NO. 43051-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KATHRYN SCRIVENER,

Appellant,

v.

CLARK COLLEGE,

Respondent.

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION

In May 2006, Appellant Kathryn Scrivener, then aged 54, was interviewed as a finalist for one of two tenure-track positions teaching English at Clark College (College). She is before this Court having filed an age-discrimination suit against the College, pursuant to RCW 49.60.180 (the Washington Law Against Discrimination, or WLAD). Her suit alleges that the College hired other candidates only after discriminating against Ms. Scrivener on the basis of her age.

The trial court below ruled that even when viewed in a light most favorable to Ms. Scrivener, the evidence she presented did not raise any genuine issue of material fact regarding age discrimination, and the College was entitled to judgment as a matter of law under CR 56.

The trial court's ruling was based on Ms. Scrivener's failure to present any specific evidence to rebut the College's legitimate, non-discriminatory explanations for its hiring of excellent candidates. This failure is fatal to her case. So are the facts: The College had recently rehired Ms. Scrivener, spent months considering her candidacy, and never asked about or discussed her age. She disputes none of this. After an extensive search process, the College found and hired two candidates who were better qualified teachers than Ms. Scrivener and more deserving of tenure. That would be disappointing for any job applicant. It is not

illegal. This Court should affirm the trial court's decision. Clark College did not discriminate against Ms. Scrivener on the basis of her age.

II. COUNTERSTATEMENT OF THE CASE

A. Counterstatement Of Facts

In the fall of 1994, Kathryn Scrivener was hired as a part-time adjunct English instructor at Clark College. CP at 88. She was 42 years old.[1] In 1999, she signed a one-year contract to be a full-time temporary English instructor at the College. CP at 88. She was 47. Since 1999, Ms. Scrivener has been continuously employed by Clark College under a series of similar one-year contracts. CP at 101. Such positions are faculty positions; they are appointed by the College president (CP at 59) but they are not on the tenure track. CP at 101.

1. Clark College's Selection Of Tenure-Track Teachers Placed A Premium On Quality Teaching

Clark College's tenure-track positions are protected by the laws of the State of Washington with rights negotiated between the College and its faculty bargaining agents. WAC 132N-128-122. Tenured faculty cannot be dismissed without a substantial process designed to "protect[] the concepts of faculty employment rights." RCW 28B.50.850-.870. Ms. Scrivener was employed as a temporary instructor, and was not on the

[1] Scrivener was born on February 11, 1952. ER 201.

tenure-track. CP at 101. Temporary instructor positions are different, as Ms. Scrivener correctly notes, because they have "no guarantee of future contracts." CP at 101.

Clark College fills its tenure-track vacancies through a deliberate process spelled out by a contract between the College and its faculty. CP at 30-31. In its hiring, the College "plac[es] a premium on quality teaching." CP at 18. It holds good teaching as a "fundamental[] value . . . at the center of [the] institution" (CP at 18), and has a "commitment to being a learning college." CP at 20. Faculty members are expected to be innovative teachers who are "central" to student learning. CP at 21. Administrators keep those goals in mind during hiring. CP at 36. In its job posting for the tenure-track positions — at issue in this lawsuit — the College focused on inventive, student-centered teaching, asking all applicants to "describe your teaching philosophy" and to "describe strategies you have used to ensure your teaching is effective and students are succeeding." CP at 36. Additionally, the teaching skill of each of the finalists was observed in the classroom by member of the selection committee. Put simply, every aspect of the College hiring process was directed toward hiring the best teachers. CP at 30-32.

2. In 2006, Clark College Selected Scrivener As A Finalist For A Competitive Tenure-Track Teaching Position At The College

Clark College's English department began accepting applications for two tenure-track faculty positions in the fall of 2005. CP at 36-37. A total of 156 people applied: 106 of the applicants were younger than 40, while just 50 were older than 40. CP at 32. Ms. Scrivener was one of the applicants. CP at 101.

Assessing a candidate's teaching style was one important aspect of the hiring process. CP at 36 (i.e., asking candidates to "describe strategies you have used to ensure your teaching is effective"). In accordance with the College's written tenure-track hiring process, a faculty committee was tasked with selecting a group of finalists. CP at 32. The committee reviewed applications, checked references, and conducted interviews. CP at 30-31. Applicant's ages were not collected or discussed. CP at 33. Committee members winnowed the applicant pool to 13 candidates who were each asked to give teaching demonstrations. CP at 32. Seven of the 13 were over the age of 40. CP at 32. Faculty observed the demonstrations, and critiqued the candidate's classroom styles. CP at 32. Ms. Scrivener was selected as one of four finalists.

Committee members compiled a memorandum describing the strengths and weaknesses of each candidate, listed in alphabetical order, as

required by the college's hiring policy. CP at 32. In May 2006, the memo was sent to the College's president, Dr. R. Wayne Branch, and its acting Vice President of Instruction, Dr. Sylvia Thornburg. CP at 32. Dr. Branch had been the College's president since August 2003. CP at 1.

In accordance with the College faculty hiring policy, Drs. Branch and Thornburg interviewed the committee's four best candidates. As the president of Clark College, Dr. Branch was the College's appointing authority for all positions. CP at 1. But, for this position, he made his decision in consultation with Dr. Thornburg. See CP at 2, 32, 59.

3. Scrivener Was Not Offered A Job, As Other Candidates Were More Qualified And Gave Better Teaching Demonstrations

The faculty committee listed the four finalists in alphabetical order in the strengths and weaknesses memorandum: Ms. Geneva Chao, Ms. Jill Darley-Vanis, Mr. Scott Fisher, and Ms. Kathryn Scrivener. CP at 63-65. Mss. Chao, Darley-Vanis, and Scrivener were already teaching at Clark College. CP at 46-49, 50-53. The three women shared supervisors. CP at 46-57 (Ms. Chao was supervised by Joe Pitkin, Ms. Darley-Vanis by Don Erskine, and Ms. Scrivener by both Pitkin and Erskine). Age-related information was not collected (CP at 33), but the parties do not contest that in May 2006 both Mss. Chao and Darley-Vanis were under age 40.

Ms. Chao was a graduate of Barnard College of Columbia University in New York City, and later earned separate master's degrees from San Francisco State University in English (M.A.) and Creative Writing (M.F.A.). CP at 49. She had taught English at both New York University and the Art Institute of California in San Francisco. CP at 47. After observing Ms. Chao's teaching demonstration, the faculty committee called her an "articulate fast thinker who can challenge expectations without insulting or offending." CP at 63. The committee commended her "clarity when presenting information" while praising her teaching demonstration as "skilled, enjoyable and interactive." CP at 63. Although Ms. Chao had experience teaching at Clark, as well as an art institute and a well-respected four-year school, the committee noted that she had less experience than other finalists. CP at 63.

Ms. Darley-Vanis earned a B.A. in both English and French from Oregon State University and an M.A. in English from Portland State University. Ms. Darley-Vanis had also studied at the Universite de Poitiers as an undergraduate.

Ms. Darley-Vanis had significant and varied experience, having taught at Clark College since 2000, and other universities and community colleges in the Portland area since 1997. CP at 51. At the time of her application, Ms. Darley-Vanis had taught at: Clark, Lower Columbia,

Concordia, and Portland State. She also had experience with practical industrial, technical writing and editing for several northwest Oregon corporations. CP at 51-53.

Ms. Darley-Varis's teaching demonstration was "[e]xtremely organized," and the faculty committee admired her "creative[] use" of "outstanding written materials." CP at 64. During the demonstration, Ms. Darley-Vanis demonstrated excellent "patience and compassion" with students that helped to achieve their "buy in." CP at 64. The observers also noted that Darley-Varis could have moved around the room more and used jargon "that may not have been appropriate to her audience level." CP at 64.

Mr. Fisher's job application is not included in the record, but the committee said that he had an "excellent work history" and a "strong background in vocational-technical areas [that would] shore[] up a department need." CP at 64. His teaching demonstration "had pertinent examples," "tailor[ed] topics" and was well targeted for its audience. CP at 64. However, he lacked experience teaching literature. CP at 64.

Kathryn Scrivener earned a B.S. in Journalism from the University of Kansas and an M.A. in English from Portland State University with an emphasis on rhetoric and composition. CP at 54-57. Ms. Scrivener had taught at Clark full time since 1999, but also had teaching experience at

other institutions in the Portland area including: Washington State University at Vancouver, the University of Portland, and Mt. Hood Community College. Ms. Scrivener's non-academic employment included five years as a reporter/photographer for the Clackamas County News.

According to the faculty committee, Ms. Scrivener was an "[e]nergetic and enthusiastic" presenter with "excellent experience" in teaching community college courses. CP at 65. However, the committee noted that in her teaching demonstration, Ms. Scrivener "lost her place and was not as smooth or clear as she could have been" in front of students. CP at 65. For example, while writing on the board, Ms. Scrivener faced away from the audience for too long and "lost touch" with the classroom. CP at 65. Generally, the committee expressed concern that students might find her "exuberance and passion . . . off-putting" because she had such an extreme "up-front style." CP at 65.

Ms. Scrivener's interview with Drs. Branch and Thornburg took place on May 11, 2006, five days after the strengths and weaknesses memorandum was submitted by the faculty committee. CP at 101, see also CP at 59 (memo submitted May 6, 2006). At the time,

Ms. Scrivener was 54 years old, Dr. Branch was 55,[2] and Dr. Thornburg was 61.[3] Discussion during the interview centered on the College's teaching and student learning mission, and the skills and abilities required to best accomplish student success. CP at 2. Among other topics, the interview featured questions about "[r]ecent change[s] in teaching styles." CP at 60. The president and vice president hoped their hiring decision would address broad institutional teaching goals, as well as the needs of the English department, and student success across campus. CP at 59.

After all four finalists were interviewed, and after consulting the candidates' applications and strengths and weaknesses, the president and vice president "agreed that of the four finalists, Ms. Scrivener was ranked last." CP at 59. Mss. Chao and Darley-Vanis – highly credential current faculty members of Clark College who gave practically flawless teaching demonstrations – were considered by to be the best and most qualified candidates. CP at 2-3. Ms. Scrivener – whose teaching style was potentially off-putting and whose demonstration "was not as smooth as it could have been" – was not offered a tenure-track position. CP at 101. Mss. Chao and Darley-Vanis were offered tenure-track appointments. CP at 101.

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[2] CP at 3 (d.o.b. July 30, 1950).
[3] CP at 60 (d.o.b. October 2, 1944).

Ms. Scrivener dismisses Dr. Thornburg as "effectively an extension of Mr. Branch" who "participat[ed] little if at all in the interview" and "appear[ed] to defer to President Branch throughout the interview." Brief of Appellant (Appellant's Br.) at 14 (citing CP at 107-08). In her brief, Ms. Scrivener characterizes Dr. Branch as "clowning" in the interview, and states she felt that he did not take her interview seriously. But in her deposition she explains that what Dr. Branch actually did was quote Jon Stewart's Daily Show during her interview. Appellant's Br. at 15 (citing CP at 107). Ms. Scrivener seems to have been uncomfortable. She understood the president's reference, but it did not put her at ease. CP at 107. Drs. Branch and Thornburg both indicate that all candidates were taken seriously, and the hiring decision was made by Dr. Branch only after he received input and recommendations from Dr. Thornburg. CP at 2, 59.

Drs. Branch and Thornburg were in "mutual agreement" that Mss. Chao and Darley-Vanis were hired "because they were . . . the best fit for both the institution and the English department." CP at 4. This was not a decision reached lightly: It followed months of careful process by the College, all outlined in written procedures. CP at 32. Teaching ability was central to the process, as the job announcement itself sought information about each applicant's "teaching philosophy" and asked each

applicant to "describe strategies you have used to ensure your teaching is effective." CP at 36. The decision followed close observation by search committee members of 13 different teaching demonstrations, further illustrating the College's regard for innovative teachers and its policy decision to place a "premium on quality teaching." CP at 32 (13 demonstrations), CP at 18 ("premium on quality teaching"). Drs. Branch and Thornburg were given a report written by current faculty members outlining each candidate's strengths and weaknesses in the classroom. CP at 32. Unsurprisingly, Drs. Branch and Thornburg decided that those who "fit" best in Clark College's classrooms were those teachers with the most impressive classroom strengths and the best ability to connect with the students in the classroom. CP at 4.

At no point during the hiring process was age considered. None of the job applications included any candidate's age or birth date. CP at 33, see also CP at 46-57. Neither was there any discussion of any candidate's age during any interview, or any post-interview discussion between Drs. Branch and Thornburg, who, in any case, were both older than Scrivener. CP at 3, 60; see also notes 1-3 supra pp. 2, 9.

4. Scrivener Filed Lawsuit Alleging Age-Based Discrimination

In July 2009, Ms. Scrivener sued Clark College alleging that the May 2006 decision not to hire her for a tenure-track faculty position was based on age discrimination, and violated WLAD. CP at 69-72; RCW 49.60.180. The basis of Ms. Scrivener's allegation was her own assessment of her qualifications, and a short statement included within a lengthy public speech by Dr. Branch given as the "State of the College" address in January 2006.[4] CP at 70.

Dr. Branch's address highlighted the College's goal of preparing its students to "learn[] how to learn." CP at 16. At various parts, he discussed the evolution of community colleges, the role that the Truman Commission in 1946 played in defining shared education goals at similar colleges across the nation, and the educational necessity of efforts such as broad-based community partnerships and workforce development. CP at 15-28. For a few sentences in the middle of his speech, Dr. Branch extolled the virtues of campus diversity. CP at 24. He discussed statistics from an October 2005 affirmative action report that had been generated, as required, by the college's human resources department. CP at 3-4, 32. Dr. Branch informed the audience of the report's conclusion: While

[4] The State of the College address given by Dr. Branch was approximately 5,500 words (thirteen single-spaced pages). Ms. Scrivener relies upon three sentences (49 words) on the tenth page of the address. CP at 24.

19 percent of the student body "represents some form of ethnic diversity," only 12.2 [sic] percent of the college's employees were members of an ethnic minority. CP at 24; compare CP at 39 (12.4 percent). Dr. Branch then said:

> [P]erhaps the most glaring need for diversity is in our need for younger talent. 74 percent 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. Dr. Branch also cited a newspaper report indicating that Vancouver, Washington needed "the Funk Factor." CP at 24. When discussing hiring, Dr. Branch's comments were explicitly aimed at the College's entire workforce – not just its faculty, not just its tenure-track faculty. CP at 24.

Dr. Branch, the final decision maker here, has stated that the assessment of the College's diversity needs, as articulated in his State of the College speech, "played no role in the decision to hire Ms. Chao and Ms. Darley-Vanis," who were both hired for the exceptional teaching skill they brought to the English department and to Clark College. CP at 4. They were the "best fit" for the College because they embodied the goals articulated in Branch's "State of the College" speech: preeminent teaching skill and an ability to connect with Clark College students in a way that made them desire to learn.

5. New Allegations Raised After The Complaint

Ms. Scrivener did not raise any other allegation of discrimination in her Complaint (CP at 69-72), but has raised two other allegations during the course of the lawsuit. Appellant's Br. at 5-6. First, she alleges that Dr. Branch was "opposed to having any minimum experience for applicants." Appellant's Br. at 5 (CP at 109-10). As proof of this allegation, Ms. Scrivener cites only her own deposition. Appellant's Br. at 5. Despite her allegation, it is undisputed that the College required all applicants to have college teaching experience. CP at 36-37.

Finally, Ms. Scrivener asserts that in 2005 and 2006 just "four of the 13 hires for tenure track positions (approximately 30%) were 40 or over." Appellant's Br. at 5-6 (citing CP at 43-44). Ms. Scrivener makes a slight error. The data clearly show that four of 12 hires were age 40 or over. CP at 44. That is 33 percent. For comparison, people over the age of 40 constituted only 32 percent of the applicants for the positions at issue in this lawsuit. CP at 33 (just 50 of 156 applicants were older than 40). The College's hiring rate of people older then 40 as faculty members was slightly higher than the percentage of people older than 40 in the applicant pool for these positions. Appellant's Br. at 5-6, 33.

B. Procedural History

The College moved to dismiss Ms. Scrivener's claim with prejudice. CP at 73-85. On January 5, 2012, the trial court granted the motion. CP at 117-18. On February 2, 2012, Ms. Scrivener filed this appeal.

III. ARGUMENT

A. Standard Of Review

Orders granting summary judgment are reviewed de novo. Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Summary judgment is appropriate where the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). A trial court's ruling may be upheld on any grounds that the record supports. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). Any time a non-moving party cannot prove an essential element of the party's case, summary judgment should be granted. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986).

1. Scrivener Bears The Burden Of Setting Forth Admissible Evidence Revealing A Factual Dispute

A non-moving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits

considered at face value." KS Tacoma Holdings, LLC v. Shorelines Hearings Bd., 166 Wn. App. 117, 126, 272 P.3d 876 (2012) (quoting *Seven Gables Corp. v. MGM UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)); see also Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (Plaintiff's affidavits regarding "sincere belief and conclusions as to the occurrences at issues" are insufficient.). Instead, the non-moving party must set forth specific facts that sufficiently rebut the moving party's contentions, and reveal the existence of a genuine issue of material fact. Ranger Ins. Co. v. Pierce Cnty., 138 Wn. App. 757, 766, 158 P.3d 1231 (2007), *aff'd*, 164 Wn.2d 545, 192 P.3d 886 (2008).

2. Courts Do Not Treat Discrimination Differently From Other Ultimate Questions Of Fact

Courts at all levels have repeatedly granted summary judgment for employers in discrimination cases involving subjective determinations of merit when an employee fails to meet his or her evidentiary burden. E.g., *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); Robinson v. Pierce Cnty., 539 F. Supp. 2d 1316, 1334 (W.D. Wash. 2008) (applying WLAD); Grimwood, 110 Wn.2d at 359-60; *Clarke v. State Attorney Gen.'s Office*, 133 Wn. App. 767, 788, 138 P.3d 144 (2006), review denied, 160 Wn.2d 1006 (2007); Milligan v. Thompson, 110 Wn. App. 628, 639, 42 P.3d 418 (2002).

Ms. Scrivener argues that courts are reluctant to grant summary judgment in cases where material facts "are particularly within the knowledge" of one party. Appellant's Br. at 7. Ms. Scrivener suggests that this hiring decision reflects such a situation. Appellant's Br. at 15. However, all of the cases Ms. Scrivener relies upon are distinguishable. None of them involve claims of employment discrimination, and each of them involves a vital witness who has died. Arnold v. Saberhagen Holdings, Inc., 157 Wn. App. 649, 653-55, 240 P.3d 162 (2010) (wife and her son brought suit alleging that asbestos exposure killed husband, who cannot present testimony; son died while case pending, allegedly also from asbestos exposure); Riley v. Andres, 107 Wn. App. 391, 393, 27 P.3d 618 (2001) (party trying to establish adverse possession of land asserted that possession began when property was owned by now-deceased neighbors who were predecessors in title, and obviously unable to present testimony); Michigan *Nat'l Bank v. Olson*, 44 Wn. App. 898, 899-900, 723 P.2d 438 (1986) (undetermined person charged $52,500 on a man's credit card just before man's death; he could not testify as his widow sought to avoid paying bank for the charges). No similar circumstance is present here, and so the cases cited by Ms. Scrivener have no precedential value as the court considers this appeal.

Instead, the Supreme Court of the United States has repeatedly said that basic summary judgment standards apply in employment discrimination cases, and that courts "should not treat discrimination differently from other ultimate questions of fact." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (age discrimination case); *see also St. Mary's Honor Center*, 509 U.S. at 524; U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983).

The Supreme Court of Washington has embraced that same standard, even citing Reeves, *St. Mary's* and Aikens. Hill v. BCTI Income Fund I, 144 Wn.2d 172, 184-85, 23 P.3d 440 (2001), abrogated on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006); *see also Parsons v. St. Joseph's Hosp. & Health Care Ctr.*, 70 Wn. App 804, 807, 856 P.2d 702 (1993) (granting summary judgment to employer, even while casting "employer's motive and intent" as the central issue). Indeed, where admissible evidence permits reasonable minds to reach only one conclusion, summary judgment should be granted. Ranger Ins., 138 Wn. App. at 766; LaMon, 112 Wn.2d at 199.

B. Washington's Statutory Structure

Age discrimination is prohibited in Washington by WLAD, which in relevant part forbids employers from (1) "refus[ing] to hire any person

because of age . . . unless based upon a bona fide occupational qualification." RCW 49.60.180. The statute does not, of course, require employers to create positions for people because of their protected status, or to hire a person from a protected class instead of other, more qualified candidates. See MacSuga v. Cnty. of Spokane, 97 Wn. App. 435, 444, 983 P.2d 1167 (1999), review denied, 140 Wn.2d 1008, 999 P.2d 1259 (2000).

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). On this narrow point, Washington has a "less onerous" requirement than the "but-for" standard federal courts require under the ADEA. Turcotte v. ABM Janitorial Servs., No. C10-345-MJP, 2011 WL 1154486 (W.D. Wash. Mar. 25, 2011).[5]

However, it is clear that Washington courts interpreting WLAD generally do seek guidance from "federal cases construing the Age Discrimination in Employment Act of 1967 (ADEA)." Grimwood, 110 Wn.2d at 361; see also Keenan v. Allan, 889 F. Supp. 1320, 1377 (1995).

[5] Ms. Scrivener relied upon Turcotte in her brief before this Court. Appellant's Br. at 10-11. It is an unpublished case. Its use in Washington Courts is permissible under GR 14.1 and 9th Cir. Rule 36-3. Unpublished cases can be cited as examples, but do not provide precedential value. E.g., Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 678, 15 P.3d 115 (2000).

Washington Courts interpreting WLAD treat federal case law regarding ADEA as persuasive. BCTI Income Fund, 144 Wn.2d at 180.

C. Discrimination Claims Under WLAD Are Analyzed Using The Burden-Shifting Framework Created By McDonnell Douglas

1. The First Two Prongs Of The McDonnell Douglas Framework Are Conceded By The Parties

Age discrimination claims under WLAD are analyzed under the McDonnell Douglas burden-shifting framework. Hegwine v. Longview Fibre Co., Inc., 162 Wn.2d 340, 354, 172 P.3d 688 (2007). Under the three-step formula, a plaintiff must first present a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). A plaintiff who carries that initial burden creates a rebuttable presumption of discrimination, which the employer avoids by producing a legitimate reason for the adverse employment action. Id. An employer who has produced such an explanation is entitled to judgment as a matter of law, unless a plaintiff can fulfill the third prong of the analysis by demonstrating that the employer's reason is pretextual. McDonnell Douglas Corp., 411 U.S. at 804.

For the purposes of summary judgment, both parties concede that the first two steps of the framework have been met. Appellant's Br. at 9.

2. Under McDonnell Douglas, Scrivener Must Prove That The College's Explanations Are Pretextual

The third and final step of the framework requires a plaintiff to prove pretext by a preponderance of the evidence. Specifically, Scrivener must show that the College's proffered reasons are false and "unworthy of belief." E.g., *Clarke v. State Attorney Gen.'s Office*, 133 Wn. App. 767, 788, 138 P.3d 144 (2006), review denied, 160 Wn.2d 1006 (2007); Hines v. Todd Pac. Shipyards Corp., 127 Wn. App. 356, 372, 112 P.2d 522 (2005); Hedenburg v. Amarak Am. Food Servs, Inc., 476 F. Supp. 2d 1199, 1205 (W.D. Wash. 2007) (applying WLAD).

To prove pretext, a plaintiff must show that the defendant's explanation (1) had no basis in fact, (2) was not really a motivating factor for its decision, (3) was not temporally connected to the adverse employment action, or (4) was not a motivating factor in decisions regarding other employees in the same circumstances. Fulton v. State, *Dep't of Social & Health* Servs., No. 41499-6-II, 2012 WL 2401702, at *23 (Wash. Ct. App. Jun. 26, 2012).[6] A plaintiff must present more than speculative or conclusory assertions. Grimwood, 110 Wn.2d at 359-60. "[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with

[6] This Court has determined this opinion will be published. ER 201.

the plaintiff." Texas *Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

There are two primary ways for a plaintiff to fail to prove pretext. First, if a defendant presents abundant and uncontroverted evidence that there was no discrimination while the plaintiff presents evidence that only weakly demonstrates discrimination, then pretext has not been proven. See Milligan, 110 Wn. App. at 638 (defendant's "strong evidence and Milligan's weak claim made summary judgment appropriate"); BCTI Income Fund, 144 Wn.2d at 184-85. Second, a plaintiff's attempt to prove pretext will fail if the record conclusively reveals "some other, nondiscriminatory reason for the employer's decision." BCTI Income Fund, 144 Wn.2d at 184. Importantly, an employee who merely disagrees with an employer's assessment of the employee's job capabilities "does not demonstrate pretext or 'give rise to a reasonable inference of discrimination.'" Fulton, 2012 WL 2401702, at *10-11 (2012) (citing *Parsons v. St. Joseph's Hosp. & Health Care Ctr.*, 70 Wn. App. at 811).

If a plaintiff fails either of these separate tests, then summary judgment should be granted to defendant. BCTI Income Fund, 144 Wn.2d at 184; see also Milligan, 110 Wn. App. at 638-39.

In her brief before this Court, Ms. Scrivener confuses her burden on the third and final prong. She states that because the parties have made

concessions all that is left is "the third prong: whether there is any question of fact that age was a substantial factor in the College's decision not to hire Scrivener for a tenure track position." Appellant's Br. at 9.

Ms. Scrivener is incorrect. As this section shows, McDonnell Douglas establishes an entire, three-step framework to evaluate questions like whether "age was a substantial factor in the College's decision." See McDonnell Douglas Corp., 411 U.S. at 802. Ms. Scrivener's formulation inappropriately collapses the inquiry, and ignores the concessions that she herself has made. Appellant's Br. at 9 ("Clark College ha[s] articulated a legitimate non-discriminatory reason," namely, it hired qualified candidates because they were excellent teachers with great credentials).

Ms. Scrivener's burden on appeal is to "present evidence that the defendant's reasons[] were untrue or mere pretext." Clarke, 133 Wn. App. at 788. If she does not prove that the College's reasons were untrue – and she cannot – then summary judgment should be affirmed. E.g., BCTI Income Fund, 144 Wn.2d at 184-185. If she only presents "weak" pretext evidence, she should also lose. E.g., Johnson v. Express Rent & Own, Inc., 113 Wn. App. 858, 860, 56 P.3d 567 (2002).

D. The Only Question On Appeal Is Whether Scrivener Can Prove That The College's Explanation Is False, And She Cannot Do So

For the purposes of summary judgment, both parties concede that the first two steps of the framework have been met. Appellant's Br. at 9. The only issue the trial court decided, therefore, and the only issue on appeal, is whether Ms. Scrivener has fulfilled her burden on the third step of the McDonnell Douglas analysis: Proving through specific evidence that the College's explanation – that it hired qualified candidates because of their undisputed qualifications – is an explanation unworthy of belief. E.g., Clarke, 133 Wn. App. at 788. Ms. Scrivener cannot meet her burden. Summary judgment should be affirmed.

1. The Decision Makers Were Older Than Scrivener, And The College Employs Many People Protected By WLAD, So Any Inference of Discrimination Is Weak

As an initial matter, it is important to highlight that those people who Ms. Scrivener alleges illegally discriminated on the basis of her age are both older than Ms. Scrivener: Dr. Branch is 18 months older, and Dr. Thornburg is seven years older. See notes 1-3 supra pp. 2, 9. Furthermore, the College (not President Branch) is the defendant in this case, and its workforce was disproportionately represented by employees who, like Ms. Scrivener, were old enough to be protected by WLAD. CP at 33.

Washington State courts have explicitly discussed circumstances like these, and have indicated that they tend to negate a finding of discrimination on the basis of that protected status. See, e.g., BCTI Income Fund, 144 Wn.2d at 190 (granting summary judgment in age discrimination case, in part because both plaintiff and decision maker were older than 40); Griffith v. Schnitzer Steel Indus., 128 Wn. App. 438, 455-60, 115 P.3d 1065 (2005), review denied 156 Wn.2d 1027, 115 P.3d 1065 (2006). In Griffith, for instance, a 52-year-old Mormon man who was fired from his job alleged age and religious discrimination against non-Jewish employees. The appellate court upheld summary judgment on behalf of the employer, while noting that (1) plaintiff's manager was 42 years old, and also protected by WLAD; (2) many of the company's current employees were older than plaintiff, so no discrimination was evident in the wider employee population; and (3) many of the company's managers were not Jewish, and therefore unlikely to discriminate against other non-Jewish people. Griffith, 128 Wn. App. at 455-60. Such evidence "undercut[]" the plaintiff's discrimination claims. Id. at 459.

Washington is hardly alone in holding that the status of decision makers and the makeup of the general employee population is germane to employment discrimination cases. The Supreme Court of the United States, for instance, has clearly stated the proposition. *St. Mary's Honor*

Ctr., 509 U.S. at 514. "The disproportionate minority makeup of the company's work force and the fact that its hiring officer was of the same minority group as the plaintiff" is relevant, the Court said. Id. Such situations tend to negate any inference that a plaintiff's minority status was the basis of an adverse act. Id. at 508, n.2. The Seventh Circuit stated that a plaintiff who is six years younger than the decision maker has "a tough row to hoe" in proving pretextual age discrimination. Fairchild v. Forma Scientific, Inc., 147 F.3d 567, 572 (7th Cir. 1998). The D.C. Circuit Court has also held that a company's general employee population can militate against a finding of pretext. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1290 (D.C. Cir. 1998). "Where an employer has a strong record of equal opportunity employment, any inference of discrimination arising from the discrediting of the employer's explanation may be a weak one." Id. The Fifth Circuit has similarly noted that evidence that a hiring officer comes from the same protected class as the plaintiff "tend[s] to negate a finding of discrimination." Anderson v. Douglas & Lomason Co., Inc., 26 F.3d 1277, 1292-93 (5th Cir. 1994) (citing *St. Mary's Honor* Ctr., 509 U.S. 502).

The facts of this case tend to negate a finding of pretext. Ms. Scrivener does not dispute that the majority of the College's workforce was old enough to be protected by WLAD – indeed, it is a basis

of her claim. Appellant's Br., App. A-1. However, the makeup of the College's workforce helps its case, as it illustrates a "strong record of equal opportunity employment" which means "any inference of discrimination" implicating Ms. Scrivener's similar status is "a weak one." Aka, 156 F.3d at 1290; see also Griffith, 128 Wn. App. at 455-60. Weak issues of fact cannot survive summary judgment. Milligan, 110 Wn. App. at 638.

Moreover, the ultimate decision makers in this case were both older than Ms. Scrivener, and thus members of her protected class. See notes 1-3 supra pp. 2, 9. She therefore has "a tough row to hoe" in proving pretext, because this is a second, and independent, fact tending to negate a finding of discrimination on the basis of Ms. Scrivener's age. Fairchild, 147 F.3d at 572; Anderson, 26 F.3d at 1292-93.

Finally, other facts further heighten the difficulty that Ms. Scrivener faces. First, Dr. Branch explicitly stated that he had "a great affinity for people in this age group." CP at 24. Second, Ms. Scrivener finished fourth out of 156 candidates, a clear indication that she was taken seriously as a candidate, even if the College ultimately decided to hire Mss. Chao and Darley-Vanis. CP at 33. Ms. Scrivener cannot prove that the College's regard for the undisputed qualifications and teaching skills of Mss. Chao and Darley-Vanis is "unworthy of

belief." Her task becomes even harder given Dr. Branch's statement, her own progression through the hiring process, the College's strong record of employing WLAD-protected people, and the ages of the ultimate decision makers.

2. Scrivener Does Not Allege And Cannot Prove That She Was A Better Candidate Than Chao Or Darley-Vanis

Employers "are free to hire qualified candidates, and the decision to hire a qualified candidate who happens to be younger does not necessarily evidence discrimination." Robinson, 539 F. Supp. 2d at 1329 (applying WLAD). An employer attempting to defeat a claim of pretext need only show that the hired candidate "was at least equally qualified for the job." Barker v. Advanced Silicon Materials, LLC, 131 Wn. App. 616, 624, 128 P.3d 633 (2006) (granting summary judgment); see also Burdine, 450 U.S.at 258 (defendant does not need "to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff"). Where a small pool of final candidates is forwarded to an ultimate decision maker, a failure to hire one of those qualified candidates does not demonstrate discrimination against that candidate. See Kuyper v. State, 79 Wn. App. 732, 738, 904 P.2d 793 (1995) (granting summary judgment). This is true because companies have "leeway to make subjective business

decisions, even bad ones." Pottenger v. Potlach Corp., 329 F.3d 740, 748 (9th Cir. 2003) (affirming summary judgment in age discrimination case).

On the other hand, a plaintiff in Washington seeking to establish pretext must do more than merely show that she was also qualified. See, e.g., Kuyper, 79 Wn. App. at 738. In Kuyper, an older female plaintiff was undisputedly qualified for an open position, and had already been performing the duties of the job, but a younger male was hired. Id. Those facts, which so closely mirror the facts of this case, were insufficient to establish that the defendant's explanation that it preferred a different qualified candidate was pretextual. Id. at 738 (no evidence of age or gender discrimination). To prove pretext, a plaintiff also must do more than show that he or she has some qualities that are superior to the successful candidates. Robinson, 539 F. Supp. 2d at 1329. Indeed, a plaintiff's contention that the employment decision "would have been better if based on other criteria" is plainly insufficient. Id.

While Washington Courts do not seem to have offered a precise formulation of how much more qualified a plaintiff must be, federal courts offer guidance. E.g., Ash v. Tyson Foods, Inc., 546 U.S. 454, 457-58, 126 S. Ct. 1195, 163 L. Ed. 2d 1053 (2006) (recognizing that Circuits differ). For instance, the Eleventh Circuit requires a plaintiff to prove "disparities in qualifications . . . of such weight and significance that no reasonable

person, in the exercise of impartial judgment, could have chosen the candidate selected." Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004). The D.C. Circuit demands a plaintiff show that he or she is "significantly better qualified." Aka, 156 F.3d at 1294. The Seventh Circuit says that a plaintiff's "competing qualifications do[] not constitute pretext unless . . . there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." Millbrook v. IBP, Inc., 280 F.3d 1169, 1180 (7th Cir. 2002) (internal quotations omitted). The Ninth Circuit requires plaintiffs to prove qualifications that are "clearly superior" to the successful candidate. Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003).

At no point in any of her briefing before this Court does Ms. Scrivener argue that she is more qualified than Mss. Chao and Darley-Vanis. Throughout her argument, she argues only that she had more experience in teaching and online instruction. E.g., Appellant's Br. at 21 (calling her "a top applicant"). Of course, experience is only a single element of a candidate's qualifications. See Oda v. State, 111 Wn. App. 79, 87-98, 44 P.3d 8 (experience influences a faculty member's value, but does not determine it), review denied, 147 Wn.2d 1018, 44 P.3d 8 (2002); see also Merrick v. Farmers Ins. Group, 829 F.2d 1434, 1438 (9th Cir.

1990) (Plaintiff's "greater experience, and . . . somewhat better job performance" did not prove plaintiff was better qualified.). At any rate, the College does not dispute that Ms. Scrivener's experience had value, and helped her become "a top applicant." In fact, the College identified her as the fourth best out of 156 candidates. Unfortunately, there were only two open positions.

Relying only on her own deposition, Ms. Scrivener argues that Dr. Branch wanted to hire candidates with zero experience. Appellant's Br. at 5. This argument has several problems. First, this Court does not have to take Ms. Scrivener's deposition at face value. KS Tacoma Holdings, 166 Wn. App. at 126 (Non-moving party "may not rely on . . . having its affidavits considered at face value."). But even if the court were to evaluate the claim at face value, Ms. Scrivener cannot dispute that every finalist for the position did have experience. Second, she infers a direct correlation between "experience" and "age" that does not exist.[7] Cases like Daniel v. Boeing Co. illustrate the logical flaw. 764 F. Supp. 2d 1233, 1244 (W.D. Wash. 2011) (applying WLAD) (noting that salary and seniority are "factors often correlate[d] with age" but holding that employment decisions motivated by such factors "do not

[7] Ms. Scrivener's personal history illustrates the fallacy of such an assumption. Originally a journalist, Ms. Scrivener did not have her first teaching job until 1993, when she was 41 years old. CP at 51. Ms. Scrivener, thus, may actually have less teaching experience than other teachers in her own age cohort.

constitute age discrimination"). Finally, to the degree that Ms. Scrivener implies that the College undervalued her particular experiences when making its hiring decision, she is simply contending that the hiring decision "would have been better if based on other criteria." Robinson, 539 F. Supp. 2d at 1329. Self-serving desires like this might be understandable, but they create no issue of fact whatsoever. Id.

Indeed, summary judgment is appropriate even if the College only argued that Mss. Chao and Darley-Vanis were as "equally qualified" as Ms. Scrivener. Barker, 131 Wn. App. at 624; see also Burdine, 450 U.S. at 258. They not only had relevant experience and impressive credentials, but each also gave nearly flawless teaching demonstrations. In such a circumstances, the College was "free to hire" them as qualified candidates. Robinson, 539 F. Supp. 2d at 1329. This would be true even if hiring them seemed like an objectively bad decision, Pottenger, 329 F.3d at 748, which is an argument that Ms. Scrivener does not even attempt to raise.

3. Branch's Public Speech Was Not About Scrivener Or This Decisional Process, And It Does Not Prove Pretext

Ms. Scrivener argues that Dr. Branch's public speech is evidence of pretext. However, it is important to present his comments within their proper context: They were a few short sentences in a long State of the

College speech that primarily discussed the value of good teaching and the importance of student learning.

When a defendant has presented a legitimate, non-discriminatory reason for a challenged employment action, courts applying WLAD will not easily find that reason pretextual on the basis of a comment that is disconnected from the decision process, or is not directly targeted at the plaintiff. See Kirby v. City of Tacoma, 124 Wn. App. 454, 468, 98 P.3d 827 (2004), review denied, 154 Wn.2d 1007, 98 P.3d 827 (2005); Dom*ingo v. Boeing Emp.'s Credit Union*, 124 Wn. App. 71, 89-91, 98 P.3d 1222 (2004). Where a comment is disconnected from the hiring process or is not particular to the plaintiff, it is said to be "stray," and it will not support a finding of pretext. Id.

For instance, in Kirby, the Tacoma police chief made comments about the plaintiff, a temporary police captain, being part of the "old guard." Kirby, 124 Wn. App. at 467-78. The facts in Kirby are similar to those at issue in Ms. Scrivener's case: An older employee on a temporary contract sought, but did not receive, a permanent position for the job he was already performing. Before the hiring decision in Kirby, the police chief said in a command meeting that he wanted to get "gray-haired old captains to leave" the department to make room for younger officers. Id. Although quite specific, and blatantly discriminatory, the chief's

comments did not reference Kirby in particular. Id. The Kirby court therefore characterized the comments as "stray" and said they "would not have given rise to an inference of discriminatory intent" when one employee, Kirby, was bypassed for a single permanent captain's position. Id. at 467, n.10. The Kirby court noted that the police chief left the department shortly before Kirby was bypassed, but said its conclusion would have held "even if [the chief] had been the decision maker." Id.

Similarly, in Domingo, three months before an employee was fired, the plaintiff and her supervisor had a meeting to discuss the plaintiff's allegedly poor relationships with her co-workers. Domingo, 124 Wn. App. at 90. In that meeting, the supervisor said the plaintiff was "no longer a spring chicken." Id. at 89. Even though plaintiff was soon fired, allegedly for her poor relationships with co-workers, the Domingo court viewed the comment as 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." Id. at 90.

Many federal courts have affirmed summary judgments or judgments as a matter of law in employment discrimination cases, finding that a plaintiff failed to prove comments far more specific than Dr. Branch's did not constitute pretext. For instance, the Seventh Circuit did not find pretext when an African-American employee was demoted,

even though his supervisor said he would not get promoted, that he did not like plaintiff's "type," and that he thought one of plaintiff's "type" was enough. Smith v. Firestone Tire & Rubber Co., 875 F.2d 1325, 1329 (7th Cir. 1989) (comments "not shown to be related" to the demotion). Similarly, the First Circuit did not find pretextual age discrimination when a supervisor made repeated comments about the type of employee she hoped to hire. Among other things, the supervisor said that (1) she would favor women and younger people, (2) she hoped women and younger people could assume positions of prominence, and (3) she hoped to change the company's "old, white men" culture. Williams v. Raytheon Co., 220 F.3d 16, 19-20 (1st Cir. 2000) (comments not shown to be related to dismissal for insubordination). The Ninth Circuit said a supervisor's comments were "not tied directly" to a plaintiff's being laid off, even though the supervisor said he intended to get rid of all the "old timers" because they would not "kiss my ass." Nidds v. Schindler Elevator Corp., 113 F.3d 912, 915-19 (9th Cir. 1996).

Ms. Scrivener has not shown that a few sentences in a long, non-discriminatory public speech have ever been held to create evidence of pretext in an individual hiring decision completed months later. Instead, ample case law illustrates that Dr. Branch's comment should be considered a stray remark incapable of establishing pretext. Kirby, 124

Wn. App. at 468; Domingo, 124 Wn. App. at 89-91. The State of the College speech did not target Ms. Scrivener specifically in any way, and certainly less than the comments about Kirby targeted him. Kirby, 124 Wn. App. at 467-78. The State of the College Speech relates even less to the hiring process of Mss. Chao and Darley-Vanis than comments in Domingo related to the issue in that case – the comments were made to Domingo in a meeting about the very topic that led to Domingo's dismissal. Domingo, 124 Wn. App. at 90.

Dr. Branch's discussion of workforce diversity also provides less support for a finding of pretext than any of the dramatically discriminatory comments from Raytheon, Firestone Tire & Rubber or Nidds, cases where pretextual discrimination could not be found. This is in part true because Dr. Branch, who is older than Ms. Scrivener, also made clear that he had "a great affinity" for older employees (CP at 24), and the College employed a disproportionate number of the protected class. CP at 39.

Finally, nothing undermines Ms. Scrivener's conclusory reliance upon the comment more than facts of the case: The hiring decision at issue had no effect whatsoever on the make up of the College's workforce which, after all, was the subject of the sentences at issue. CP at 24. ("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.") Mss. Chao, Darley-Vanis and Scrivener were all employees of the College before the hiring process began, and they were all employees of the College when the hiring process ended. CP at 46-57. Indeed, they were all faculty members both before and after the process. E.g., CP at 101. This result of this hiring process, then, not only was "not tied directly" to Ms. Scrivener's employment decision, but was entirely irrelevant to the makeup of the College's workforce and even to the diversity of its faculty. Nidds, 113 F.3d at 919.

All of these arguments demonstrate that the most Ms. Scrivener can reasonably create is a weak issue of fact. Even that would be speculative. Regardless, weak issues of fact are not enough to counter the strong evidence that the College acted in a legitimate, non-discriminatory manner. E.g., Milligan, 110 Wn. App. at 638.

4. Data Show The College Hired, As A Percentage, As Many People Older Than 40 As Applied For These Jobs

Ms. Scrivener argues that selective hiring data from 2005 to 2006 "supports an inference that age was an impermissible factor in the hiring decisions during this period." Appellant's Br. at 16. Ms. Scrivener attempts to show that about 30 percent of the College's tenure-track hires during the period were over the age of 40. Id. However, she misconstrues

the data, which show that 33 percent of the tenure track hires during the timeframe went to people over the age of 40. CP at 44 (four of 12, instead of four of 13). Ms. Scrivener's mathematical error is of little moment, because even without it her argument would gain no traction: The data set she quotes has a too-small sample size and fails to account for any relevant variable outside of the ages of people hired.

The Washington Supreme Court says a sample size tracking 100 employee jobs over the course of five years is "too small . . . to be reliable." Oliver v. Pac. NW Bell Telephone, Co., Inc., 106 Wn.2d 675, 682, 724 P.2d 1003 (1986) (en banc). "[T]he use of such evidence must be closely scrutinized to avoid inferences of disproportionality, which are based upon conjecture, speculation, or chance, rather than discriminatory practices," the court said. Id.; accord, Pottenger, 329 F.3d at 748 (courts are "skeptical" of such data).

One basic variable that would be necessary is the age of applicants. *McAllister v. Pac. Maritime Ass'n*, No. C07-0700-JPD, 2008 WL 5416415, at *9 (W.D. Wash. 2008) (applying WLAD) (A relevant inquiry would "compar[e] those who enter the process with those who emerge from it.").[8] Of course, the data show that 33 percent of the College's campus-wide faculty hires were older than 40, which is slightly higher

[8] The use of this unpublished case is permissible in Washington Courts under GR 14.1 and 9th Cir. Rule 36-3.

than the 32 percent of the applicant pool for the positions at issue in this lawsuit. CP at 32. Such data cannot carry Ms. Scrivener's burden, as "it is only when . . . the availability of minorities in the relevant labor pool substantially exceeded those hired" that an inference of discrimination can be drawn. Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 294, 106 S. Ct. 1842, 90 L. Ed 2d 260 (1986) (O'Connor, J., concurring).

5. Scrivener Was Rehired When She Was 53 Years Old

Clark College first hired Ms. Scrivener when she was 42, and has annually rehired her since she turned 47. Appellant's Br. at 3. So, while Ms. Scrivener was not promoted at age 54, she had been rehired at age 53. Ms. Scrivener contends that this fact is a "distract[ion]", since Ms. Scrivener was "not hired by President Branch." Appellant's Br. at 17. However, the record shows that the president of Clark College "makes the final selection" for all faculty hiring decisions, even those that are not tenured. E.g., CP at 1, 59 (noting that the Vice President of Instruction is only part of the tenured faculty hiring process). Therefore, the wedge that Ms. Scrivener attempts to drive between Dr. Branch and the repeated hiring of Ms. Scrivener is not supported by the record. Instead, it is clear that Dr. Branch was responsible, at a minimum, for rehiring Ms. Scrivener both in 2004 and 2005. CP at 1 (Dr. Branch was hired in August 2003).

It is abundantly clear that when an employer makes two different decisions related to a plaintiff's employment – such as hiring and then firing them – "there is a strong inference that [the employee] was not discharged because of any attribute the decisionmakers [sic] were aware of at the time of the hiring." BCTI Income Fund, 144 Wn.2d at 189 (emphasis in original). The court in BCTI Income Fund included a powerful quotation from the Eight Circuit:

> It is simply incredible, in light of the weaknesses of the plaintiff's evidence otherwise, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later.

Id. (quoting Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 175 (8th Cir. 1992). Washington courts have emphasized that public policy considerations demand that the inference against discrimination be strong. E.g., Griffith, 128 Wn. App. at 453. Otherwise, employers "could be discouraged from hiring the very persons the Legislature intended [WLAD] to protect, fearful that doing so would make them more vulnerable, rather than less, to legal claims" of discrimination if the employer subsequently took an adverse employment action against the individual, even if there were legitimate reasons for the action. Id. at 453 (quoting BCTI Income Fund, 144 Wn.2d at 190).

The *Lowe* quote succinctly frames Ms. Scrivener's predicament. It is her burden to "set forth specific facts that sufficiently rebut the moving party's contentions" revealing a genuine issue of material fact, *Ranger Ins. Co.*, 138 Wn. App. 757, 766 (2007), but her case relies on a speculative assessment of a "suddenly developed aversion to older people." *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 175 (8th Cir. 1992). Simply put, that is not enough. Summary judgment should be affirmed.

IV. CONCLUSION

It is Ms. Scrivener's burden to prove by a preponderance of the evidence that the College's explanation for its hiring decision is pretextual. She has failed to do so. Because Ms. Scrivener has not carried her burden at summary judgment under the *McDonnell Douglas* framework, the trial court's dismissal of her claims, in their entirety, should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of July 2012.

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DECLARATION OF SERVICE

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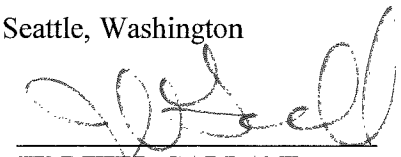
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 27th day of July 2012, at Seattle, Washington



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