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Court of Appeals No. 43051-7II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KATHRYN SCRIVENER

Petitioner,

v.

CLARK COLLEGE

Respondent.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
AMICUS CURIAE BRIEF

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Filed *E*
FEB 26 2014
Clerk of Supreme Court
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I. INTRODUCTION AND INTEREST OF AMICUS

The Plaintiff had been employed as an English Instructor at Clark College in Vancouver, Washington since 1994. She applied for one of two full time tenure track positions, and was 54 years old at the time of her application. Both positions were given to substantially younger candidates under 40 years of age. She filed suit alleging age discrimination in violation of the Washington Law against Discrimination (“WLAD”). The trial court granted summary judgment in favor of the Defendant, and the Court of Appeals affirmed. *Scrivener v. Clark College*, 176 Wn. App. 405, 309 P.3d 613 (2013). For the reasons stated below, this Court should reverse the lower courts and remand for a trial on the merits.

The Washington Employment Lawyers Association (“WELA”) has approximately 170 members who are admitted to practice law in the State of Washington and who primarily represent employees in employment law matters. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA is a chapter of the National Employment Lawyers Association.

II. SUMMARY OF ARGUMENT

The Washington Law against Discrimination is violated when an illegal motive is a “substantial factor” in the decision to take adverse employment action. That standard applies both at trial and summary

judgment and regardless of the framework utilized for deciding the case or the characterization of the evidence as “direct” or “circumstantial.” The Court of Appeals erred when it ruled to the contrary.

The law has developed to recognize two different frameworks for resolving discrimination claims at summary judgment; the shifting burdens framework adopted from *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and the “direct and circumstantial” framework adopted from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).¹ The determination of which framework applies is unrelated to the characterization of the evidence relied upon as “direct” or “circumstantial.” The question of whether evidence is “direct” or “circumstantial” is one that has defied consistent application and has caused the Ninth Circuit Court of Appeals to describe the issue as a “quagmire.” See *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851-853 (9th Cir. 2002) (en banc) (discussing different standards by different circuits and

¹ The “direct and circumstantial” framework is sometimes imprecisely known as the “mixed motives” framework. This creates confusion because it implies two different types of cases; a “mixed motives” case and a “pretext” case. But there are not two separate types of cases; only one type of case which requires that Plaintiff prove that an illegal motive is a “substantial factor” in the decision making process. See *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002) (en banc) (“[W]e emphasize that there are not two fundamentally different types of Title VII cases”). Confusingly, the phrase “mixed motives” is a term of art which has nothing to do with the number of the employer’s motives or the standard of causation. In virtually every employment discrimination case, the employer offers a legitimate non-discriminatory reason(s) for its adverse action. In every case the jury may decide 1) that the legitimate reason motivated the employer, and that the illegal reason did not; 2) that the illegal reason motivated the employer and the legitimate reason did not; or 3) that both the illegal and legitimate reason motivated the employer. In this sense, every case is *potentially* a multiple or mixed motive case regardless of whether a “substantial factor” or “but for” standard of causation applies. In order to avoid this confusion, the Court in *Pacific Shores Properties v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013) described the alternative approach to *McDonnell Douglas* as the “direct or circumstantial approach.” *Id.* at 1158 (emphasis supplied).

inconsistent ruling by panels of the same circuit). In rejecting the distinction between direct and circumstantial evidence, the United States Supreme Court has recognized that direct evidence is not more probative than circumstantial evidence, and that in any case proof of illegal discrimination does not require a heightened standard of proof. *Desert Palace v. Costa*, 539 U.S. 90, 99-100 (2003). This Court should similarly reject the distinction between direct and circumstantial evidence as arbitrary and unworkable. Federal courts have ruled that Plaintiffs have a choice about which framework they seek to utilize for the purpose of responding to a motion for summary judgment. *E.g.*, *Dominguez-Curry v. Nevada Transp. Dept.* 424 F.3d 1027, 1039 (9th Cir. 2005). This court should also rule that Plaintiffs have a choice about which framework to apply regardless of the type of evidence upon which they rely.

The *McDonnell Douglas* framework provides one evidentiary tool for proving that an illegal motive played a causal role in the decision to take adverse employment action. It was “was never intended to be 'rigid, mechanized, or ritualistic.'” *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). The framework should be adapted to fit the facts of each case. The components of a prima facie case or pretext are not essential elements of a discrimination claim and were never intended to be a substitute for the “substantial factor” standard. Under the WALD there is only one dispositive issue: was an illegal motive a “substantial factor” in the decision to take adverse action? Regardless of whether Plaintiff satisfies any of the

variety of formulations of the prima facie case or pretext, evidence that an illegal reason was a "substantial factor" in the decision to take adverse employment action is *always* sufficient to survive summary judgment. Judicial reliance upon a predetermined formulation of either the prima facie case or pretext transforms the shifting burden framework from one which is flexible into one which is "rigid, mechanized, or ritualistic."

It necessarily follows that under the shifting burden framework, evidence that an illegal reason was a "substantial factor" in the employer's actions must always be considered as one method of proving pretext: *i.e.*, that the employer's claim it was motivated by wholly lawful reasons is untrue. The Court of Appeals' failure to include the "substantial factor" standard as an alternative prong of the pretext formulation is inconsistent with decisions by this court and federal courts. That failure transformed the "substantial factor" standard into the "only factor" standard, which has been rejected by both state and federal courts.

The "direct or circumstantial" framework does not rely upon shifting burdens and instead addresses more directly whether an illegal reason is a "substantial factor." While proof that the employer's articulated reason is a "pretext" will support an inference of an illegal motive, Plaintiff does not have to prove "pretext" to survive summary judgment. Proof of discriminatory intent can take many forms, and no single type of proof or type of evidence is required.

The doctrine of “stray remarks” is inextricably related to the doctrine of “direct evidence.” Just like the “direct evidence” doctrine, the “stray remark” doctrine defies consistent application. The jurisprudence attempting to define “stray remarks” is no less of a “quagmire” than the jurisprudence attempting to define “direct evidence.” As did the Supreme Court in California, this court should reject the stray remarks doctrine as inconsistent, arbitrary and unworkable. *See Reid v. Google Inc.*, 50 Cal.4th 512, 535-545, 113 Cal. Rptr. 3d 327, 235 P.3d 988 (2010) (analyzing in detail the history, inconsistencies, and “major flaws” of the stray remarks doctrine).

If a discriminatory remark is relevant, the weight of the evidence is a question for the jury and not the court. In this case, the President of Clark College was a decision-maker concerning the hiring of new faculty. He explicitly stated his preference for hiring younger faculty at the very time when he was considering hiring Plaintiff for an open position. The jury should have been allowed to weigh this relevant evidence against the Defendant’s insistence that age played no part in the hiring decision. This Court should reverse the lower courts and remand for a trial on the merits.

III. ARGUMENT

A. Summary Judgment is Generally an Inappropriate Vehicle for Resolving the Issue of Motive.

Within the context of employment discrimination, very little evidence is necessary to establish a question of fact on the issue of motive sufficient

to create a jury question. While a different summary judgment standard does not apply for discrimination cases, the application of that standard is more difficult when motive is the central factual issue. Illegal motive is difficult to prove and legitimate reasons are easily concocted; even below average workers are protected.

Proof of [employment] discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. . . . The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were of a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative.

Riordan v. Kempiners, 831 F.2d 690, 697-98 (7th Cir. 1987) (Posner, J.).

“Summary judgment in favor of the employer in discrimination cases 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.” *Carle v. McChord Credit Union*, 65 Wn.App. 93, 102, 827 P.2d 1070 (1992).² The Ninth Circuit Court of Appeals “has set

² See also *Johnson v. Department of Social and Health Services*, 80 Wn. App. 212, 229, 907 P.2d 1223 (1996) (“The question of an employer’s intent to discriminate is “a pure question of fact Where the evidence creates ‘reasonable but competing inferences of both discrimination and nondiscrimination,’ a factual question for the jury exists”); *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn. App. 852, 863, 851 P.2d 716 (1993) (“Thus, by pointing to evidence which calls into question the defendant’s intent, the plaintiff raises an issue of material fact which, if genuine, is sufficient to preclude summary judgment”).

a high standard for the granting of summary judgment in employment discrimination cases.” *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996). “We require very little evidence to survive summary judgment in a discrimination case, ‘because the ultimate question is one that can only be resolved through a ‘searching inquiry’--one that is most appropriately conducted by the factfinder, upon a full record.” *Lam v. University of Hawai’i*, 40 F.3d 1551, 1564 (9th Cir. 1994).³

B. The “Substantial Factor” Standard of Causation Applies at Trial and Summary Judgment.

The same standard of liability which applies at trial must also apply at summary judgment. *Anderson v. Liberty Lobby Inc.*, 477 U.S., 242, 252, 106 S. Ct. 2025 (1986)(“we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits”). *See also Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 73, 118 Wn.2d 46 (1991) (applying the “substantial factor” standard as an alternative method of proving pretext); *Rice v. Offshore Sys., Inc.*, 167 Wn.

³ *See also Pacific Shores Properties v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013) (“When a plaintiff opts to rely on . . . factors to demonstrate discriminatory intent through direct or circumstantial evidence, the plaintiff need provide ‘very little such evidence... to raise a genuine issue of fact...; any indication of discriminatory motive... may suffice to raise a question that can only be resolved by a fact-finder’”); *Lyons v. England*, 307 F.3d 1092, 1113 (9th Cir. 2002) (“However, we have held that ‘any indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a factfinder,’ and for that reason ‘summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the elusive factual question of intentional discrimination’”); *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir.1985) (same) (quoting *Burdine*, 450 U.S. at 255 n. 8, 101 S. Ct. 1089).

App. 77, 272 P.3d 865, *review denied*, 174 Wn.2d 1016 (2012) (recognizing the substantial factor standard at summary judgment); *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn.App. 774, 800, 120 P. 3d 579 (2005)(same)(citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003)).

Twenty years ago this Court held that the “substantial factor” causation test was the standard for liability under the WLAD. WPI 330.01; *MacKay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995). The Court Appeals ruled that at summary judgment the “substantial factor” standard does not apply in the absence of “direct evidence.” 309 P.3d at 618. This was fundamental error. The same standard of liability applies regardless of the type of evidence and regardless of whether the decision is made at summary judgment or at trial.

C. The Framework for Deciding Discrimination Cases at Summary Judgment Is Not Dependent upon the Characterization of the Evidence as “Direct” or “Circumstantial.”

The United States Supreme Court has rejected the distinction between direct and circumstantial evidence as a basis for applying the “direct or circumstantial” framework. In *Desert Palace v. Costa*, 539 U.S. 90 (2003), the Court acknowledged that nothing in the text of the statute required a heightened standard of direct evidence, and also relied upon the long standing rule of law that direct evidence is not more probative than circumstantial evidence. “The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: ‘Circumstantial evidence is not only sufficient,

but may also be more certain, satisfying, and persuasive than direct evidence.” *Id.* at 100. Requiring courts to distinguish between direct and circumstantial evidence will inevitably lead to confusion and subjective judicial judgments concerning the nature of the evidence which qualifies as “direct.” As stated by the Ninth Circuit, “[t]he resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators.” *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851-853 (9th Cir. 2002) (en banc) (discussing different standards by different circuits and inconsistent ruling by panels of the same circuit).

In this case, the Court of Appeals ruled that both the framework for deciding the case and the standard for liability turned on the characterization of the evidence as “direct” or “circumstantial.” This was fundamental error.⁴ Although this Court has previously acknowledged the “direct” and “circumstantial” dichotomy as a basis for determining the framework to decide a discrimination case at summary judgment, *see Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440, 446 (2001), it should now rule that the characterization of the evidence as either “direct” or “circumstantial” is

⁴ In *Alonso v. Quest Communications*, No. 43703-1-II (Dec. 31, 2013), the Court also considered an appeal from a grant of summary judgment in favor of the defendant. The Court ruled that the comments made by a manager were “direct evidence,” and applied the “direct evidence test.” Slip Opinion at 6-7. The Court then proceeded to analyze whether there was sufficient evidence to conclude that an illegal motive was a “substantial factor” in the decision making process. *Id.* at 9-10. In Division II of the Court of Appeals, it appears that a “substantial factor” standard applies for deciding summary judgment when there exists “direct evidence” (not a “stray remark”) of an illegal motive. However, in the absence of “direct evidence” the “substantial factor” standard does not apply, and the Plaintiff must prove that an illegal reason was the “only factor” utilizing the shifting burden framework.

irrelevant to the resolution of discrimination claims.⁵ This Court should join the Ninth Circuit Court of Appeals and rule that regardless upon which type of evidence they rely Plaintiff has a choice of whether to utilize the shifting burden framework or the “direct and circumstantial” framework.⁶

D. The Shifting Burden Framework is a Flexible Guideline to Determine the Existence of an Illegal Motive.

The shifting burden framework for deciding discrimination cases at summary judgment is derived from *McDonnell Douglas v. Green, supra*. It provides a *guideline* and “was never intended to be rigid, mechanized, or ritualistic.” *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). The shifting burdens framework was developed to assist Plaintiff in surviving summary judgment in recognition that discriminatory intent is often difficult to prove. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-03. No

⁵ The Court in *Hill* adopted the direct/circumstantial evidence distinction in reliance on federal case law. 144 Wn.2d at 179-180. Insofar that federal courts have now rejected this distinction its basis under state law should be reconsidered.

⁶ See *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (“[W]hen responding to a summary judgment motion, the plaintiff is presented with a choice regarding how to establish his or her case. [Plaintiff] may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]”); *Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1039 (9th Cir. 2005) (“a plaintiff may produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the defendant's decision, or alternatively may establish a prima facie case under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*”) (emphasis original); *Pacific Shores Properties v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013) (“A plaintiff does not, however, have to rely on the *McDonnell Douglas* approach to create a triable issue of fact regarding discriminatory intent in a disparate treatment case. Citation omitted. Instead, he may ‘simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated’ the defendant and that the defendant's actions adversely affected the plaintiff in some way”).

particular *type of evidence* or *type of proof* is required to establish a violation of the WLAD.⁷ Nor is it significant how that evidence is designated - as part of the prima facie case or pretext. “The ultimate question for the court in making a summary judgment determination in such a case is not whether the plaintiff has produced sufficient evidence to survive the *McDonnell Douglas/Burdine* shifting burdens, but rather whether there are any genuine issues of material fact concerning the defendant’s motivation for its adverse employment decision, and, if none are present, whether the law . . . supports a judgment in favor of the moving party on the basis of the undisputed facts.” *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008). The inflexible application of the *McDonnell Douglas* shifting burdens creates a barrier to the vindication of civil rights.⁸

1. The Court of Appeals Applied an “Only factor” Standard.

In this case, it was conceded that Plaintiff satisfied a prima facie case. After analyzing the Defendant’s asserted legitimate reason, the Court of

⁷ *E.g. Pacific Shores Properties v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013)(“Our cases clearly establish that plaintiffs who allege disparate treatment under statutory anti-discrimination laws need not demonstrate the existence of a similarly situated entity who or which was treated better than the plaintiffs in order to prevail. Citation omitted. Proving the existence of a similarly situated entity is only one way to survive summary judgment on a disparate treatment claim”).

⁸ *See also Texas Dep't of Community Affairs v. Burdine*, 450 US 248, 253 n6 (1981) (explaining that the McDonnell Douglas formulation is flexible and can be adapted to fit the facts of each case); *Spaulding v. University of Washington*, 740 F. 2d 686, 700 9th Cir. 1984)(“Title VII’s nature and purpose require that the McDonnell Douglas test be flexible. What must be shown to support an inference that the plaintiff was discriminated against depends on the facts of each case. . . . Thus, we do not specify the minimum factors required for plaintiffs to establish a prima facie Title VII case of sex-based wage discrimination”).

Appeals proceeded to analyze whether Plaintiff had demonstrated that the Defendant's reason was a pretext. The Court of Appeals defined pretext as proving that the Defendant's reason: (1) had no basis in fact, (2) were not really motivating factors for its decision, (3) were not temporally connected to the adverse employment action, or (4) were not motivating factors in employment decisions for other employees in the same circumstances. 405 P.3d at 617. Summary judgment was affirmed because Plaintiff could not satisfy this formulation of pretext. *Id.* at 617-18.

Under the Court of Appeal's formulation of pretext, if the Defendant's legitimate reason actually motivated it to take adverse action then Plaintiff could not prevail. This formulation of pretext *excuses* invidious discrimination so long as there exists a legitimate reason for adverse action which was true and motivated the employer. The purpose of WLAD, however, is not to excuse but to *eradicate* discrimination from the workplace. *E.g., Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 360, 20 P.3d 921 (2001) ("The overarching purpose of the law is 'to deter and to eradicate discrimination in Washington'"). The "substantial factor" standard allows the Plaintiff to prevail even though the Defendant was also motivated by its legitimate reason.⁹ The Court of Appeal's formulation of "pretext"

⁹ In *Wilmo v. Kaiser Aluminum & Chem. Corp.*, the Washington Supreme Court explained that "[u]nder the substantial factor test, if the pursuit of a claim for benefits was a significant or substantial factor in the firing decision, the employer could be liable, even if the employee's conduct otherwise did not entirely meet the employer's standards." *Id.* at 71. The issue in every case is not whether there existed legitimate reason(s) for termination, but whether an illegal reason was a substantial factor. If it was, then Plaintiff prevails. *See*

transformed the “substantial factor” standard into the “only factor” standard. The “only factor” standard created a virtually insurmountable barrier that has been rejected by this court and federal courts.¹⁰

2. The “Substantial Factor” Standard Must Be Available as an Alternative Method to Pretext.

Whether an illegal reason was a “substantial factor” in the decision to take adverse action is the only dispositive question regardless of the type of evidence, the type of proof, and whether characterized part of the prima facie case or pretext. Under the substantial factor standard, the existence of a true and legitimate reason for an adverse employment action is not dispositive. Plaintiff survives summary judgment and ultimately wins if there existed an illegal reason which was a substantial factor in the decision making process even though the Defendant’s asserted reason is true. When proceeding under the shifting burden framework, Plaintiff may ultimately succeed, as an alternative to pretext, by demonstrating that an illegal reason is a substantial factor in the decision making process. *See Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 73, 118 Wn.2d 46 (1991) (“Because the

also Allison v. Seattle Housing, 118 Wn.2d 79, 821 P.2d 34 (1991)(holding that substantial factor test applies to public policy tort); *MacKay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-11, 898 P.2d 284 (1995)(adopting the reasoning of *Wilmot* and *Allison* as applied to the WLAD).

¹⁰ *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 69, 118 Wn.2d 46 (1991)(“Finally, as to plaintiff’s ultimate proof, we reject one test of causation, i.e., that retaliation for pursuing workers’ compensation benefits was the sole reason for the discharge. . . . This requirement is difficult for a plaintiff to meet, and, we conclude, inconsistent with the public policy mandate expressed in RCW 51.48.025”); *Price Waterhouse*, 450 U.S. at 241 (Brennan, J., plurality opinion)(When Congress enacted Title VII it “specifically rejected an amendment that would have placed the word ‘solely’ in front of the words ‘because of’”).

substantial factor test is the appropriate standard by which plaintiff must ultimately prove his or her claim by a preponderance of the evidence, the plaintiff may respond to the employer's articulated reason either by showing that the reason is pretextual, *or by showing that although the employer's stated reason is legitimate, the worker's pursuit of or intent to pursue workers' compensation benefits was nevertheless a substantial factor motivating the employer to discharge the worker.*") (emphasis added). The Court of Appeals erred when it failed to allow proof of "substantial factor" as an alternative to pretext. *See also Brownfield v. City of Yakima*, 30994-1-III (Dec. 3, 2013) (Published Jan. 14, 2014 - affirming summary judgment for failure to prove pretext and failing to include "substantial factor" as an alternative to pretext; creating an "only factor" standard).

E. The "Direct or Circumstantial" Test Applied at Summary Judgment.

To succeed under the direct or circumstantial test, plaintiff must simply create a question of fact about whether an illegal reason was a "substantial factor" in the decision to take adverse action. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (en banc) ("The inquiry is simply that of any civil case: whether the plaintiffs evidence is sufficient for a rational factfinder to conclude by a preponderance of the evidence that the employer violated the statute that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice"). There are no restrictions concerning the manner of satisfying this standard,

and each case may differ depending upon the unique facts and circumstances. *See Pacific Shores Properties v. City of Newport Beach*, 730 F. 3d 1142, 1158-59 (9th Cir. 2013) (describing a non-exhaustive multi-factor sensitive inquiry to determine the existence of discriminatory intent).

Plaintiff may satisfy the “direct and circumstantial” test with evidence *including but not limited to* the following: 1) discriminatory comments or remarks by a decision maker which suggest a bias against the protected class at issue; 2) that employees outside the protected class are treated more favorable than those within the protected class; 3) statistical evidence which satisfies the “gross disparity” standard 4) that the defendant’s articulated reason for adverse action has changed over time; 5) that the defendant’s articulated reason for adverse action is false and/or unworthy of belief; 6) proximity in time between protected activity and adverse employment action (in cases alleging retaliation); and 7) any other evidence which creates an inference that an illegal reason was a “substantial factor” in the decision to take adverse action. Proof of pretext is not required. *See Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1067 (9th Cir. 2003) (“In mixed motive cases, . . . it does not make sense to ask if the employer's stated reason for terminating an employee is a pretext for retaliation, . . .”).

F. The Issue of “Direct Evidence” is Identical to the Issue of “Stray Remarks.” Both Doctrines Should be Abandoned as Arbitrary and Unworkable.

The “direct evidence” doctrine and “stray remark” doctrine are inextricably related. If a discriminatory comment is “direct evidence,” it is not a “stray remark,” and vice versa. *See Price Waterhouse*, 490 U.S. at 276-77 (discussing “stray remarks” as a corollary to “direct evidence”) (Justice O’Conner concurring). The inconsistent application of both doctrines has resulted in a “quagmire,” that is arbitrary and unworkable. If the discriminatory comment is relevant then the weight of the evidence is for the jury and not the court.

In *Reid v. Google Inc.*, 50 Cal.4th 512, 535-545, 113 Cal. Rptr. 3d 327, 235 P.3d 988 (2010), the Court rejected the “stray remarks” doctrine after analyzing in detail its history, inconsistencies, and “major flaws.” In *Reid*, the Plaintiff filed an age discrimination claim against his former employer. He offered statistical evidence of discrimination, discriminatory comments made by coworkers and decision-makers, and evidence of changing rationales for his termination. *Id.* at 521. The defendant’s motion for summary judgment was denied, and the defendant appealed.

The California Supreme Court considered whether to follow the federal doctrine of “stray remarks;” specifically that “statements that non-decision-makers make or that decision makers make outside of the decisional process are deemed ‘stray,’ and they are irrelevant and insufficient to avoid

summary judgment.” *Id.* at 516.¹¹ The Court rejected the federal doctrine: “An age-based remark not made directly in the context of an employment decision or uttered by a non-decision-maker may be relevant, circumstantial evidence of discrimination.” *Id.* at 539. “Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury.” *Id.* at 541 (citing *Reeves v. Sanderson Plumbing*, 530 U.S. at 152-153). In rejecting the “stray remark” doctrine, the Court also recognized the broad disagreement about who a decision-maker is, what constitutes a “stray remark,” and the required proximity in time between the remark and the decision. *Id.* at 542-46.

“The ‘stray remarks’ or ‘stray comments’ doctrine, . . . , is a series of loosely-bound doctrines and casual labels that different courts assign to proffered evidence of discrimination that they plan to discount or ignore.” See Kerri Lynn Stone, Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law, 77 *Mo. L. Rev.* 149, 159 (2012). A discriminatory comment offered to show discriminatory intent, under various iterations of the doctrine, has been deemed “stray” and therefore insufficient or otherwise ignored for one or more of the following reasons: (1) the remark(s) were made by one too removed from the decision

¹¹ Plaintiff was told by co-workers that his opinions and ideas were “obsolete” and “too old to matter,” that he was “slow,” “fuzzy,” “sluggish,” and “lethargic,” and that he did not “display a sense of urgency” and “lack[ed] energy.” These comments were made “every few weeks.” Other coworkers called Reid an “old man,” an “old guy,” and an “old fuddy-duddy,” told him his knowledge was ancient, and joked that Reid’s CD (compact disc) jewel case office placard should be an “LP” instead of a “CD.” *Id.* at 535-36.

making process at issue; (2) the remark(s) were isolated, as opposed to part of a broader pattern of comments tending to evince bias; (3) the remark(s) were not made with sufficient temporal proximity to the adverse action at issue in the suit; (4) the remark(s) were too ambiguous to be clearly probative of discriminatory bias; or (5) the remark(s) were too contextually attenuated from the adverse action at issue in the suit to be reflective of discriminatory bias. *Id.* at 159-69 (collecting cases).

This Court should adopt the reasoning of the California Court and rule that discriminatory comments which reflect bias against a protected class are relevant, and their weight is to be considered by the jury and not the court. Whether the comments were made in the context of the decision making process is not determinative. For example, racial jokes and comments and frequent use of the “N word” clearly reflect racial bias which a jury should be free to consider even when not be made within the decision making context. *See Alonso v. Quest*, No. 43703-1-II (Dec. 31, 2013) (the Court considered as “direct evidence” the racial comments by both co-workers and managers outside the decision making context); *Sprint/United Management v. Mendelsohn*, 552 US 379, 387 (2008) (rejecting the per se exclusion of evidence of age discrimination by supervisors who played no part in the adverse employment action alleged by Plaintiff).

In this case, the discriminatory comments *were* related to the decision to hire new faculty, they were made by the President of the College, who had

ultimate hiring authority, and they were made during the time that Plaintiff was being considered for open positions. The Court of Appeals erred when it designated the comments as “stray remarks,” and then weighed their probative value.

The State argues that the President’s comments in favor of hiring *younger* employees should be considered as part of a program to implement diversity at the workplace. *See* State Supplement Brief at 12-18. Whether and under what circumstances affirmative action on the basis of age is a legitimate basis for a hiring decision under the WLAD is not before this court. But the authority offered by the State involves diversity or affirmative action in favor of a *protected class* of employees, who represent a disadvantaged minority group. Such programs seek the employment of individuals who, because of the invidious bias against them, are unable to secure employment on an equal basis. *Younger* employees, under the age of 40, are not a protected class, not a disadvantaged minority group, and not subjected to invidious bias. Affirmative action plans or recruitment in favor of *older* workers would be consistent with the spirit and authority advocated by the State. But in this case the comments of the President reflect a bias in favor of *younger* workers, who are neither a protected class nor disadvantaged. WELA is aware of no case where affirmative action in favor of someone not in a protected classification has been sustained.

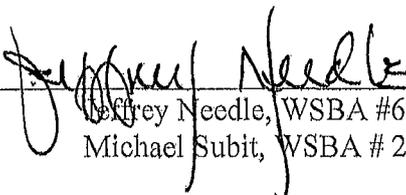
Moreover, the President of the College in opposition to summary judgment insisted that age played no part in his hiring decision. 309 P.3d at 615-616. The State can't have it both ways. It can't deny that age played a factor in the hiring decision, on one hand, and then insist that the decision was justified based on a desire for greater age diversity. The jury should be allowed to assess the credibility of the President of the college should he choose to change his testimony and assert that age did play a factor in the hiring decision. Inconsistent reasons offered in justification for adverse action is in and of itself a basis for inferring discriminatory intent. *See Staten v. New Palace Casino, LLC*, 187 Fed. Appx. 350, 359 (5th Cir. 2006) ("When an employer offers inconsistent explanations for its employment decision at different times, as here, the jury may infer that the employer's proffered reasons are pretextual")(collecting cases).

IV. CONCLUSION

The Court of Appeals should be reversed, and the case remanded for trial on the merits.

Respectfully submitted this 18th day of February, 2014.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By  _____
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CERTIFICATE OF SERVICE

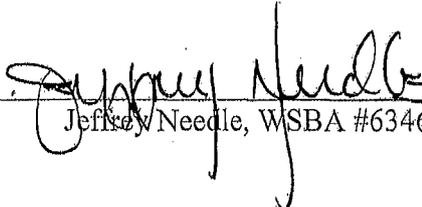
I hereby certify that on 18th day of February, 2014, I presented the foregoing Amicus

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