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NO. 89377-2

SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN SCRIVENER,

Petitioner,

v.

CLARK COLLEGE,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

There is no substantive disagreement between the parties to this case regarding how a plaintiff may establish pretext in an employment discrimination case. A plaintiff may establish pretext by showing either that the employer's reasons for the allegedly discriminatory action are unworthy of credence or that the decision was more likely than not motivated by discriminatory reasons.

But that standard has not been met here. Respondent Clark College did not hire Petitioner Kathryn Scrivener for a tenure-track faculty position because she was not as strong of a teacher as the successful candidates, and the College prioritizes teaching ability in making hiring decisions. The trial court correctly rejected Ms. Scrivener's argument that comments made by the College's President affirming a commitment to, and a desire to increase, diversity demonstrated that the College's stated reason for not hiring her was pretext. To subject employers to jury trials whenever they publicly support diversity would deter diversity efforts and, in the process, undermine Washington's strong public policy supporting diversity. Fortunately, both well-established case law and public policy dictate that such comments are not evidence of pretext. This Court should affirm the dismissal of Ms. Scrivener's claim and reject her attempt to deter employers' diversity efforts.

II. STATEMENT OF THE ISSUES

1. Whether this Court should reaffirm the well-established pretext standard that has served Washington well for 20 years.

2. Whether the trial court properly dismissed Ms. Scrivener's age discrimination claim when statements affirming a commitment to, and a desire to increase, diversity do not constitute evidence of pretext and holding otherwise would undermine Washington's strong public policy supporting diversity.

III. STATEMENT OF THE CASE

A. The College Based Its Hiring Decisions On Teaching Ability¹

In the fall of 2005, Respondent Clark College's (the "College") English department began accepting applications for the two tenure-track faculty positions at issue in this case. CP at 32, 36-37. Petitioner Kathryn Scrivener was one of 156 applicants for these positions. CP at 32, 101.

In hiring faculty, the College "plac[es] a premium on quality teaching." CP at 18. It holds good teaching as a "fundamental[] value . . . at the center of [the] institution," CP at 18, and has a "commitment to being a learning college." CP at 20. Faculty members are expected to be innovative teachers who are "central" to student learning. CP at 21. Administrators keep these goals in mind during hiring, (CP at 1-3, 36, 59-

¹ The Counterstatement of the Case in Respondent's Answer to Petition for Review accurately states the relevant facts in this case and is largely reproduced here.

60), and the hiring decision at issue in this case was no exception. In its job posting for these positions, the College focused on inventive, student-centered teaching, asking all applicants to “[d]escribe your teaching philosophy” and to “[d]escribe strategies you have used to ensure your teaching is effective and students are succeeding.” CP at 36. Additionally, the teaching skills of each finalist for these positions were observed in the classroom during the hiring process. CP at 32. Put simply, every aspect of the hiring process was directed toward hiring the best teachers. CP at 30-32.

In accordance with the College’s written tenure-track hiring policy, the first step in filling these positions was for a faculty committee to select a group of finalists. CP at 32. The committee reviewed applications, checked references, conducted interviews, observed teaching demonstrations by 13 candidates, and selected four finalists for the positions, including Ms. Scrivener. CP at 30-32, 63-65.

The committee composed a memorandum detailing each finalist’s strengths and weaknesses and provided it to the College’s President, Dr. Wayne Branch, and its acting Vice President of Instruction, Dr. Sylvia Thornburg. CP at 32. In accordance with the faculty hiring policy, Drs. Branch and Thornburg interviewed each of the four finalists. CP at 2. As the College’s President, Dr. Branch had the ultimate decision-making

authority for all faculty positions. CP at 1-2. In making his decisions, however, he consulted with Dr. Thornburg. CP at 2, 59. In May 2006, Dr. Branch decided to hire Ms. Geneva Chao and Ms. Jill Darley-Vanis for the two positions. CP at 3. Drs. Branch and Thornburg agreed that these two were the best candidates for the positions. CP at 4. They also “agreed that of the four finalist[s], Ms. Scrivener was ranked last.” CP at 59.

The successful candidates were well-qualified for the positions. Ms. Chao was a graduate of Barnard College of Columbia University, and had masters degrees from San Francisco University in English and Creative Writing. CP at 49. She had taught at New York University, the Art Institute of California in San Francisco and Clark College. CP at 47. After observing Ms. Chao’s teaching demonstration, the faculty committee called her an “[a]rticulate fast thinker who can challenge expectations without insulting or offending.” CP at 63. The committee also commended her “[c]larity when presenting information” while praising her demonstration as “[s]killed, enjoyable and interactive.” CP at 63.

Ms. Darley-Vanis had a B.A. in English and French from Oregon State University and an M.A. in English from Portland State University. CP at 53. She had taught at Lower Columbia College, Concordia University, Portland State University, and Clark College. CP at 51. Ms. Darley-Vanis’s teaching demonstration was “[e]xtremely organized,”

and the committee admired her “creative[] use[]” of “[o]utstanding written materials.” CP at 64. During the demonstration, Ms. Darley-Vanis demonstrated excellent “patience and compassion” with students that helped to achieve their “buy-in.” CP at 64.

In contrast, the faculty committee expressed concerns about Ms. Scrivener. While Ms. Scrivener was an “[e]nergetic and enthusiastic” presenter, she “lost her place and was not as smooth or clear as she could have been.” CP at 65. Further, the committee expressed concern that students might find her “exuberance and passion . . . off-putting” because she had such an extreme “up-front style.” CP at 65.

B. Dr. Branch, Who Is Older Than Ms. Scrivener, Regularly Hired Individuals Over 40 For Faculty Positions

At the time of this hiring decision, Ms. Scrivener was 54 years old, Dr. Branch was 55, and Dr. Thornburg was 61. CP at 3, 60, 73. Ms. Chao and Ms. Darley-Vanis were both under 40. CP at 101.² Statistics regarding the College’s workforce demonstrate that Dr. Branch was not at all reluctant to hire individuals over 40 years of age. Dr. Branch had been the College’s President since August 2003. CP at 1. As of October 2005, 74 percent of the College’s total workforce was over 40 years of age. CP at 39. During the 2005-06 academic year at issue in this case, 7 of the 16

² “Over 40 years of age” is the relevant protected class for age discrimination. RCW 49.44.090.

(or 44 percent) of all faculty, and 4 of the 12 (or 33 percent) of all tenure-track faculty, Dr. Branch hired were over 40 years of age, proportions greater than the proportion of applicants for the tenure-track faculty positions at issue in this case who were over 40 (50 of 156, or 32 percent). CP at 32, 43-44. Further, Dr. Branch annually hired Ms. Scrivener for non-tenure track faculty positions from 2003 through 2006. CP at 1, 101.

C. Procedural History

In 2009, Ms. Scrivener filed this lawsuit against the College, alleging that the decision not to hire her for one of the tenure-track faculty positions constituted age discrimination in violation of RCW 49.60. CP at 122-25. The trial court granted the College's motion for summary judgment, dismissing Ms. Scrivener's claim with prejudice. CP at 117-18. Ms. Scrivener appealed and the Court of Appeals affirmed.

IV. ARGUMENT

A. Traditional Standards Of Review Apply To This Case

This Court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court.³ The purpose of summary judgment is to avoid unnecessary trials.⁴ If there is no genuine issue of material fact, summary judgment shall be granted.⁵ This Court may affirm

³ *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

⁴ *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

⁵ CR 56(e).

a lower court's ruling on any grounds supported by the record.⁶ There is no exception to these standards for employment discrimination cases. While it has been stated that summary judgment is seldom appropriate in such cases,⁷ the authority that originally made that statement⁸ has since been abrogated.⁹ Thus, as this Court has stated, "courts 'should not treat discrimination differently from other ultimate issues of fact.'"¹⁰

B. This Court Should Reaffirm Washington's Long-Standing Pretext Standard

1. This Case Is Governed By The Well-Established Burden-Shifting Analysis

In discrimination cases where the plaintiff lacks direct evidence of discrimination, Washington courts employ the four-step burden-shifting analysis articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*¹¹ to rule on summary judgment motions.¹² Before the trial court, Ms. Scrivener agreed that this analysis governed the

⁶ *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

⁷ *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 144, 94 P.3d 930 (2004) (citing *deLisle v. FMC Corp.*, 57 Wn. App. 79, 84, 786 P.2d 839 (1990)).

⁸ *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364-65 (8th Cir. 1987) (cited by *deLisle*, 57 Wn. App. at 83-84).

⁹ *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043, 1060 (8th Cir. 2011) (abrogating *Hillebrand* and holding that there "is no 'discrimination case exception' to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial").

¹⁰ *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 185, 23 P.3d 440 (2001) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)), overruled on other grounds by *McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006).

¹¹ 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

¹² *Hill*, 144 Wn.2d at 180.

resolution of summary judgment in this case.¹³ Under this analysis, first, the plaintiff bears the burden of establishing a prima facie case of discrimination, and the defendant is entitled to judgment as a matter of law if the plaintiff fails to meet this burden.¹⁴ Second, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a nondiscriminatory reason for the adverse employment action at issue.¹⁵ Third, if the defendant articulates such a reason, the burden shifts back to the plaintiff to demonstrate that the reason was pretext, and the defendant is entitled to judgment as a matter of law if the plaintiff fails to meet this burden.¹⁶ Fourth, if the plaintiff demonstrates pretext, summary judgment is denied if the record contains reasonable but competing inferences of both discrimination and nondiscrimination.¹⁷

In this case, both parties agreed that Ms. Scrivener had established a prima facie case and that the College had articulated a nondiscriminatory reason for not hiring Ms. Scrivener for a tenure-track faculty position.¹⁸ Thus, the analysis in this case begins at the third step—pretext.

¹³ CP at 92 (stating in opposition brief that “Washington courts have adopted the burden-shifting framework established in *McDonnell Douglas*” and opposing summary judgment based on that framework).

¹⁴ *Hill*, 144 Wn.2d at 181.

¹⁵ *Id.*

¹⁶ *Id.* at 182.

¹⁷ *Id.* at 186-90.

¹⁸ CP at 80, 93.

2. Courts Have Consistently Used The Same Pretext Standard For 20 Years

This Court has defined pretext as follows: “[A] plaintiff establishes pretext by showing that the employer’s reasons for the allegedly discriminatory action are unworthy of credence or that the decision . . . was more likely than not motivated by discriminatory reasons.”¹⁹ Courts have subsequently provided additional specificity to this standard through the language used by the Court of Appeals in this case, which has become the most common articulation of the pretext standard:

To show pretext, a plaintiff must show that the defendant’s articulated reasons (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.²⁰

Over the past 20 years, the Court of Appeals has articulated this standard in at least a dozen cases,²¹ this Court has cited this standard with

¹⁹ *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 643 n.32, 911 P.2d 1319 (1996) (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

²⁰ *Scrivener v. Clark College*, 176 Wn. App. 405, 412, 309 P.3d 613 (2013).

²¹ *Scrivener*, 176 Wn. App. at 412; *Fulton v. State*, 169 Wn. App. 137, 161, 279 P.3d 500 (2012); *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 89-90, 272 P.3d 865 (2012); *Hollenback v. Shriners Hosps. for Children*, 149 Wn. App. 810, 824, 206 P.3d 337 (2009); *Dumont v. City of Seattle*, 148 Wn. App. 850, 867, 200 P.3d 764 (2009); *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 467, 98 P.3d 827 (2004); *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 88, 98 P.3d 1222 (2004); *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 619, 60 P.3d 106 (2002); *Chen v. State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997); *Kuyper v. State*, 79 Wn. App. 732, 738-39, 904 P.2d 793 (1995); *Sellsted v. Wash. Mutual Sav. Bank*, 69 Wn. App. 852, 859 n.14, 851 P.2d 716 (1993), *overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995).

approval,²² and there have been no apparent issues with it until now.

This standard does not, as Ms. Scrivener suggests, require a plaintiff to meet a “but for” standard of causation to defeat summary judgment when only the lower “substantial factor” standard is required to prevail at trial.²³ Evidence demonstrating that a plaintiff’s membership in a protected class was a substantial factor for an adverse employment action would suffice to establish pretext under this standard. Such evidence would show that “the decision . . . was more likely than not motivated by discriminatory reasons.”²⁴ It would also, by supporting an alternative reason for an adverse employment action, show that the employer’s articulated reasons “were not really motivating factors for its decision[.]”²⁵ Thus, the well-established pretext standard does not impose a higher standard on summary judgment than applies at trial.

3. *Rice* Erroneously Conflated The Third And Fourth Steps Of The Burden-Shifting Analysis

The apparent confusion regarding the pretext standard that led to the issue in this case has its origins in the Court of Appeals’ opinion in *Rice v. Offshore Sys., Inc.*²⁶ After articulating the same pretext standard used by the Court of Appeals in the present case, the *Rice* court

²² *Riehl*, 152 Wn.2d at 150-51 (citing *Kuyper* with approval).

²³ Petition for Review at 12.

²⁴ *Fell*, 128 Wn.2d at 643 n.32.

²⁵ *Scrivener*, 176 Wn. App. at 412.

²⁶ 167 Wn. App. 77, 272 P.3d 865 (2012).

summarized that standard by stating, “The central dispute here is whether Rice met his burden of producing sufficient evidence to support a reasonable inference that a discriminatory retaliatory motive was a substantial factor in his discharge—pretext.”²⁷

This sentence from *Rice*, for which the *Rice* court cited no legal authority, conflates the third and fourth steps of the burden-shifting analysis. The third step, pretext, requires plaintiffs to provide evidence that shows the employer’s reasons “are unworthy of credence or that the decision . . . was more likely than not motivated by discriminatory reasons.”²⁸ The fourth step, in contrast, requires that the court look at the entire record and determine whether it permits “*reasonable but competing* inferences of *both* discrimination *and* nondiscrimination.”²⁹ This fourth step exists because “there will be instances where, although the plaintiff has . . . set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was discriminatory.”³⁰

By conflating the third and fourth steps of the burden-shifting analysis, the *Rice* court articulated an imprecise pretext standard that omits the method plaintiffs most frequently use to demonstrate pretext—showing that the employer’s reasons for the adverse employment action

²⁷ *Id.* at 90.

²⁸ *Fell*, 128 Wn.2d at 643 n.32.

²⁹ *Hill*, 144 Wn.2d at 186 (emphasis in original).

³⁰ *Id.* at 188-89.

“are unworthy of credence.”³¹ Thus, the Court of Appeals in this case was correct in rejecting the imprecise language in *Rice*.³²

C. Ms. Scrivener Failed To Establish Pretext

1. Existing Case Law Demonstrates That Comments Supporting Diversity Do Not Establish Pretext

Applying the well-established pretext standard, it is apparent that Ms. Scrivener failed to establish pretext in this case. Ms. Scrivener’s primary evidence of pretext are comments made by Dr. Branch during his January 2006 State of the College address supporting diversity:

Long before my arrival, the College held Respect for Differences as one of its core values. And that this value also bec[a]me one of the College’s mission imperatives by way of our Strategic Plan highlights the recognition that respect for differences is a skill essential to success in today’s workforce. As Sylvia Thornburg, Acting Vice President for Instruction, put it during our last management team meeting, “Exposure to dealing with persons – student colleagues or staff – of different cultures or life experiences is of value. Conversely, the absence of such exposure to multi-cultural, multi-ethnic, multi-dimensional viewpoints is a gap in the education of anyone expected to operate successfully in an increasingly multicultural environment or a global economy.”

And though 19% of our student body represents some form of ethnic diversity, only 12.2% of our workforce brings diversity to college community. And when we examine our faculty, only 9.6% of that critical aspect of the learning enterprise brings diversity to the experiences of student[s] at Clark College. Yet perhaps the most glaring need for increased diversity is in our need for younger talent. 74%

³¹ *Fell*, 128 Wn.2d at 643 n.32.

³² 176 Wn. App. at 413.

of Clark College's workforce is over forty. And though I have a great affinity for people in this age group, employing people who bring different perspectives will only benefit our college and community.³³

In determining whether comments, such as those made by Dr. Branch, establish pretext, Washington courts consider factors such as (a) whether the comment evidences discriminatory animus,³⁴ (b) whether the comment was directed at the plaintiff's qualifications as an employee,³⁵ (c) the comment's proximity in time to the allegedly discriminatory decision,³⁶ and (d) whether the person who made the comment was involved in the allegedly discriminatory decision.³⁷ Dr. Branch's comments did not evidence any discriminatory animus, were not directed at Ms. Scrivener or her qualifications, and occurred months before the hiring decision at issue. Thus, they do not establish pretext.

This result is consistent with the conclusions of federal courts, which have consistently held that comments supporting diversity, such as

³³ CP at 24.

³⁴ *Domingo*, 124 Wn. App. at 90 ("Without evidence about the context of the remark, it is impossible to know whether it is related to Domingo's termination, whether Walsh innocently made the comment in an unrelated context, or said it as a joke.").

³⁵ *Griffith*, 128 Wn. App. at 458 ("Griffith had to establish a nexus between the jokes and his employment by demonstrating that the jokes were probative of how Schnitzer Steel viewed Griffith as an employee."); *Kirby*, 124 Wn. App. at 467 n.10 (holding that comments "unrelated to the decision process" were insufficient to give "rise to an inference of discriminatory intent" (quotation marks omitted)).

³⁶ *Domingo*, 124 Wn. App. at 90 (noting that allegedly discriminatory remark was made three months prior to the challenged employment action).

³⁷ *Griffith*, 128 Wn. App. at 457 ("Neu was an employee of a competitor and neither Neu nor the competitor had control over Griffith's employment.").

Dr. Branch's, do not establish pretext.³⁸ RCW 49.60 and Title VII substantially parallel each other.³⁹ Both statutes apply substantively similar standards for imposing liability in discrimination cases,⁴⁰ and both are to be liberally construed to effectuate their purposes.⁴¹ As a result, this Court has considered federal authorities to be "persuasive authority for the construction of RCW 49.60,"⁴² and has generally followed federal authorities except where there has been a substantive difference between the statutes.⁴³ As there are no statutory differences that would support

³⁸ See, e.g., *Bissett v. Beau Rivage Resorts Inc.*, 442 Fed. Appx. 148, 152-53 (5th Cir. 2011) (holding that statements that employer "value[s] diversity and consider[s] it an important and necessary tool that will enable us to maintain a competitive edge," and that employer "is committed to maintaining a workforce that reflects the diversity of the community" were not evidence of pretext.); *Plumb v. Potter*, 212 Fed. Appx. 472, 477-78 & 481 (6th Cir. 2007) (holding that comment of "that's what we need in the VMF, a little more diversity" was not evidence of pretext); *Altizer v. City of Roanoke*, No. 02-484, 2003 WL 1456514, at *4 (W.D. Va. 2003) ("Gaskins' concern about the lack of diversity in the Department's ranks is not evidence of discriminatory animus. Nor is the fact that Gaskins thought it important to recruit and prepare minorities for promotion. That evidence says nothing about Gaskins willingness to promote a candidate because that candidate is an African-American." (emphasis in original)), *aff'd*, 78 Fed. Appx. 301 (4th Cir. 2003). Citation to unpublished federal opinions is permitted. GR 14.1(b); Fed. R. App. P. 32.1. Pursuant to GR 14.1, a copy of *Altizer* is attached to Respondent's Answer to Petition for Review.

³⁹ *Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986).

⁴⁰ 42 U.S.C. § 2000e-2(m) (stating that liability arises under Title VII when a protected class is a "motivating factor"); 6A *Washington Practice: Wash. Pattern Jury Instr. Civil* 330.01 & 330.01.01 (WPI) (stating that liability arises under RCW 49.60 when a protected class is a "substantial motivating factor").

⁴¹ *Fahn v. Cowlitz County*, 93 Wn.2d 368, 376, 610 P.2d 857 (1980) ("Congress has expressed an intent that Title VII be construed broadly. [O]ur legislature has likewise mandated a liberal construction for RCW 49.60[.]"). See also RCW 49.60.020 ("[RCW 49.60] shall be construed liberally[.]"). *But see Martini v. Boeing Co.*, 137 Wn.2d 357, 372-73, 971 P.2d 45 (1999) ("Nor does Title VII contain a direction for liberal interpretation[.]").

⁴² *Oliver*, 106 Wn.2d at 678.

⁴³ Compare *Antonius v. King County*, 153 Wn.2d 256, 266-68, 103 P.3d 729 (2005) (adopting federal statute of limitations analysis); *Hill*, 144 Wn.2d at 180-90 (adopting federal pretext standard) with *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d

deviating from federal authorities in this case, federal authorities are persuasive here. Accordingly, well-established legal authority indicates that Dr. Branch's comments are not evidence of pretext.

2. A Contrary Holding Would Undermine Washington's Strong Public Policy Supporting Diversity

The conclusion that Dr. Branch's comments do not establish pretext is supported not only by well-established case law, but also by compelling policy considerations. It is beyond dispute that Washington has a strong public policy supporting diversity, including in the workplace.⁴⁴ In recognition of the fact that state and federal laws prohibit the consideration of protected characteristics when making hiring decisions, however, efforts have been made to identify strategies that increase diversity through recruitment and retention strategies *other than* considering impermissible factors when making hiring decisions.

349, 358, 20 P.3d 921 (2001) (“[T]he interpretation of federal antidiscrimination laws is not directly applicable here because the language of RCW 49.60.040(3) is significantly different from corresponding federal law.”).

⁴⁴ RCW 41.06.530(2)(a) (referencing “the state’s policy of valuing and managing diversity in the workplace”); Executive Order 12-02 (“[I]t is the policy of Washington State to proactively build a diverse, inclusive, and culturally competent workforce[.]”); *see also* RCW 1.20.100 (“[I]t shall be the policy of the state of Washington to welcome and encourage the presence of diverse cultures and the use of diverse languages in business, government, and private affairs in this state.”); Washington State Minority and Justice Commission, *Diversifying the Bench Guidebook*, at 5 (“Today it is even more imperative that our courts reflect the growing diversity of our country.”), *available at* <http://www.courts.wa.gov/committee/pdf/Diversifying%20the%20Bench%20Guidebook.pdf>; GR 12.1 (identifying “promot[ing] diversity” as a goal of the WSBA).

This Court's Minority and Justice Commission has done just that by publishing *Building a Diverse Court: A Guide to Recruitment and Retention*. This guide identifies many lawful strategies for furthering the public policy of increasing workplace diversity.⁴⁵ For example, it recommends that employers advertise positions in minority media, implement diversity and mentoring programs, and ensure that individuals involved in hiring processes are diverse and sensitive to diversity issues.⁴⁶

Of particular relevance here, the guide also advises employers to “[b]uild a reputation for being diversity-friendly.”⁴⁷ As one federal court has held, one important way to do this is for an employer to make public affirmations of a commitment, and a desire to increase, diversity.⁴⁸ It is thus not surprising that many employers, including institutions of higher education such as Gonzaga University,⁴⁹ the University of Washington,⁵⁰ and Harvard University,⁵¹ have done just that.

⁴⁵ See Washington State Minority and Justice Commission, *Building a Diverse Court: A Guide to Recruitment and Retention*, at 4 (“Workforce diversity is an integral part of an impartial justice system in the United States.”), available at <http://www.courts.wa.gov/committee/pdf/Buidling%20a%20Diverse%20Court%20RR%20Manual%202nd%20Ed.pdf>.

⁴⁶ *Id.* at 46-70.

⁴⁷ *Id.* at 54.

⁴⁸ *Altizer*, 2003 WL 1456514, at *4 (holding that such comments “may have the salutary effect of an announcement that a[n] . . . institution will conduct itself as an equal opportunity employer” (emphasis in original)), *aff’d*, 78 Fed. Appx. 301 (4th Cir. 2003).

⁴⁹ Office of Intercultural Relations, available at <http://www.gonzaga.edu/ACADEMICS/Diversity/default.asp> (“The Diversity Office strives to increase diversity in the faculty, student and staff populations.”).

⁵⁰ Resources for Enhancing Diversity, available at <http://www.washington.edu/diversity/faculty-advancement/faculty-recruitment->

Ms. Scrivener's own arguments establish how these diversity efforts, and the public policy supporting them, would be subverted by ruling in her favor here. Ms. Scrivener argues not only that Dr. Branch's comments are sufficient to defeat summary judgment in this case, but also that they "give[] rise to the reasonable inference that age was to be considered in *all hiring decisions* from the time of the speech."⁵² Thus, adopting Ms. Scrivener's analysis would result in Dr. Branch's comments supporting diversity potentially entitling numerous unsuccessful applicants to jury trials for discrimination claims.

It is difficult to imagine a more effective way to deter employers from supporting diversity than to subject them to numerous, costly, risky jury trials each time they express such support for diversity through comments or actions. This deterrent effect is not lessened by the possibility that such employers might ultimately prevail at such a jury trial. "Employment discrimination cases are extremely fact-intensive,"⁵³ and are thus very time-consuming and expensive to defend through trial. Further, as RCW 49.60 entitles a prevailing plaintiff to attorneys' fees and

toolkit/resources-for-enhancing-diversity/ ("Although the passage of Initiative 200 has changed how the University goes about increasing diversity on campus, the University commitment to do so has been strengthened.").

⁵¹ Office for Diversity & Community Partnership, *available at* <http://www.hms.harvard.edu/dcp/> ("The Office . . . was established to promote the increased recruitment, retention and advancement of diverse faculty[.]")

⁵² Petitioner's Answer to Washington Employment Lawyers Association's Amicus Curiae Memorandum at 6.

⁵³ *Greer v. Bd. of Educ. of Chicago*, 267 F.3d 723, 727 (7th Cir. 2001).

costs,⁵⁴ even the risk of a small jury verdict presents great risk to an employer. Simply put, if Ms. Scrivener's arguments were the law, employers would reduce or eliminate their support for diversity, and Washington's public policy supporting diversity would be subverted. The Court should reject Ms. Scrivener's attempt to make this the law and it should affirm the dismissal of Ms. Scrivener's claim.

3. Ms. Scrivener's Other Evidence Of Alleged Pretext Fails As Well

Before the courts below, Ms. Scrivener also pointed to two other facts she argued established pretext. The Court of Appeals, however, properly rejected these arguments.⁵⁵ First, Ms. Scrivener alleged that Dr. Branch had at one point wanted to eliminate the experience requirement for the positions Ms. Scrivener had applied for, but that he ultimately agreed to seek at least three years of teaching experience in applicants.⁵⁶ This fact does not establish pretext, however, as the candidates who were ultimately hired each had at least six years of teaching experience, including time teaching at Clark College.⁵⁷ Further, for comparative qualifications to establish pretext, a plaintiff needs to show that he or she had such superior qualifications than the selected candidate that "no

⁵⁴ RCW 49.60.030(2).

⁵⁵ 176 Wn. App. at 416-17.

⁵⁶ CP at 110.

⁵⁷ CP at 47, 51.

reasonable person, in the exercise of impartial judgment” would not have hired the plaintiff.⁵⁸ Ms. Scrivener has not made this showing.

Second, Ms. Scrivener alleges that Dr. Branch did not take her interview seriously because, at one point, he impersonated Jon Stewart.⁵⁹ Yet Ms. Scrivener has not established that Dr. Branch was any more formal in other interviews than in her own. Further, if Dr. Branch did not take Ms. Scrivener’s interview seriously, he would not have interviewed her. Simply put, levity during an interview does not establish pretext.

D. The Record Does Not Permit A Reasonable Inference Of Age Discrimination

An alternative basis for affirming the dismissal of Ms. Scrivener’s claim is Ms. Scrivener’s failure to satisfy the fourth step in the burden-shifting analysis. Even where a plaintiff has provided some evidence of pretext, dismissal is still appropriate where the record does not permit a reasonable inference of discrimination.⁶⁰ In this case, Drs. Branch and Thornburg were older than Ms. Scrivener and statistics demonstrate that

⁵⁸ *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 623, 128 P.3d 633 (2006) (quoting *Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000)); see also *Kuyper*, 79 Wn. App. at 738 (“The problem with Kuyper’s argument is that the Department was free to hire any of the qualified candidates . . . for that position. That the Department chose a different qualified candidate who happens to be a younger male is not sufficient to establish that the Department intended to discriminate against her.”).

⁵⁹ CP at 107.

⁶⁰ *Hill*, 144 Wn.2d at 186; see also *id.* at 184-85 (“[A]n employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer’s decision, or if the plaintiff created only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.” (emphasis and quotation marks omitted)).

Dr. Branch had a strong track record of hiring employees over the age of 40.⁶¹ Further, Clark College is entitled to the “same actor inference” because Dr. Branch repeatedly hired Ms. Scrivener for non-tenure track faculty positions every year between 2003 and 2006.⁶² Plaintiffs are “rarely” able to muster the “extraordinarily strong showing of discrimination” needed to overcome the same actor inference on summary judgment,⁶³ and Ms. Scrivener has not done so here. Given the lack of any evidence rebutting Dr. Branch’s reason for hiring better qualified teachers, the lack of any evidence of discrimination, and Dr. Branch’s track record of hiring older workers, including Ms. Scrivener, the courts below properly found that Ms. Scrivener’s claim failed as a matter of law.

V. CONCLUSION

The Court should reject Ms. Scrivener’s invitation to create new law that would deter workplace diversity efforts and should affirm the dismissal of Ms. Scrivener’s claim.

RESPECTFULLY SUBMITTED this 6th day of February, 2014.

⁶¹ CP at 13, 32, 39, 43-44, 60, 73, 101

⁶² *Hill*, 144 Wn.2d at 188-90 (“For a plaintiff to prevail under such circumstances, the evidence must answer an obvious question: 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?”); *Griffith*, 128 Wn. App. at 454-55 (applying same actor inference when prior positive action was promotion rather than a hiring); *Coughlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1093-97 (9th Cir. 2005) (applying same actor inference when prior positive action was a favorable assignment rather than a hiring, and adverse employment action was not obtaining a different favorable assignment rather than a discharge).

⁶³ *Coughlan*, 413 F.3d at 1096-97.

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CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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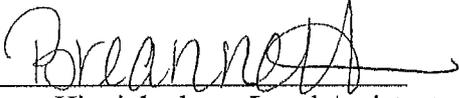
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of February, 2014, at Tumwater,
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