CAUSE NO. 89377-2

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 MEMORANDUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

OTHER FEDERAL

STATE AUTHORITY

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Plaintiff filed suit alleging age discrimination in violation of the Washington Law Against Discrimination ("WLAD"). The trial court granted summary judgment, and the Court of Appeals affirmed. *Scrivener v. Clark College,* 176 Wn.App. 405, 309 P.3d 613 (2013). In relevant part, the Court applied the shifting burden model adopted from the federal protocol, and ruled that the "substantial factor" standard, which is applicable at trial, did not apply at summary judgment. 309 P.3d at 618. The Court of Appeals affirmed because Plaintiff could not, as a matter of law, prove that the Defendant's legitimate reason for an adverse action was a pretext. *Id.* at 620. The Court also ruled that age related discriminatory comments made by the President of the College were "stray remarks," and therefore not considered at summary judgment. *Id.* at 618-19. The Court of Appeals' rulings are clear error, and dramatically raises the bar for an employee to survive summary judgment. For the reasons stated below, the Petition for Review should be granted.

The Washington Employment Lawyers Association ("WELA") has approximately 160 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 same liability standard applies both at summary judgment and at trial. The Court of Appeals' ruling to the contrary conflicts with decisions of this Court, United States Supreme Court, and the Washington Court of Appeals, Division I. The Court of Appeals' definition of "pretext" in this case is inconsistent with a decision by the Washington Supreme Court, and has transformed the "substantial factor" standard into the "only factor" standard which this court and federal courts have explicitly rejected.

This Court has previously ruled that the shifting burden analysis modeled after *McDonnell Douglas* applied only in the absence of direct evidence. *See Hill v. BCTI Income Fund-I,* 144 Wn.2d 172, 180, 23 P.3d 440, 446 (2001)(relying upon federal law). Federal law has evolved significantly since the Court has last addressed this issue. Federal law has now recognized that direct evidence is no more probative than circumstantial evidence within this context, and that regardless of the type of evidence relied upon Plaintiff has a choice about whether to proceed under the *McDonnell Douglas* shifting burden model or under the "direct and circumstantial" model (also known as "mixed motives"). The characterization of the evidence as "direct" or "circumstantial" is irrelevant to the resolution of the issue of discriminatory intent both at trial and at summary judgment.

The Court of Appeals ruled that the decision maker's comments about hiring younger faculty made during the decision making process were "stray

remarks," and therefore were not considered in support of pretext and discrimination. The Court of Appeals was wrong. The comments by the President of the College were not stray remarks as that term has been traditionally understood. As the California Supreme Court unanimously held, the stray remarks doctrine has no basis in law. A court cannot label as "stray remarks" discriminatory statement that are clearly admissible under the Rules of Evidence and then disregard them. The weight of the evidence is within the province of the jury and not the court. The evidence is this case was clearly relevant and admissible.

III. ARGUMENT

A. The Same WLAD Liability Standard Applies at Summary Judgment and at Trial.

Under the WLAD, a Plaintiff prevails if she proves that an illegal reason was a "substantial factor" in the decision to take adverse action. WPI 330.01; *MacKay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995). The Court of Appeals ruled that the substantial factor standard did not apply at summary judgment, and that instead the Plaintiff had to prove pretext (the third prong of the *McDonnell Douglas* shifting burden model) which she failed to do. This ruling conflicts with a decision of this Court, the United States Supreme Court, and the Washington Court of Appeals, Division I.

The United States Supreme Court has recognized that the same

standard of liability which applies at trial must also apply at summary judgment. See *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").

Moreover, this Court has ruled that the substantial factor standard *does* apply to summary judgment, and is an alternative part of the pretext definition. *See Wilmot v. Kaiser Aluminum,* 118 Wn.2d 46, 73, 118 Wn.2d 46 (1991)("Because the 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). *See also Rice v. Offshore Sys., Inc.*, 167 Wn. 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)("At the summary judgment stage of pretext, Estevez must provide evidence that supports an inference that her complaints . . . were a 'substantial factor' motivating the employment decision")(*citing*

Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003).

B. The Court of Appeals Transformed the "Substantial Factor" Standard Into the "Only Factor" Standard.

Under the Court of Appeals formulation of "pretext," Plaintiff could not prevail unless she established 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. 309 P.3d at 617. This definition of pretext is clear error. *See Wilmot v. Kaiser Aluminum,* 118 Wn.2d at 73 (including "substantial factor" as an alternative method of satisfying pretext).

Pursuant to the lower court's incorrect definition of pretext, Plaintiff could not prevail if the Defendant's legitimate reason was a true reason and it actually motivated the adverse employment action. But to prevail under the WLAD, whether the Defendant had a true and legitimate reason which actually motivated the adverse action is irrelevant if there also existed an illegal reason which was a substantial factor for the adverse employment action.[1] The Court of Appeals has effectively created an "only factor"

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[1] In *Wilmot 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 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

standard for the purpose of summary judgment.

This Court has explicitly rejected the "only factor" test for causation. *Cf 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.").[2]

C. Direct Evidence is Not Required to Avoid the *McDonnell Douglas* Shifting Burden Model. Plaintiffs Always Have A Choice.

In *Hill v. BCTI Income Fund-I,* 144 Wn.2d 172, 23 P.3d 440, 446 (2001), the Court acknowledged that "Washington courts have largely adopted the federal protocol announced in *McDonnell Douglas* for evaluating

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applied to the WLAD).

[2] When Congress enacted Title VII it "specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" *See Price Waterhouse,* 450 U.S. at 241 (Brennan, J., plurality opinion) *citing* 110 Cong.Rec. 2728, 13837 (1964). Even under the "but for" standard of causation, Plaintiff need not prove that an illegal reason was the only reason for an adverse action. Accordingly, in numerous cases, particularly under the Age Discrimination in Employment Act, 29 U.S.C. Section 621 *et seq.*, courts have routinely instructed juries that in order to prevail "age need not be the sole factor in the decision to terminate the plaintiff's employment, but must be 'a determining factor' or 'make a difference.'" *E.g., Graham v. Dresser Industries Inc.,* 928 F.2d 408 (9th Cir. 1991)("To constitute an ADEA violation, age need not be the sole factor in the decision to terminate the plaintiff's employment, but must be "a determining factor" or "make a difference")(citing Ninth Circuit cases); *Golomb v. Prudential Insurance Co.,* 688 F.2d 547 (7th Cir. 1982)("We agree that a successful claimant in an ADEA action need not prove that age was the sole determining factor for the defendant-employer's action, but rather that age was a determining factor"); *Greene v. Safeway Stores, Inc.,* 98 F.3d 554, 557 (10th Cir. 1996)("To prevail on an ADEA claim, a plaintiff must prove that age was a determining factor in the employer's decision to terminate the plaintiff. The plaintiff need not prove that age was the sole factor behind his termination").

motions for judgment as a matter of law in discrimination cases brought under state and common law, *where the plaintiff lacks direct evidence of discriminatory animus.*" *Id.* at 180. The Court in *Hill* was explicitly clear that the federal shifting burden was only utilized in recognition of the "fact that direct evidence of intentional discrimination is hard to come by." *Id.* at 180. *See also Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 149-150, 94 P.3d 930 (2004)("where the employee lacks direct evidence, the employee may survive summary judgment if the employee creates a presumption of discrimination by presenting a prima facie case"). This rule of law is outdated and should be reconsidered.

The United States Supreme Court has rejected the distinction between direct and circumstantial evidence as a basis for applying the "direct or circumstantial" model, sometimes imprecisely known as the "mixed motive" model.[3] In *Desert Palace v. Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (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

[3] 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 *Pacific Shores Properties v. City of Newport Beach,* No. 11-55460, (9th Cir. 2013), the Court describes the "mixed motive" model (the alternative approach to *McDonnell Douglas)* as the "direct or circumstantial approach." *Id.* at 29.

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 123 S.Ct. at 2154.[4] Federal Courts now recognize that Plaintiff's can use either model at summary judgment regardless of the type of evidence upon which they rely.[5]

D. The Court of Appeals Erred by Refusing to Consider Age Related Statements by a Final Decisionmaker as "Stray Remarks."

The plaintiff in this case alleges that during the 2005-2006 academic year Clark College refused to hire her for a tenure-track position and hired less qualified younger applicants. In January 2006, the President of Clark College,

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[4] *See Siegert v. Gilley,* 500 U.S. 226, 236 (1991) (Kennedy Concurring) ("I would reject, however, the Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence. Circumstantial evidence may be as probative as testimonial evidence"). All juries are traditionally instructed that direct evidence is not entitled to any greater weight than circumstantial evidence. *See* WPI 330.01; Model Ninth Circuit Jury Civil Instructions 1.5. 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). *See also* Michael Zubrensky, *Despite the Smoke, There Is No Gun: Direct Evidence in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 Stanford L. Rev. 959, 970-980 (1994)(recognizing the differing approaches to direct evidence within the circuits).

[5] *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).

who was involved in the final decision to hire a younger applicant instead of the plaintiff, stated that the institution needed to hire "younger talent." 309 P.3d at 610. The Court of Appeals dismissed the President's statements as "a 'stray comment,' a remark that does not give rise to an inference of discriminatory intent. . . and cannot demonstrate pretext." *Id.* at 618-619. The Court of Appeals erred by refusing to recognize that the college president's expression of a hiring bias in favor of young employees at the very time he refused to hire the plaintiff was highly probative evidence of age discrimination, that in combination with the other evidence of pretext and discrimination, entitled Scrivener to present her case to the jury.

At summary judgment, all inferences, including the meaning of discriminatory comments must, as a matter of law, be drawn in favor of the plaintiff. *Briggs v. Nova Services*, 166 Wn. 2d 794, 801, 213 P. 3d 910 (2009). Evaluating discriminatory comments necessarily involves the drawing of inferences about meaning and intent through the weighing of evidence. If a comment is relevant and admissible, the weight of that evidence is for the jury and not for the court. In this case, the Court of Appeals gave greater weight to the Defendant's statistics than the President's comments: "Despite his stated desire to inject the college with young faculty, Branch still tended to hire applicants over 40 at a relatively high rate." 309 P.3d at 618. The Court of Appeals thereby supplanted the function of the jury and improperly

weighed the evidence by dismissing the President's comments as stray remarks.

The Court of Appeals held that the President's biased comments were "stray remarks" because they did not relate directly to the plaintiff or the specific hiring decision at issue. 309 P.3d at 618. This holding conflicts with the common sense proposition that where "a decisionmaker makes a discriminatory remark against a member of the plaintiff's class, a reasonable fact finder may conclude that discriminatory animus played a role in the challenged decision." *Dominguez-Curry*, 424 F.3d at 1038. For this reason, and others, the California Supreme Court unanimously abolished the stray remarks doctrine. *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, inconsistences, and "major flaws" of the stray remarks doctrine). This Court should likewise hold the "stray remarks" doctrine is fundamentally inconsistent with the proper functions of the court and jury.

IV. CONCLUSION

The Petition for Review should be GRANTED.

Respectfully submitted this day of 3rd December, 2013.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By, _____
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CERTIFICATE OF SERVICE

I hereby certify that on 3rd day of December, 2013, I presented the foregoing Amicus Curiae Memorandum for filing electronically and by email to the following:

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Dear Clerk:

Attached hereto please find for filing a copy of an Amicus Curiae Memorandum and attached certificate of service in support of a Petition for Review in Scrivener v. Clark College, No. 89377-2. A Motion for Leave to file has already been granted. As reflected above, a copy is being sent to counsel for both parties. Please confirm receipt. Thanks.

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