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Court of Appeals No. 43051-7-II

Supreme Court No. _____

IN THE SUPREME COURT
STATE OF WASHINGTON

KATHRYN SCRIVENER,

Petitioner,

v.

CLARK COLLEGE,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The petitioner is Kathryn Scrivener, appellant in the Court of Appeals and the plaintiff in the Clark County Superior Court proceeding.

B. CITATION TO COURT OF APPEALS DECISION

Ms. Scrivener seeks review of the published decision of Division II of the Court of Appeals in *Scrivener v. Clark College*, No. 43051-7-II, __ Wn.App. __ , __P.3d __ , 2013 WL 4746854 (September 4, 2013). A copy is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Whether the Court should accept review from Division II of the Court of Appeals decision upholding the Superior Court's grant of Defendant's motion for summary judgment on Ms. Scrivener's claim of age discrimination under the Washington Law Against Discrimination (WLAD) because:

1. Pursuant to RAP 13.4(b)(2), Division II's decision conflicts with Division I's opinion in *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77,272 P.3d 865, *rev. den'd*, 174 Wn.2d 1016 (2012), thereby creating a split in the Divisions of the Courts of Appeals; and

2. Pursuant to RAP13.4 (b)(4), Division II's decision effectively abrogates the substantial factor standard in employment

discrimination cases, and involves an issue of substantial public interest that should be determined by the Supreme Court.

D. STATEMENT OF THE CASE

1. Factual Background

a. Clark College's President asserted in his formal policy address that the College needed to hire "younger talent."

In fall of 2005, Clark College posted two open tenure track teaching positions within the College's English Department. Ms. Scrivener, a full time temporary English instructor at the College, applied for the positions. Then College President Dr. Wayne Branch made final faculty hiring decisions. CP 2 *(Declaration of R. Wayne Branch in Support of Motion, ¶5)*. In his "State of the College" address in January 2006, in the midst of the hiring process for the two tenure track openings in the College's English Department, College President Branch, the final decision maker on hiring, asserted that the College had a "glaring need" for "younger talent" under forty on the faculty. CP 24 *(Ex.3, p. 10 to Dec. of Branch)*. In a public forum discussing the posting for the two tenure track openings in the College's English Department, President Branch stated that he opposed having any minimum experience requirement for applicants for the positions. CP 109-110 *(Scrivener Depo. 71:21-72:9, Ex. 1 to Dec. of McCulloch)*.

b. Clark College hired younger applicants over Scrivener for the tenure track positions despite Scrivener's superior experience.

Ms. Scrivener had been employed by Clark College since 1994. She was hired as a part time English teacher and went to full time in 1999. CP 106 *(Scrivener Depo. 13:19-22, Ex. 1 to Dec. of McCulloch)*. She had been awarded year-long contracts as a full time temporary English instructor every academic year since 1999, but there was no guarantee of renewed contracts. CP 101 *(Declaration of Scrivener in Support of Opposition, ¶1)*. Ms. Scrivener is presently 61 years old. CP 101 *(Dec. of Scrivener, ¶3)*.

Ms. Scrivener applied for the two open positions. Hires were made for both positions through a single application process. CP 32 *(Dec of Williams in Support of Motion, ¶10)*. Ms. Scrivener was one of the top applicants for the positions, and her name was one of four forwarded from the hiring committee for a final interview with the decision maker, President Branch, and his Vice President of Instruction. CP 32 *(Dec. of Williams, ¶10)*. Ms. Scrivener was a much more experienced instructor than either of the younger applicants the College hired. CP 46-57 *(Ex. 5 to Dec. of Williams)*. Ms. Scrivener possessed all of the qualifications listed as "desirable" on the recruitment announcement for the positions, unlike the two young, successful applicants who lacked the "computer assisted and/or distance education" experience sought in the position posting. CP

37 *(Ex.1, p. 2 to Dec. of Williams);* CP 101 *(Dec. of Scrivener, ¶2);* CP 8-10 *(Ex. 1 to Dec. of Branch*).

When Ms. Scrivener interviewed with President Branch and Vice President Thornburg on May 11, 2006, she was nearly 54 years old. CP 101 *(Dec. of Scrivener, ¶3)*. The same day as her interview, the College informed Ms. Scrivener that it had selected two (much younger) applicants for the positions and that both had accepted. CP 101 *(Dec. of Scrivener, ¶3)*.

c. Clark College under President Branch hired predominantly individuals under 40 years old for tenure track faculty positions in 2005-06.

17 faculty positions were filled in 2005-06: four temporary positions and 13 tenure track. While three of the hires for the four temporary positions were 40 years old or over, only four of the 13 hires for the more desirable, protected tenure track positions (approximately 30%) were 40 or over. CP 43-44 (*Ex.4 to Dec. of Williams*)

2. **Procedural Background**

a. Proceedings in Superior Court

On July 13, 2009, Ms. Scrivener filed a lawsuit against Clark College alleging that the College illegally used age as a substantial factor in its hiring decision for two open tenure track teaching positions in violation of R.C.W. 49.60, the Washington Law Against Discrimination ("WLAD"). CP 122-25. Clark College filed a summary judgment motion on August 30, 2011, taking the position that Ms. Scrivener could not show

that the non-discriminatory reasons presented by the College for its hiring decision were pretextual and that statements regarding age made by the decision maker were mere "stray comments." Ms. Scrivener asserted in her response that the trial court should deny Clark College's summary judgment motion because Ms. Scrivener raised a question of fact whether age was a substantial factor in the hirings, violating the WLAD, and that statements of policy made in a formal annual address by Clark College President Wayne Branch calling for 'younger talent' clearly were not stray comments. CP 87-100.

The Superior Court granted Clark College's summary judgment motion on January 5, 2012. CP 117-118. The Order does not include any findings of fact or conclusions of law, or any other indication of the basis for the trial court's decision. *Id.*

b. The Court of Appeals Decision

Ms. Scrivener appealed the Superior Court's dismissal of her claim, arguing that at the third prong of the burden shifting analysis, she need only demonstrate a reasonable inference that age discrimination played "a substantial factor" in Clark College's hiring decisions to defeat summary judgment. *Opening Brief of Appellant.* Clark College responded that an age discrimination plaintiff defending against a summary judgment motion must prove that all reasons put forth by the employer are untrue, mere pretext for discrimination, notwithstanding the substantial factor standard applicable at trial. *Respondent's Answering Brief, p. 23.* Ms.

Scrivener replied that she had successfully raised a question of fact as to whether age was a substantial factor in the College's hiring decisions for the tenure track positions, which was sufficient to show that the College's proffered reasons were not the only reasons and the statement that these were the only considerations was untrue and therefore summary judgment was inappropriate. *Reply Brief of Appellant, p. 7.*

Division II upheld the Superior Court's summary dismissal of Ms. Scrivener's age complaint, holding: that the *McDonnell Douglas* burden shifting framework was applicable to this case and Ms. Scrivener failed to show pretext (*Opinion, p. 5-6)*; that the substantial factor standard was a standard of proof for the finder of fact not applicable at summary judgment (*Opinion p.8-9*); and that the formal statements regarding the need to hire younger employees made by the hiring decision maker, President Branch, in his annual published State of the College address were "stray comments." *Opinion, p. 9-10.* In so deciding, the Court of Appeals relied exclusively on the declarations of the decision maker and his assistant. *Opinion, p. 7.*

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Summary of Argument

Division II's opinion directly contradicts another Court of Appeals ruling and undermines Washington's well-established substantial factor standard in employment discrimination cases. The Opinion also improperly relies on self-serving declarations of interested witnesses to

resolve a question of fact, improperly weighs credibility and errs in deciding that discriminatory, ageist comments made by the decision maker were "stray remarks," and inappropriately applies the *McDonnell Douglas* burden shifting framework.

2. There is a direct conflict between a Division I Court of Appeals ruling and this Division II ruling.

It is well settled that the standard of proof for an age discrimination claim under Washington law is whether age was a substantial factor in the challenged decision, even if there were other reasons supporting the decision. "To prevail on a WLAD claim, a plaintiff in Washington must prove that age was a 'substantial factor' in an adverse employment action." *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995). The central importance of the substantial factor standard was reflected in the ruling of Division I of the Court of Appeals on an age discrimination claim brought under the WLAD. *Rice v. Offshore Systems, Inc.*, 167 Wn.App. 77, 272 P.3d 865 (2012). *Rice* applied the *McDonnell Douglas* burden-shifting framework to analyze a summary judgment motion. Noting that both parties had stipulated that the plaintiff had established a prima facie case and the defendant employer had offered a legitimate reason for the adverse employment action, the Court stated that the remaining question, the third prong of the analysis, was whether the plaintiff could "produc[e] sufficient evidence to support a reasonable inference that a discriminatory [or] retaliatory motive was a substantial

factor in his discharge — pretext." *Id.* at 90. The holding in *Rice* recognized the fact that if there is a reasonable inference of discrimination, then there is clearly a question whether any legitimate reasons offered were the only reasons considered or were pretext for impermissibly including age as a substantial factor in the challenged decision. Any other approach to pretext ignores the substantial factor standard, pursuant to which a discriminatory motive need not be the only factor in an employment decision nor even the determinative factor, simply a substantial factor. Therefore, other factors may be part of the decision without undermining a WLAD claim.

In this case, Division II of the Court of Appeals explicitly contradicted the holding in *Rice*, stating that "[i]n our view, *Rice* confused the burden of persuasion with the burden of production, and we decline to follow its analysis here." *Opinion p. 8.* In fact, the *Rice* court correctly held that introducing evidence raising a reasonable inference that consideration of age was a substantial factor in an employment decision likewise raises a question as to whether the given reasons in the aggregate were not truly the entire basis for the employment decision, that they were not the only considerations, and that the implication they were the exclusive considerations is pretext.

This case raises an important question regarding the application of the *McDonnell Douglas* burden shifting framework to summary judgment analysis in any employment discrimination action under the WLAD, RCW

49.60.180. Division II here held that "[e]ssentially, the *Rice* court took Mackay's burden of persuasion test for triers of fact determining pretext at trial and improperly applied it to pretrial, burden of production stages. Accordingly, Scrivener's reliance on the "substantial factor" test is misplaced. Scrivener must show pretext in the initial burden of production pretrial phase." *Opinion p.8-9.* Division II wrongly failed to note that under the substantial factor standard, an age discrimination claimant could prevail at trial despite the existence of a legitimate motive if age was a substantial factor in the adverse employment decision. Requiring a showing of pretext as to the offered reasons at summary judgment would make it more difficult to survive summary judgment than to prevail at trial, undermining the remedial purpose of the WLAD and the established law of Washington. Instead, as illustrated by the *Rice* holding, a discrimination plaintiff who shows a reasonable inference that illegal discrimination was a substantial factor in the decision has established pretext, that the employer's assertion that its proffered reasons were the only reasons is not believable, without having to prove that any individual given reason is pretextual.

3. The Court of Appeals Opinion undermines an established legal standard and involves an issue of substantial public interest.

a. The Court of Appeals Opinion is contrary to the purpose of the WLAD.

In enacting the WLAD, the Washington legislature issued a sweeping statement against discrimination, declaring that "practices of discrimination against any of its inhabitants" for any of the listed characteristics, including age, "are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. Accordingly, the legislature directed that "the provisions of this chapter are to be liberally construed." RCW 49.60.20. This Court similarly has held that given this remedial purpose, "the statutory protections against discrimination are to be liberally construed and its exceptions narrowly confined." *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989) (*internal cite omitted*). *And see Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937, 940 (1994), stating that "the fundamental purpose of the act, deterring discrimination" would be undermined if the statute's application was limited to Washington inhabitants.

b. *McDonnell Douglas* framework is inappropriate for summary judgment analysis in this employment discrimination case and creates an improper "but for" standard.

Division II's interpretation of the *McDonnell Douglas* burden shifting test places far too onerous a burden on a discrimination plaintiff. The Court erred in automatically applying a burden shifting framework and requiring the plaintiff to disprove the employer's stated reasons. The

Court relied on *Hill v. BCTI Income Fund–I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001), overruled on other grounds by *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006), for the proposition that the *McDonnell Douglas* framework should be applied in WLAD cases unless there is "direct evidence" of discrimination. Opinion, p. 6. This reasoning has been firmly rejected by the Ninth Circuit in *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (*en banc*), aff'd, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). The Ninth Circuit discusses the way a case may reach trial and the application of the *McDonnell Douglas* analysis at summary judgment:

> It is important to emphasize, however, that nothing compels the parties to invoke the *McDonnell Douglas* presumption. *United States Postal Serv. Bd. v. Aikens,* 460 U.S. 711, 717, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). Evidence can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence-direct or circumstantial-of discriminatory intent. *Id.* at 714 & n. 3, 717, 103 S.Ct. 1478. Thus, although *McDonnell Douglas* may be used where a single motive is at issue, this proof scheme is not the exclusive means of proof in such a case. Indeed, it also might be invoked in cases in which the defendant asserts a "same decision" defense to certain remedies, a circumstance in which mixed motives are at issue.

Costa v. Desert Palace, Inc., 299 F.3d 838, 855 (9th Cir. 2002) (en banc), aff'd, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003).

Division II's Opinion failed to recognize that approaches other than burden shifting may be more appropriate where, as in this case and indeed most employment cases, there is likely to be more than one reason for a

challenged employment decision. The substantial evidence standard of review implicitly recognizes that more than one factor is usually in play in an employment decision, that there is in fact a "mixed motive," and the discriminatory consideration need only be one substantial factor in the decision, not the conclusive factor. *Mackay,* 127 Wn.2d at 310. In this case, Clark College's own assertions indicate that more than one motive was in play, and Ms. Scrivener pointed out on appeal that there was direct evidence of an ageist statement. Reply, p. 9-10. Thus the rigid application of the *McDonnell Douglas* burden shifting is misplaced, wrongly requiring the employee to adduce additional proof beyond the existence a question of fact of discrimination that the decision maker's given reasons were pretextual where the claimant could prevail at trial even if the particular reasons given were truly part of the consideration, if impermissible discrimination had been a substantial factor. This effectively would replace the substantial factor test with a "but for" test which has been repeatedly rejected by this Court for over two decades. (*See e.g. Allison v. Hous. Auth. of City of Seattle,* 118 Wn.2d 79, 85 & 88, 821 P.2d 34, 37 & 38 (1991), noting the WLAD's important purpose to fight discrimination and the provision which requires its liberal construction for the accomplishment of its purposes, and opining that the "but for" standard of causation would "negatively affect enforcement of the law against discrimination." *See also Marquis v. City of Spokane,* 130 Wn.2d 97, 114, 922 P.2d 43, 52 (1996), holding when remanding a WLAD gender

discrimination claim to the trial court that "[a]t this point, the plaintiff retains the final burden of persuading the trier of fact that discrimination was a substantial factor in the disparate treatment.")

Requiring a pretext analysis that basically imposes a "but for" standard would severely weaken workers' recognized rights to be free from discrimination in the workplace by making it more difficult to survive summary judgment than to prevail at trial, contrary to the holdings of this Court that "in employment discrimination cases summary judgment in favor of the employer is seldom appropriate." *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 144, 94 P.3d 930, 934 (2004).

On a motion for summary judgment in a race discrimination case, the Ninth Circuit held that "direct evidence" is not necessary to opt out of the *McDonnell Douglas* framework, consistent with the ruling in *Costa*:

> [N]othing compels the parties to invoke the *McDonnell Douglas* presumption. Instead, when responding to a summary judgment motion[,] the 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.
>
> *Metoyer v. Chassman*, 504 F.3d 919, 930-31 (9th Cir. 2007).

Under Washington law, as echoed in WPI Civil 1.03, there is "no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other." *State v. Tucker*, 32 Wn.App. 83, 645 P.2d 711 (1982). It would be utterly inconsistent to base a summary judgment analysis on a perceived

qualitative difference between direct and circumstantial evidence, a distinction expressly prohibited at trial.

i. Scrivener introduced direct evidence of discrimination.

In this case, Ms. Scrivener introduced direct of discrimination in the form of the explicit formal statement regarding hiring policy by the decision maker, President Branch, that "the most glaring need for increased diversity is in our need for younger talent [because] 74% 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." CP 24. "'Direct ... evidence' includes discriminatory statements by a decision maker and other 'smoking gun' evidence of discriminatory motive." *Fulton v. State, Dept. of Social & Health Services*, 169 Wn.App. 137, 148 n.17, 279 P.3d 500 (2012) (internal citations omitted). Dr. Branch's published statement, issued during the search to fill the positions at issue in this litigation, is just such direct evidence. He was the final decision maker and he stated that Clark College had a "glaring need" to increase the number of people in the Clark College workforce who are under forty years old. This statement is directly on point and sufficient to take this case outside the *McDonnell Douglas* framework even under the now-rejected reasoning of *Hill*.

ii. The statements of the decision maker regarding hiring policy were not "stray comments."

The Court of Appeals inexplicably found that the formal statements of the final decision maker regarding age as a consideration in hiring which were made in his annual published policy State of the College speech were "stray comments," akin to an off the record reference to the "old guard." Opinion, p. 9-10. This simply ignored the nature of the decision maker's formal policy statement that the College needs to hire "younger talent." *CP 24 (Ex. 3, p 10, to Dec. of Branch*). This statement was made in an official annual address setting forth the direction of the College, and was given while the search was being conducted to fill the two open English Department teaching positions. It was not, as the Division II strains to find, temporally removed from the hiring decision. Opinion, p. 9. Further, the decision maker and the Vice President who discussed the final hiring decision with him both stated that listed considerations formed the bases for the hiring decision; the list included the "needs of the college," and the President had already gone on record stating he believed that the College had a "glaring need" for younger faculty.

c. Division II erroneously relied on self-serving declarations from the defense witnesses.

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), the Supreme Court gave guidance on the appropriate review of evidence. *Reeves* made it clear that the inquiry is

the same for ruling on a summary judgment motion as it is for a motion for judgment as a matter of law. *Reeves,* 530 U.S. at 150. In reference to the moving party, the court *"must disregard all evidence favorable to the moving party that the jury is not required to believe.* That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, *at least to the extent that evidence comes from disinterested witnesses." Id.* at 151 (internal quotation and citations omitted) (emphasis added). Thus, the Court is not to give credence to the evidence of the moving party to the extent that it comes from interested witnesses. Similarly, Washington appellate courts have been reluctant to grant summary judgment "where material facts are particularly within the knowledge of the moving party". *See Riley v. Andres,* 107 Wn.App. 391, 395, 27 P.3d 618 (2001). The declarations of "interested" defense witnesses President Branch and Vice President Thornburg were wrongly relied upon by the Division II to affirm an improper grant of summary judgment.

d. Division II erred in weighing evidence.

Division II inappropriately weighed the credibility of the witnesses, basing its decision on the statements of the interested defense witnesses. Opinion, p. 7. In addition, the Court of Appeals put itself in the position of the fact finder by analyzing the relative qualifications of the applicants. Opinion, p. 11.

F. REQUEST FOR ATTORNEYS' FEES

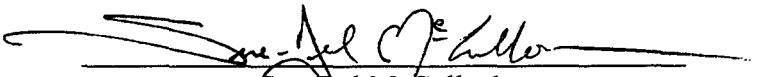
Petitioner's counsel continues and renews its request for attorneys' fees and costs on appeal, pursuant to RAP 18.1 and RCW 49.60.030(2).

G. CONCLUSION

Scrivener's petition for review should be granted because there is a conflict between Division II's opinion and the position of Division I, and because the decision effectively abrogates the "substantial factor" standard under the WLAD, which involves an issue of substantial public interest.

DATED October 4th, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on October 4, 2013, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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Attorney for Respondents

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

DATED this 4th day of October, 2013.

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— APPENDIX A —

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KATHRYN SCRIVENER, Appellant, v. CLARK COLLEGE, Respondent.	No. 43051-7-II PUBLISHED OPINION

JOHANSON, A.C.J. — Kathryn Scrivener, a nonpermanent member of Clark College's faculty, sought one of two tenure-track positions at the college. When the college hired younger candidates to fill those positions, she sued the college for age discrimination under Washington's Law Against Discrimination Act[1] (WLAD). The trial court dismissed the suit on summary judgment. Because Scrivener does not demonstrate that Clark College's nondiscriminatory explanations for hiring the other candidates were pretext for discrimination, we affirm.

FACTS

In 1994, Clark College hired the then 42-year-old Scrivener as a part-time English instructor and, beginning in 1999, she signed annual contracts to be a temporary, full-time

[1] Ch. 49.60 RCW.

English instructor. Then, in the 2005 academic year, Clark College sought applications for two tenure-track faculty positions, and Scrivener was one of 156 applicants.

Of the 156 applicants, 50 were over 40 years old, and 106 were younger than 40. The screening committee, comprised of five tenured faculty members, reviewed the 152 applications that met the positions' minimum requirements. The screening committee narrowed the candidate pool and interviewed 13 candidates, including Scrivener. Of these 13 candidates, 7 were over 40 years old and 6 were under 40.

After observing and evaluating the candidates' teaching demonstrations, the screening committee identified finalists: Geneva Chao, Jill Darley-Vanis, Scott Fisher, and Scrivener. The screening committee forwarded the names, application materials, and candidate evaluations to Clark College President R. Wayne Branch and its Vice President of Instruction, Sylvia Thornburg.[2]

Branch and Thornburg reviewed the materials and interviewed the four finalists in May 2006, before hiring Chao and Darley-Vanis, who were both under 40 years old. Branch and Thornburg "agreed that of the four finalist[s], Ms. Scrivener was ranked last." Clerk's Papers (CP) at 59.

Scrivener sued Clark College under the WLAD, claiming age discrimination. In a summary judgment motion, Clark College attached declarations from Branch, Thornburg, and Clark College Human Resources Associate Director Sue Williams. Branch, who is older than

[2] The screening committee viewed each candidate's teaching demonstrations and evaluated each candidate's strengths and weaknesses. The screening committee noted Scrivener's weaknesses. Scrivener "lost her place and was not as smooth or clear as she could have been" which caused confusion among her audience; she lost touch with her audience by turning away from them while writing on the board; and her up-front style "could be an off-putting reaction [for] some passive students." Clerk's Papers (CP) at 65.

Scrivener, explained that as president, he made the final decision on faculty hiring, but Thornburg also participated and offered input. Branch and Thornburg hired Chao and Darley-Vanis based on the screening committee's recommendations of the finalists, candidate interviews, reference checks, and the needs of the English department and college as a whole. Branch stated that candidate interviews involved questions relating to how the finalists would meet the college's goals and functions; at no point did Branch, Thornburg, or the candidates discuss or consider the candidates' ages.

Thornburg is also older than Scrivener, and she too described the hiring process. She said that she and Branch "agreed that of the four finalist[s], Ms. Scrivener was ranked last" and that the college should hire Chao and Darley-Vanis. CP at 59. Thornburg explained that the decision to hire Chao and Darley-Vanis was based on the screening committee recommendations, candidate interviews, and English department needs. She also said they weighed the "broader institutional picture, what was lacking in terms of skills and abilities within the English Department, and considered which candidates would contribute to student success and the institution as a whole." CP at 59. Like Branch, Thornburg stated that at no point during final interviews did the topic of candidate age arise, nor did Branch and Thornburg consider age in the selection process.

Williams stated that at the time of hiring, 74.2 percent of Clark College's permanent workforce was over 40 years old, as were 87 percent of tenure-track faculty. Of the 34 faculty and administrative positions hired in the 2005 academic year, 18 (53 percent) were over 40 years old and 7 of 16 (44 percent) faculty hires during that period were over 40. Finally, Williams noted that the college's employment applications do not ask the applicant's age.

Scrivener opposed Clark College's summary judgment motion, claiming that the college passed over her for younger applicants despite her superior experience. She referenced Branch's January 2006 "State of the College" address in which he stated that Clark College needed "younger talent." CP at 89. Finally, she argued that Branch predominantly hired faculty under 40 for tenure-track positions in the 2005 academic year; she cited statistics showing that of the 17 faculty positions filled during this period, 13 were tenure track, and the college filled only 4 of those positions with candidates over 40.[3] Scrivener asserted that the trial court should deny Clark College's summary judgment motion because Scrivener raised a question of fact whether age was a substantial factor in hiring, violating the WLAD.

Scrivener's declaration explained that she possessed all the "desirable" qualifications the college sought for the tenure-track positions. CP at 101. She also stated that during her final interview, Branch impersonated Jon Stewart[4] by putting his hands under his chin and leaning across his desk, saying, "Go on." CP at 107. She characterized this as "clowning" and felt that he did not take her interview seriously. CP at 107. Scrivener also stated that Branch was initially open to a candidate with no experience for the tenure-track English positions, but that others later convinced him to seek candidates with at least three years experience. Finally, Scrivener stated in her deposition that Branch advised one person on a faculty hiring committee (though not the committee hiring the English tenure-track positions) to find candidates "with funk," "i.e., youthfulness." CP at 110.

[3] The college filled 16 tenure-track positions during this period, not 17.

[4] Jon Stewart is an award-winning political satirist, best-selling author, and comedian. He is best known as the host of Comedy Central's *The Daily Show*, a nightly satirical news program.

The trial court granted Clark College summary judgment, ruling that the college was entitled to judgment as a matter of law. Scrivener appeals.

ANALYSIS

Scrivener claims that the trial court erred in granting summary judgment to Clark College because genuine issues of material fact exist regarding whether Scrivener's age was a substantial factor in her not being hired for a tenure-track position. The trial court did not err because Scrivener failed to demonstrate that the college's nondiscriminatory reasons for hiring Chao and Darley-Vanis were pretext for age discrimination.

A. Standard of Review

We review summary judgment orders de novo. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Trial courts properly grant summary judgment where the pleadings and affidavits show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Questions of fact may be determined on summary judgment as a matter of law only where reasonable minds could reach but one conclusion. *Alexander v. County of Walla Walla*, 84 Wn. App. 687, 692, 929 P.2d 1182 (1997). When reviewing a grant of summary judgment, we consider solely the issues and evidence the parties called to the trial court's attention on the motion for summary judgment. RAP 9.12.

Under the WLAD, an employer may not refuse to hire, bar from employment, or discriminate against anyone because of an individual's age. RCW 49.60.180. To successfully raise an age discrimination claim under the WLAD, the employee has the initial burden of presenting a prima facie case of age discrimination. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988). Once the employee establishes a prima facie case of age discrimination, the burden of production shifts to the employer, who must show a

legitimate, nondiscriminatory reason for its conduct. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). If the employer meets its burden of production, the employee must then show that the employer's proffered reason was mere pretext for discrimination.[5] *Domingo v. Boeing Emps.' Credit Union*, 124 Wn. App. 71, 77, 98 P.3d 1222 (2004).

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. *Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 161, 279 P.3d 500 (2012). To meet this burden, the employee is not required to produce evidence beyond that already offered to establish a prima facie case. *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 860, 851 P.2d 716, *review denied*, 122 Wn.2d 1018 (1993), *overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995). A court may grant summary judgment when the record conclusively reveals 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 abundant and uncontroverted independent evidence shows that no discrimination occurred. *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418 (2002). Thus, the trial court should submit the case to a jury only when it determines that all three facets of this burden-shifting scheme are met and that the parties have produced sufficient evidence supporting reasonable but competing inferences of both discrimination and nondiscrimination. *Fulton*, 169 Wn. App. at 149.

[5] This burden-shifting protocol, adopted by Washington courts, was originally announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

B. No Showing of Pretext

The parties agree that Scrivener made a valid prima facie showing of age discrimination and that the college showed legitimate, nondiscriminatory reasons for not hiring Scrivener. Accordingly, we are left to decide only whether Scrivener demonstrated that Clark College's proffered explanations for not hiring Scrivener were pretextual. *See Domingo*, 124 Wn. App. at 77.

Here, Clark College explained its reasons for hiring Chao and Darley-Vanis over Scrivener. Branch stated that he hired them based on (1) screening committee recommendations, (2) candidate interviews, (3) candidate reference checks, (4) English department needs, and (5) college needs. Thornburg's explanation largely mirrored Branch's, as she articulated that the college hired Chao and Darley-Vanis based on (1) screening committee recommendations, (2) candidate interviews, and (3) English department needs. Both Branch and Thornburg explained that during final interviews, they considered the institution's focus on teaching and learning, the skills and abilities required of the English department to further that focus, and which candidates would best facilitate student success and the institution's ability to accomplish its goals and functions. Ultimately, Branch and Thornburg concluded that Chao and Darley-Vanis offered the best fit for the institution and the English department. They added that age was never considered during the hiring process, and Williams noted that employment applications do not ask an applicant's age.

Scrivener, however, challenges Branch's and Thornburg's explanations. She asserts that Branch's "State of the College" address expressed a desire to hire "younger talent." Br. of Appellant at 14. She also asserts that Branch said in a public forum that he did not want experience requirements for the positions, implying that he sought younger applicants. Finally,

Scrivener claims that Branch's "clowning" during her interview made her feel that Branch did not take her seriously. Br. of Appellant at 15.

As a threshold matter, Scrivener argues that to demonstrate pretext, she need only raise a reasonable inference that age discrimination played "a substantial factor" in Clark College's hiring decisions. *See* Reply Br. of Appellant at 9 n.1. For this proposition, she cites *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 272 P.3d 865, *review denied*, 174 Wn.2d 1016 (2012). In our view, *Rice* confused the burden of persuasion with the burden of production, and we decline to follow its analysis here.

Rice was a discrimination case that the trial court dismissed on summary judgment in which both parties stipulated that the plaintiff established a prima facie case and the defendant employer offered a legitimate reason for the adverse employment action. 167 Wn. App. at 85, 90. Division One of this court stated that the remaining question was whether the plaintiff could "produc[e] sufficient evidence to support a reasonable inference that a discriminatory retaliatory motive was a substantial factor in his discharge—pretext." *Rice*, 167 Wn. App. at 90. *Rice* relied on *Mackay*, 127 Wn.2d at 310, in using this "substantial factor" test. *See* 167 Wn. App. at 89. *Mackay*'s "substantial factor" test, however, does not apply to the burden shifting scheme used in a plaintiff's burden of production. In *Mackay*, our Supreme Court articulated that a trier of fact must use the "substantial factor" test in deciding whether a plaintiff meets her or his *burden of persuasion* to demonstrate that discrimination played a substantial factor in an employment decision. 127 Wn.2d at 310. Essentially, the *Rice* court took *Mackay*'s burden of persuasion test for triers of fact determining pretext at trial and improperly applied it to pretrial, burden of production stages. Accordingly, Scrivener's reliance on the "substantial factor" test is

misplaced. Scrivener must show pretext in the initial burden of production pretrial phase. As discussed below, Scrivener is unable to meet this burden.

First, Scrivener points to Branch's January 19, 2006 statement about the college needing "younger talent" as evidence of pretext. But we must review that remark in context. This reference was part of Branch's push for greater Clark College diversity: "[P]erhaps the most glaring need for increased diversity is in our need for younger talent. 74% 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." CP at 24. Branch drew from the college's human resources statistics that revealed that 74.2 percent of Clark College's permanent employees were over 40, as were 87 percent of tenured faculty.

Despite his stated desire to inject the college with young faculty, Branch still tended to hire applicants over 40 at a relatively high rate. During the 2005 academic year, 53 percent (18 of 34) of Branch's new hires were over 40, and 44 percent (7 of 16) of newly hired faculty were over 40. Branch expressly stated that his "younger talent" comment played no role in hiring Chao and Darley-Vanis. Given Branch's record of consistently hiring candidates over 40, Scrivener does not demonstrate how Branch's general statement, offered nearly four months before hiring the tenure-track English positions, demonstrated pretext for age discrimination.

If anything, Branch's "younger talent" remark is a "stray" comment, a remark that does not give rise to an inference of discriminatory intent. *See Kirby v. City of Tacoma*, 124 Wn. App. 454, 467 n.10, 98 P.3d 827 (2004), *review denied*, 154 Wn.2d 1007 (2005); *Domingo*, 124 Wn. App. at 90. In *Kirby*, the Tacoma police chief described the plaintiff, a temporary police captain, and other older officers as the "old guard" and wanting to get "gray-haired old captains

to leave." 124 Wn. App. at 467. When the police department passed over the plaintiff for a promotion, he sued for age discrimination, citing the police chief's comments to establish pretext. *Kirby*, 124 Wn. App. at 462, 467. We held that even had the police chief been responsible for deciding who would receive the promotion, these stray comments were insufficient to demonstrate that the employer relied on illegitimate criteria. *Kirby*, 124 Wn. App. at 467 n.10. Like *Kirby*, here Scrivener does not show that Branch's statement related to her. Branch's isolated comment about seeking younger talent to balance the college's faculty demographics and to bring diverse perspectives to the college faculty cannot be directly tied to Scrivener or the English department hirings. Like *Kirby*, Branch's remark was a stray comment and does not support a finding of pretext. *See* 124 Wn. App. at 467.

Similarly, in *Domingo*, three months before an employee was fired, the employer told her that the employee was "no longer a spring chicken." 124 Wn. App. at 89-90. Though the employee was soon fired, allegedly for her poor relationships with coworkers, Division One of this court held that the plaintiff could not demonstrate that the comment was anything more than an "isolated, stray remark" that "create[d] such a weak issue of fact that no rational trier of fact could conclude that [defendant] fired Domingo because of her age." *Domingo*, 124 Wn. App. at 90. Accordingly, the plaintiff could not demonstrate pretext. Like *Domingo*, here Branch's comment occurred months before he filled the English positions. And while Division One held in *Domingo* that the defendant's stray comment, which expressly referred to the plaintiff, was not the true reason for her termination, here Branch's comment was not directed at Scrivener; the comment at issue here is even further isolated and more stray than those in *Domingo*. We hold that Branch's "younger talent" remark was a stray comment that does not give rise to an inference of discriminatory intent and cannot demonstrate pretext.

Second, regarding Branch's statement that he did not want a minimum experience requirement for the tenure-track English positions, Scrivener offers her own deposition in which she testified that Branch "wanted to hire someone with zero experience, [but others] intervened and got him to agree to ask for at least three years' experience." CP at 110. This argument, however, is inconsequential because even if we take Scrivener's deposition at face value, she cannot demonstrate that the finalists for the tenure-track positions at issue lacked substantial experience. Chao, for example, had taught English-related courses at three different colleges since 1999. Her experience included teaching English at Clark College. Darley-Vanis had taught English-related courses at four different colleges since 1997. Darley-Vanis's experience, too, included six years at Clark College. And Scrivener had taught at four different colleges since 1993, including a full-time stint at Clark College beginning in 1999. Though Scrivener argues that Clark College denied her the position despite her superior experience, the hired candidates also demonstrated substantial college English teaching experience; Branch ultimately hired two experienced candidates.

To establish pretext, Scrivener must do more than show that she also had the experience to qualify for the tenure-track positions. *See Kuyper v. Dep't of Wildlife*, 79 Wn. App. 732, 738, 904 P.2d 793 (1995), *review denied*, 129 Wn.2d 1011 (1996). In *Kuyper*, an older female plaintiff was qualified for a state agency position, a position for which she had already been performing job duties, but a qualified younger male was instead hired. 79 Wn. App. at 738. Division One affirmed the trial court's summary judgment order dismissing the discrimination suit, holding that these facts were insufficient to establish that the defendant's explanation that it preferred a different qualified candidate was pretextual. *Kuyper*, 79 Wn. App. at 737, 738.

Here, like the younger male candidate in *Kuyper*, the younger candidates were also qualified for the open position. Accordingly, here the trial court did not err in granting summary judgment.

Third, Scrivener's claims that Branch did not take her seriously because he was "clowning" during her interview do not demonstrate age discrimination. Had Branch and Thornburg not taken Scrivener's application seriously, as Scrivener asserts, they likely would not have interviewed her. Also, Branch was ultimately responsible for already hiring Scrivener in 2004 and 2005 to teach full time at Clark College during a time when Scrivener was also within the protected over-40 age class. Moreover, human resource statistics demonstrate that Branch did seriously consider older faculty candidates. During the 2005 academic year, Branch filled 44 percent (7 of 16) of faculty positions with candidates older than 40, including 33 percent (4 of 12) of permanent tenure-track positions.

To overcome a summary judgment motion, Scrivener needed to demonstrate that Branch's articulated nondiscriminatory reasons for hiring Chao and Darley-Vanis (1) had no basis in fact, (2) were not the motivating reasons for their being hired, (3) were not temporally connected to Scrivener not being hired, or (4) were not motivating factors in employment decisions with other prospective faculty members over 40 years old. *Fulton*, 169 Wn. App. at 161. She does not meet her burden. Because Scrivener does not demonstrate that Branch's justifications for hiring Chao and Darley-Vanis were pretext for age discrimination, the trial court did not err in granting Clark College summary judgment. *See Milligan*, 110 Wn. App. at 637.

We affirm.

Johanson, A.C.J.
JOHANSON, A.C.J.

We concur:

Quinn-Brintnall, J.
QUINN-BRINTNALL, J.

Dalton, J
DALTON, J.P.T.

— APPENDIX B —

RCW 49.60.010
Purpose of chapter.

This chapter shall be known as the "law against discrimination." It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

[2007 c 187 § 1; 2006 c 4 § 1; 1997 c 271 § 1; 1995 c 259 § 1; 1993 c 510 § 1; 1985 c 185 § 1; 1973 1st ex.s. c 214 § 1; 1973 c 141 § 1; 1969 ex.s. c 167 § 1; 1957 c 37 § 1; 1949 c 183 § 1; Rem. Supp. 1949 § 7614-20.]

Notes:

Effective date -- 1995 c 259: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [1995 c 259 § 7.]

Severability -- 1993 c 510: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1993 c 510 § 26.]

Severability -- 1969 ex.s. c 167: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1969 ex.s. c 167 § 10.]

Severability -- 1957 c 37: "If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." [1957 c 37 § 27.]

Severability -- 1949 c 183: "If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." [1949 c 183 § 13.]

Community renewal law -- Discrimination prohibited: RCW 35.81.170.

RCW 49.60.020
Construction of chapter — Election of other remedies.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, national origin, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter. Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights. This chapter shall not be construed to endorse any specific belief, practice, behavior, or orientation. Inclusion of sexual orientation in this chapter shall not be construed to modify or supersede state law relating to marriage.

[2007 c 187 § 2; 2006 c 4 § 2; 1993 c 510 § 2; 1973 1st ex.s. c 214 § 2; 1973 c 141 § 2; 1957 c 37 § 2; 1949 c 183 § 12; Rem. Supp. 1949 § 7614-30.]

Notes:

Severability -- 1993 c 510: See note following RCW 49.60.010.

RCW 49.60.180
Unfair practices of employers.

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

[2007 c 187 § 9; 2006 c 4 § 10; 1997 c 271 § 10; 1993 c 510 § 12; 1985 c 185 § 16; 1973 1st ex.s. c 214 § 6; 1973 c 141 § 10; 1971 ex.s. c 81 § 3; 1961 c 100 § 1; 1957 c 37 § 9. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

Notes:

Severability -- 1993 c 510: See note following RCW 49.60.010.

Effective date -- 1971 ex.s. c 81: See note following RCW 49.60.120.

Element of age not to affect apprenticeship agreements: RCW 49.04.910.

Employment rights of persons serving in uniformed services: RCW 73.16.032.

Labor -- Prohibited practices: Chapter 49.44 RCW.

Unfair practices in employment because of age of employee or applicant: RCW 49.44.090.