NO. 43051-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

KATHRYN SCRIVENER,

Appellant,

v.

CLARK COLLEGE,

Respondent.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Plaintiff-Appellant Kathryn Scrivener has alleged age discrimination in hiring in that she was not hired for either of two open tenure track positions for which she applied in 2006, despite being the most experienced applicant. Defendant-Respondent Clark College was granted summary judgment against Ms. Scrivener's claim. That grant of summary judgment was in error and must be reversed because the public policy statement regarding hiring of President Branch, the decision maker, as well as his own declaration in support of Defendant's motion for summary judgment, raise genuine questions of fact regarding the motivation for his hiring decision. Ms. Scrivener's ultimate burden is to show that age was a substantial factor in the decision to deny her a position, not that it was the only factor or that any other stated reason was pure pretext. Ms. Scrivener has shown a genuine issue of material fact exists as to whether age was a substantial factor in the decision not to hire her. The decision maker himself does not deny the fact. Further, the reasons for the decision to deny Ms. Scrivener a tenure track position and award both positions for which she applied to applicants under forty were uniquely within the knowledge of the moving party, and therefore

inappropriate for summary judgment. The grant of summary judgment should be reversed.

I.

ARGUMENT

Summary Judgment fails because the decision maker's public policy statement raises a genuine issue of fact

Then-President Branch, the ultimate decision-maker in hiring for the tenure track positions Ms. Scrivener sought, publicly and formally stated in his State of the College Address in January 2006, that "the most glaring need for increased diversity is in our need for younger talent" in the College workforce. *CP 24* (Dec. of Branch, Ex. 3, p.10). This statement was not, as Respondent's briefing would have it, a "stray"comment or "disconnected from the hiring process"; it was an explicit discussion of immediate hiring needs, of a "glaring need" to hire younger employees, made in a formal presentation to the College community by the individual ultimately in charge of hiring for faculty positions during the hiring process for the two positions for which Ms. Scrivener had applied. Within a few months of this speech, that speaker hired two applicants under 40 instead of Ms. Scrivener, who was 54 at the time, for the tenure track faculty positions.

In his Declaration in support of summary judgment, President Branch does not deny that age played a part in his hiring decisions, a statement which would have been easy enough to include in the declaration had it been true. Instead, he carefully parses his words, stating, "[m]y comments regarding the workforce profile of Clark College on January 19, 2006 played no role in the decision to hire" the under-40 applicants. *CP 4* (Dec. of Branch p.4). Ms. Scrivener does not allege that his "comments" played a role in the decision not to hire her, but that her age did, that it was a substantial factor in that decision. Dr. Branch also declares that the College had in the past been cited for lack of long term planning, that long term planning was a critical aspect of his job and that succession planning was also "very important on many levels and involves, among other things, analysis of the demographics of current employees," demographics which evidenced, according to President Branch, a "glaring need" to hire younger employees.

A.

Respondent's motion for summary judgment fails under Washington employment discrimination law

Washington appellate courts "review summary judgments de novo and conduct the same inquiry as the trial court, considering all facts

submitted and all reasonable inferences in the light most favorable to the nonmoving party." *Domingo v. Boeing Employees' Credit Union,* 124 Wash.App. 71, 78, 98 P.3d 1222 (2004) (footnote omitted). "Summary judgment should rarely be granted in employment discrimination cases." *Sangster v. Albertson's, Inc.,* 99 Wash.App. 156, 160, 991 P.2d 674 (2000).

"As a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment. This is because "the ultimate question is one that can only be resolved through a searching inquiry—one that is most appropriately conducted by a factfinder, upon a full record." *Schnidrig v. Columbia Mach., Inc.,* 80 F.3d 1406, 1410 (9th Cir., 1996) (citations and internal quotation marks omitted)." *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1124 (9th Cir., 2000).

The Washington Law Against Discrimination (WLAD) requires that "the provisions of this chapter are to be liberally construed for the accomplishment of the purposes thereof." RCW 49.60.20. Accordingly, the Washington Supreme Court has held that, given the remedial purpose of the WLAD, "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 citation omitted*).

1. Employee only need show that age was a substantial factor in the decision

A plaintiff asserting an age discrimination claim under the WLAD must show that age was a substantial factor in the decision, regardless of whether other "legitimate" considerations may have factored in. The College acknowledges that the "[t]o 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). On this [ ] point, Washington has a 'less onerous' requirement than the 'but-for' standard federal courts require under the ADEA." Respondent's Brief at 19.

"Washington courts have adopted the substantial factor test in cases involving discrimination . . . The substantial factor test is appropriate in these cases, where causation is difficult to prove, largely due to public policy considerations that strongly favor eradication of discrimination and unfair employment practices. *See, e.g., Mackay,* 127 Wash.2d at 309–10, 898 P.2d 284; *Wilmot,* 118 Wash. 2d at 70, 821 P.2d 18; *Allison,* 118 Wash.2d at 94, 821 P.2d 34 (substantial factor test is based more on policy

considerations than on the factual inquiry of the "but for" test.)" *Sharbono v. Universal Underwriters Ins. Co.* 139 Wash.App. 383, 419, 161 P.3d 406, 420 (2007).

"In an action alleging age discrimination in employment, the employee has the initial burden of presenting a prima facie case of age discrimination . . . Once the employee makes a prima facie case, the burden then shifts to the employer who 'must articulate a legitimate, non-discriminatory reason for termination. The employer's burden at this stage is not one of persuasion, but rather a burden of production.' *Grimwood,* 110 Wash.2d at 364, 753 P.2d 517." *Rice v. Offshore Systems, Inc.*, 167 Wash.App. 77, 88-89, 272 P.3d 865 (2012).

For the limited purpose of summary judgment, the College acknowledged that Ms. Scrivener established her *prima facie* case and Ms. Scrivener acknowledged that the College had articulated a nondiscriminatory reason for hiring applicants under 40. At this point, the burden of persuasion returns to the plaintiff to show that "discrimination was a substantial factor in the disparate treatment." *Marquis v. City of Spokane*, 130 Wash.2d 97, 114, 922 P.2d 43 (1996); and see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). While

acknowledging the "substantial factor" standard, Respondent mistakenly argues, at great length, that "Ms. Scrivener's burden on appeal is to 'present evidence that the defendant's reasons were untrue or mere pretext.'" Respondent's Brief at 23. This argument fails, as it ignores the fact that a plaintiff asserting an age discrimination claim under WLAD can prevail despite the presence of a non-discriminatory reason for the employment decision, if age was also a "substantial factor." Requiring the Plaintiff to prove that any stated non-discriminatory reason is untrue is not required, where as here the Plaintiff shows that the stated reasons, even if true, mask the consideration of age as a substantial factor in the employment decision. Respondent simply misstates plaintiff's burden.

> The employee is not required to produce evidence beyond that offered to establish the prima facie case, nor introduce direct or "smoking gun" evidence. *Sellsted,* 69 Wash.App. at 860, 851 P.2d 716. Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's burden. *Sellsted,* 69 Wash.App. at 861, 851 P.2d 716. He must meet his burden of production to create an issue of fact but is not required to resolve that issue on summary judgment. "For these reasons, summary judgment in favor of employers is often inappropriate in employment discrimination cases." *Sellsted,* 69 Wash.App. at 861, 851 P.2d 716. The issue at this point is whether, notwithstanding [Defendant's] statement of a nondiscriminatory reason for termination, [Plaintiff's] evidence is sufficient to support a reasonable inference that a discriminatory or retaliatory motive was a substantial

> factor in his discharge. *See Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wash.2d 302, 310, 898 P.2d 284 (1995).

Rice, 167 Wash.App. 77, 89 (2012) (reversing grant of summary judgment).

Respondent cites *Clarke v. State Attorney General's Office*, in which Plaintiff brought state law claims for hostile work environment and disparate treatment due to race, ethnicity and national origin, for the proposition that "Ms. Scrivener's burden on appeal is to 'present evidence that the defendant's reasons [] were untrue or mere pretext.'" Respondent's Brief at 23, *citing Clarke*, 133 Wash.App. 767, 788 (2006). In fact, Respondent's citation cuts off the last portion of the sentence, thus mischaracterizing the Court's holding. The Court held "that summary judgment []is proper where plaintiff cannot present evidence that the defendant's reasons [] were untrue or mere pretext ***or*** *if no rational trier of fact could conclude that the termination was discriminatory.*" *Id.* (Emphasis added.) The Court did not state that the plaintiff must show pretext, but stated that at the third step of the burden shifting analysis, "[t]he plaintiff has the final burden of persuading the trier of fact that

discrimination was the *substantial factor* in the termination decision."[1] *Id.* (Emphasis added.) In this case, making all reasonable inferences in favor of Ms. Scrivener as the nonmoving party, the statements of the President in his State of the College Address combined with his declaration could lead a rational trier of fact to conclude that age was a substantial factor in the hiring decision, that the decision was in fact discriminatory.

2. Ms. Scrivener more than made a prima facie case

Ms. Scrivener more than made a prima facie case. The statements of President Branch are direct evidence of age as a substantial consideration in hiring decisions. In analyzing the burden of proof at summary judgment under the more onerous federal age discrimination standard, the Oregon District Court has noted that where the "evidence introduced by the plaintiff to establish a *prima facie* case consists of 'more" than the evidence necessary to create a presumption of discrimination under the *McDonnell Douglas* factors, the plaintiff does not necessarily need to offer any additional independent evidence of discrimination to rebut the legitimate, nondiscriminatory reasons offered

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[1]Note that Plaintiff's burden in a WLAD age discrimination claim is not that stated by the *Clarke* court, to show that discrimination was "the substantial factor" in the employment decision, but the lighter burden of "a substantial factor." *See e.g. Rice.*

by the defendant." *Hartung v. Cae Newnes, Inc.*, 229 F.Supp.2d 1093 (D. Or., 2002) citing *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1127. Similarly, here Ms. Scrivener has offered proof sufficient for a reasonable factfinder to find discrimination and need not offer additional independent evidence to rebut the reason offered by the College. After having identified a "glaring need" to hire "younger talent" in his State of the College Address, President Branch makes just such a decision, to fill two tenure track position with applicants under forty, and describes the basis for his decision as "the best fit for the institution and the English department." *CP 4* (Dec. of Branch, p.4); *see also CP* 59 (Dec. of Thornburg, pg.2). This evidence can be reasonably interpreted as incorporating the applicants' ages as a substantial factor in the decision. (Respondent's brief inaccurately states Respondent's reason for its decision as hiring "qualified candidates because they were excellent teachers with great credentials." Respondent's Brief at 23.)

a. Analysis of age statistics not applicable where there is direct evidence of age as consideration

Respondent's discussion of cases in which courts granted summary judgment on age discrimination claims in part because both the decision

maker and the plaintiff were over 40 or because the majority of the College's workforce was over 40, is not statistically relevant nor germane to this case, in which the decision maker made an explicit, formal policy statement about the "glaring need" to increase diversity by hiring "younger talent" because there were so many older employees. President Branch stated in his Declaration in support of summary judgment that "Clark College was facing [challenges] in light of the demographics of the college's workforce[,]" *CP 3-4* (Dec. of Branch, p. 3-4), because "74% of Clark College's workforce is over forty." *CP 24* (Dec. of Branch, Ex. 3, p. 10). The Court need not rely on circumstantial evidence such as statistical inferences, where the ultimate decision maker formally stated that he saw a "glaring need" to hire younger employees. *See e.g. Kastanis v. Educ. Employees Credit Union,* 122 Wn.2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993)).

3. Summary judgment not appropriate where material facts are within particular knowledge of moving party

"We are reluctant to grant summary judgment when 'material facts are particularly within the knowledge of the moving party.' *Riley v. Andres,* 107 Wash.App. 391, 395, 27 P.3d 618 (2001). In such cases, the

matter should proceed to trial 'in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.' *Mich. Nat'l Bank v. Olson,* 44 Wash.App. 898, 905, 723 P.2d 438 (1986)." *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 661-62, 240 P.3d 162 (2010). Respondent argues that this standard should be not applied in this case because none of these cases were employment cases, however the evidentiary principal set forth in *Riley* and its progeny is not limited by the language of the cases and is equally applicable to employment cases.

Respondent further attempt to distinguish these cases by noting that the affiants with the particular knowledge in those cases had died. While President Branch is to our knowledge alive, he stated in his Declaration that he would have moved to Columbia South America by the time that the College's summary judgment motion was filed, thus effectively rendering himself unavailable. Similarly, in *Felsman v. Kessler*, a wrongful death action in which plaintiff alleged conspiracy by the defendants and employment of one defendant by others, the court denied summary judgment for defendants on their affidavits controverting the complaint, where the affidavits alleged fact particularly within

defendants' knowledge and the defendants had claimed Fifth Amendment privilege on deposition. *Felsman v. Kessler*, 2 Wash.App. 493, 496-97, 468 P.2d 691, 693 (1970). Even where the affiant is available, Washington courts have held that "where material facts are particularly within the knowledge of the moving party, courts have been reluctant to grant summary judgment.." *Arreygue v. Lutz* 116 Wash.App. 938, 941, 69 P.3d 881 (Div. 3,2003) (internal citations omitted). In *Arreygue*, a key question was whether or not the defendant had insurance coverage. The Court found this information particularly within the knowledge of defendant and therefore reversed the grant of summary judgment based upon the inability of the nonmoving party to prove this fact. The Court also noted that defendant had been "very cagey about this issue . . . neither deny[ing] nor affirm[ing] the existence of insurance." Id. at 945. *See also Brown ex rel. Richards v. Brown* 157 Wash.App. 803, 239 P.3d 602 (2010), in which the court cited *Riley* in reversing a grant of summary judgment on a conversion claim, where defendant was available.

In this case, while the ultimate decision maker, President Branch, and Vice President Thornburg, who participated with Branch in the final interviews for the tenure track positions at issue in this case, stated in their

declarations that they did not discuss age during the hiring process, they did not explicitly state that age was not a consideration, a fact that would have been particularly within their knowledge. The declarations of both President Branch and Vice President Thornburg, indicate that the "needs of the college" and "fit" were the bases for the hiring decisions. Since President Branch had recently articulated that diversifying the age of the workforce by hiring "younger talent" was a "glaring need" for the College, it is reasonable to infer that younger applicants would be considered a better fit for the needs of the College in substantial part because of their youth.

a. The decision makers do not deny that age was a consideration in hiring

Respondent spends a number of pages arguing that because Ms. Scrivener has not shown that she was clearly more qualified than the under-40 applicant who were hired instead of her, she has not shown pretext. This argument misdirects the Court away from the fact that the decision makers did not state that the decision was based on their determination that the younger applicants who were hired were "better qualified"; that is Respondent's counsel's conclusion. The decision

makers state that the selection was based on "best fit," the needs of the English Department, the broader institutional picture. "Best fit" is an open-ended criterion which does not foreclose consideration of age. Indeed, where President Branch specifically stated in his State of the College Address that hiring younger talent was a "glaring need" for the College, it is reasonable to infer that his determination of "best fit" for the College specifically included consideration of the ages of the applicants.

II.

CONCLUSION

The public policy statement of the College president and ultimate decision maker in the hiring decision, made during the hiring process, that the College needed to hire younger people can reasonable be viewed as stating an intention to hire younger people, to rely on age as a substantial factor in hiring decisions, to "discriminate" against older applicants. Here the decision making process was in the particular knowledge of the final decision maker, President Branch, and Vice President Thornburg, and this Court should reverse the grant of summary judgment for defendant on its agent's affidavits "where the affidavits alleged facts particularly within defendants' knowledge[.]" *Felsman,* 2 Wash.App. at 496-97 (1970).

Summary judgment was inappropriate as a reasonable trier of fact could draw the inference that age was a "substantial factor" in the decision. *See Mackay* 127 Wash.2d at 311; *Rice*, 167 Wash.App. 77, 89 (2012).

Ms. Scrivener has more than met her burden to defeat summary judgment by showing a question of fact that age was a substantial factor in the College's hiring decisions for the tenure track positions. The trial court's Order granting summary judgment to the College must be overturned.

DATED this 26th day of September, 2012.

LAW OFFICES OF SUE-DEL MCCULLOCH LLC

By: _____

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Attorney for Plaintiff/Appellant Kathryn Scrivener

CERTIFICATE OF FILING & SERVICE

I hereby certify that I filed: **APPELLANT'S REPLY BRIEF for SCRIVENER v. CLARK COLLEGE, COURT OF APPEALS CASE NO. 43051-7-II and SUPERIOR COURT CASE NO. 09-2-03120-1** in the Washington State Court of Appeals Division II and served the Notice on the following person(s):

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☒ by mailing to said person(s) a true copy thereof, contained in a sealed envelope, with postage paid, and deposited in the post office at Portland, Oregon, on said day, addressed to said person(s) as set forth above.

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DATED this 26th day of September, 2012

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