrimination involves showing that: (1) the plaintiff was in the statutorily protected age group; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by a younger person. *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 858, 851 P.2d 716 (1993). However, because facts will vary from case to case, “the specification above of the prima facie proof required from plaintiff is not necessarily applicable in every respect to differing factual situations.” *McDonnell Douglas*, 411 U.S., at 802, n. 13, 93 S.Ct. 1817. Specifically, courts have long recognized that the element of replacement by a younger person is not absolute. *Grimwood v University of Puget Sound*, 110 Wn.2d 355, 363, 753 P.2d 517 (1988). Indeed, it is now well established that, independent of whether he was replaced by a younger worker, the plaintiff demonstrates a prima facie case with a showing that his termination occurred under circumstances that give rise to an inference of discrimination. *Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81, 91 (2<sup>nd</sup> Cir. 1996). In *Chertkova*, the Second Circuit explained:

As the cited cases make clear, there is no unbending or rigid rule about what circumstances allow an inference of discrimination when there is an adverse employment decision. Although the Supreme Court held in *McDonnell Douglas* that a *prima facie* case may include evidence that the position remained open and the defendant continued to seek applicants, it also noted that “[t]he facts necessarily will vary in Title VII cases and the specification [in that case] of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations.” *McDonnell Douglas*, 411 U.S. at 802, n. 13, 93, S.Ct. At 1824 n. 13. Hence contrary to defendant’s assertion, the fourth element set forth in *McDonnell Douglas* is a flexible one that can be satisfied differently in differing factual scenarios.

92 F.3d, at 91.

This analysis is entirely consistent with the Washington court’s interpretation of the WLAD. The Washington court initially adopted the burden shifting protocol in *Grimwood v. University of Puget Sound*, 110 Wn.2d 355. The *Grimwood* court recognized the fourth element of the classic *prima facie* case-replacement by a younger person - is not absolute. 110 Wn.2d, at 363. Ultimately, the plaintiff must demonstrate, through direct, circumstantial, or inferential evidence that his age was a substantial factor in the defendant’s decision to discharge him from his employment.

*Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 311, 898, P.2d 284 (1995).

2. The evidence demonstrates a prima facie case of age discrimination.

Again, to establish his prima facie case of age discrimination plaintiff Scholz must demonstrate that: (1) he was in the statutory protected age group; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by a younger person. *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 858 (1993).

In the instant case the evidence is more than sufficient to demonstrate a prima facie case of age discrimination. Mr. Scholz was 59 years old at the time of his termination. Therefore, he was in the protected class with respect to a claim of age discrimination (over 40). The evidence certainly supports a finding that he was doing more than satisfactory work. He had seven different annual performance evaluations from three different supervising CFO's, all of which were exemplary. There is no evidence that he was ever disciplined for any alleged performance deficiencies. He was discharged. The evidence supports a finding that many of his duties were assumed by Patrick Palmer, a young man in his mid-30's hired in March 2012, nine months before plaintiff's discharge.

3. The trial court erred in resolving the factual question of whether plaintiff was doing satisfactory work on summary judgment.

Although not entirely clear, the trial court appears to have determined that plaintiff failed to meet his initial burden of establishing a prima facie case of age discrimination. More specifically, the trial court held there was insufficient evidence to support a finding that Scholz was doing satisfactory work. (CP 276-279). The court recognized the obvious – Scholz was in the protected age group (40+) and he was discharged. However, the court then referenced the defendant's summary judgment declarations, which set forth a litany of alleged performance deficiencies, and concluded, as a matter of fact, that Scholz consistent, exemplary performance evaluations were insufficient to support a finding of satisfactory work performance for purposes of plaintiff's prima facie case. (CP 278). This was clearly error.

It is axiomatic that, in ruling on a motion for summary judgment, the court must construe all the facts and reasonable inferences therefrom in the light most favorable to the non-moving party, in this case, plaintiff Scholz. *Sellsted*, 69 Wn. App., at 857; *de Lisle v. FMC Corporation*, 59 Wn. App. 79, 82 (1990). The plaintiff's burden in opposing summary judgment is to create an issue of fact, not to carry the burden of persuasion. *de Lisle*, 57 Wn. App., at 84.

In the instant case plaintiff produced sufficient evidence to demonstrate a triable issue of fact concerning whether he was performing satisfactory work. The record contains all of Mr. Scholz's annual performance evaluations generated through his nine year tenure of employment with SCAFCO. It is undisputed that every one of his performance evaluations, up to and including his final one, prepared on February 27, 2012 and given to him on April 3, 2012 was exemplary. There is no evidence of any disciplinary action taken against Scholz during his tenure of employment. All of the performance criticisms SCAFCO now asserts against Scholz arose out of events which occurred several years prior to his discharge.

SCAFCO did raise the issue of an \$800,000 overstatement of inventory detected on the financial statements in March 2012, ten months prior to plaintiff's discharge. But the facts are disputed with respect to the significance of this error, and who discovered it. CFO Jeffrey White testified he discovered the error and consulted Mr. Scholz about it in a conversation that occurred in April or May, 2012. Mr. Scholz testified that he actually discovered the error himself and brought it to Mr. White's attention. Scholz testified this occurred prior to receipt of his final performance evaluation in early April 2012, and he was neither criticized

nor disciplined for it. The error was routinely corrected, and there was no loss to the company.

Faced with similar facts, the court in *Sellsted v. Washington Mutual* held that the plaintiff had made a sufficient showing of satisfactory work performance to establish his prima facie case of age discrimination:

Sellsted met this burden. At 57, he was within the protected age group. He was discharged and replaced by a younger person. Sellsted's claim that he was doing satisfactory work at the time he was discharged, while disputed by Washington Mutual, is supported by the evidence he produced at the summary judgment hearing. This includes his laudatory annual written performance evaluations for years 1983 through 1988; loan committee approval under the new standards of all loan summaries he submitted after February 27; the lack of any criticism, warnings or counseling between March 31 and August 21 when he was discharged; his immediate supervisor's statement that he did an excellent job in May and suggestion that the probationary period be terminated early; the automatic expiration of his probationary period; and Lannoye's own testimony that he considered the loan summaries Sellsted prepared after the nursing home loan summary satisfactory. This evidence was sufficient to enable Sellsted to meet his initial burden of establishing a prima facie case. (Footnotes omitted).

69 Wn. App., at 858-859.

Unfortunately, in the instant case, the trial court improperly weighed the evidence and decided, as a matter of fact, that Mr. Scholz was not doing satisfactory work. The court's written decision clearly reflects its factual conclusion that SCAFCO's declarations describing alleged performance deficiencies trumped Mr. Scholz's multiple, consistently exemplary performance evaluations. Interestingly the trial court concluded as a matter of fact, that "[B]y the time of his termination in 2013, 75% of Mr. Scholz's duties had been absorbed by CFO White." (CP 277). The court cited to page 50 of Mr. White's deposition. (See, CP 131-132). This testimony was directly controverted by Mr. Scholz:

Mr. White states that by the time of my discharge, he had absorbed nearly 75% of my duties. That was simply not true. In the last months of my employment with SCAFCO, I continued to be responsible for the review of financial statements and a variety of supervisory duties. Mr. White was not absorbing or performing my job functions. (CP 203).

Despite this obvious factual dispute, the trial court erroneously decided as a matter of fact, that Scholz was not doing satisfactory work. This was clearly error.

The trial court improperly weighed the evidence in the summary judgment proceedings and concluded that Mr. Scholz was not doing satisfactory work. This was error. The record is more than sufficient to

demonstrate a triable issue of fact concerning whether Scholz was performing satisfactory work at the time of his discharge. This factual issue precludes summary judgment, and the trial court order should be reversed.

4. The record demonstrates triable issues of fact concerning whether defendant's proffered reasons for discharge were pretextual, and whether plaintiff's age was a substantial factor in the discharge decision.

Plaintiff produced evidence that he was over 40, discharged, doing satisfactory work, and replaced by a younger worker. The evidence established his prima facie case of age discrimination. As discussed above, after this lawsuit was filed, defendant SCAFCO for the first time raised a litany of alleged performance deficiencies supporting its discharge decision. The evidence was more than sufficient to demonstrate a factual question concerning whether these alleged performance deficiencies were pretextual.

In *Sellsted*, 69 Wn App., at 860, the court summarized how a plaintiff can demonstrate pretext in an employment discrimination case:

The employee can show that the employer's proffered reason is unworthy of credence or belief in three ways: (1) the company's reasons have no basis in fact; or (2) if they have a basis in fact, by showing that they were not really motivating factors; or (3) if they are factors, by showing they were

jointly insufficient to motivate the adverse employment decision, [e.g.], the proffered reason was so removed in time that it was unlikely to be the cause or the proffered reason applied to other employee[s] with equal or greater force and the company made a different decision with respect to them.

First, the evidence supports a finding that defendant's proffered reason for discharge – deficient performance – has no basis in fact. Despite Mr. Stone's and Mr. White's post termination efforts to conjure up performance problems, the record demonstrates that Mr. Scholz received seven exemplary performance evaluations during his 8 ½ year tenure with SCAFCO. His last performance evaluation was dated February 27, 2012, and given to him on April 3, 2012. It was stellar. There is no evidence of any performance failings on Mr. Scholz's part following that. The defendant's proffered reasons for discharge simply have no basis in fact.

Second, the alleged performance deficiencies are so removed in time that a jury could find they were unlikely the actual reasons for discharge. The pre lien and B&O tax issues occurred in 2010, over two years prior to plaintiff's discharge in January 2013. The issue with the attorney resulting in Art Mell stepping in to assist Mr. Scholz occurred in 2006 or 2007, five-six years before the discharge. These after the fact,

conjured up performance deficiencies are far too remote in time to be the cause of plaintiff's discharge. The evidence demonstrates a factual question concerning whether SCAFCO's proffered reason for discharge was pretextual.

Ordinarily, evidence of a prima facie case of discrimination, plus evidence sufficient to disbelieve the employer's explanation will be sufficient to preclude summary judgment and require resolution of the issue by the trier of fact. *Hill*, 144 Wn.2d, at 185. The evidence in this case is much stronger. Mr. Scholz's performance evaluations were uniformly exemplary. He was essentially replaced by Patrick Palmer, a young man in his mid-30's. When Palmer was hired, Jeff White, SCAFCO's CFO, told plaintiff he was not getting any younger and the company had to look for new blood.

The record demonstrates genuine issues of material fact concerning whether plaintiff's age was a substantial factor in defendant's discharge decision. The trial court's Order Granting Summary Judgment should be reversed.

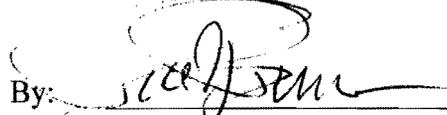
**V. CONCLUSION**

For the reasons set forth above, plaintiff respectfully requests the court to reverse the Order of the trial court granting

Defendant's Motion for Summary Judgment and remand this case  
for trial on the merits.

RESPECTFULLY SUBMITTED this 6 day of June,  
2014.

PAUL J. BURNS, P.S.

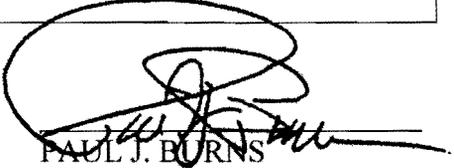
By: 

PAUL J. BURNS  
WSBA #13320  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 12 day of June, 2014, at Spokane, Washington, the forgoing was caused to be served on the following person(s) in the manner indicated:

Robert A. Dunn Dunn & Black 111 N. Post Street, Suite 300 Spokane, WA 99201	<input type="checkbox"/> Regular Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail
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