No. 93548-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 73849-6-I)

MARNIE L. SIMMONS,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other Cases

Statutes and Rules

IDENTITY OF THE PETITIONER

The petitioner is Marnie L. Simmons, appellant in the Court of Appeals and the plaintiff in the King County Superior Court proceeding.

CITATION TO COURT OF APPEALS DECISION

On July 5, 2016, the Court of Appeals, Division I, issued an unpublished decision in *Simmons v. Microsoft Corp.*, No. 73849-6-I, 2016 WL 3660805 (Wash. Ct. App. July 5, 2016), affirming the trial court's order granting Microsoft Corporation's motion to dismiss Ms. Simmons' complaint. App. 1-18. A copy is attached hereto as Appendix A.

ISSUES PRESENTED FOR REVIEW

Whether the Court should accept review from Division I of the Court of Appeals' decision upholding the Superior Court's grant of summary judgment on Ms. Simmons' claim of age and race discrimination under the Washington Law Against Discrimination (WLAD) because:

1. Pursuant to RAP 13.4(b)(1), the Court of Appeals' decision conflicts with the Washington State Supreme Court's opinion in *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014); and

2. Pursuant to RAP 13.4(b)(4), the Court of Appeals' decision misconstrues the application of the *McDonnell Douglas* burden-shifting standard in Washington State employment discrimination cases and

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

STATEMENT OF THE CASE

1. Factual Background

a. Ms. Simmons' direct supervisor at Microsoft presented inconsistent reasons for terminating Ms. Simmons' employment.

In February 2013, after many years of service as a successful full-time employee at Microsoft Corporation, Marnie Simmons was unexpectedly terminated and replaced by a much younger, less-experienced employee, Ms. Sara Young. CP 347, 350-51. Ms. Simmons, who was 43 years old at the time, has always identified as a Hawaiian/Pacific Islander, her mother being a Hawaii native. Ms. Simmons was hired by Microsoft in 2006 as a Business Administrator, CP 347, and during her tenure at Microsoft, had completed multiple yearly performance reviews, which included feedback from her supervisors. CP 348, 409. During the course of her employment, Ms. Simmons received several promotions. Although there were instances of constructive criticism that supervisors are commonly expected to offer to stimulate professional growth of their employees, any patterns of serious concern were manifestly absent from her year-to-year performance reviews.

Ms. Simmons was hired by Bret Arsenault, then Chief Information Security Officer and head of the Information Security Risk Management Group ("ISRM") at Microsoft. CP 349. Ms. Simmons wasn't Mr. Arsenault's first choice. *Id.* Up until fall of 2011, Mr. Arsenault displayed a positive and consistently professional attitude towards Ms. Simmons. CP 349-50. However, when a much younger employee entered the picture, Mr. Arsenault's attitude towards Ms. Simmons began to change: Sara Young, a white, 30-year-old female was hired into Arsenault's group in November of 2011. CP 350-51. Ms. Young was the least qualified in terms of skill set and experience and was also the youngest out of the pool of prospective candidates. CP 351.

Soon, in fact only months after giving Ms. Simmons positive feedback and stating that she was "on track" for meeting six out of seven job commitments on the 2012 Check-In, Mr. Arsenault completed an assessment of Ms. Simmons in her 2012 performance review that represented a sudden and drastic departure from all of Ms. Simmons' prior positive reviews, alleging "significant challenges" with Cross Team Collaboration, a category he had specifically identified as one where Ms. Simmons' was "on track" mid-year. CP 462, 483.

Shocked, Ms. Simmons sought feedback from her colleagues in the form of a Microsoft 360 Feedback Review, CP 350, 486, and received

overwhelmingly positive feedback in areas suddenly deemed problematic by Mr. Arsenault. CP 351, 493-94. Across all categories, Ms. Simmons received a markedly lower score only from Mr. Arsenault. CP 351.

Despite the fact that Ms. Simmons' has been recognized by her previous supervisor as "willing to support others in a selfless fashion," CP 348, 409, and despite overwhelmingly positive feedback from her coworkers, including "interpersonal awareness" and "communications skills" categories, CP 351, 493-94, Mr. Arsenault began to insist that Ms. Simmons lacked in communication skills in 2012, around the same time Ms. Sara Young came on board. *See* CP 351.

b. Ms. Simmons' direct supervisor made a racially charged comment in Ms. Simmons' presence.

While Ms. Simmons was working to support Mr. Arsenault's team, he made a racially charged comment implicating her Hawaiian/Pacific Islander heritage in her presence. CP 303. When Mr. Arsenault brought a new employee onto the team, he announced in Ms. Simmons' presence: "I'm bringing in the real kahuna." *Id.* Ms. Simmons found the comment patently offensive, troubled by the inappropriate nature of the language used, CP 303, as to her it meant that she was a half-breed and subpar. *Id.*

c. Microsoft hired a considerably younger applicant, Ms. Sara Young, for Ms. Simmons' position, soon after terminating Ms. Simmons' employment with the company.

Early in 2013, Mr. Arsenault fired Ms. Simmons for "ongoing performance issues, coupled with the demands of the business" as stated in his deposition, CP 343, and formally for "job performance and competency levels [not meeting] minimum performance standards and expectations for your position." CP 540. Sara Young, then 32 years old, immediately stepped in as Mr. Arsenault's interim assistant, taking over Ms. Simmons' role, and officially replaced Ms. Simmons in May of 2013. CP 238, 334-35, 338.

2. Procedural Background

a. Proceedings in the Superior Court

On September 8, 2014, Ms. Simmons filed a complaint for unlawful discrimination in violation of RCW 49.60 against her employer, Microsoft Corporation. CP 1. Microsoft filed a motion for summary judgment, taking the position that Ms. Simmons could not show pretext under the *McDonnel Douglas* burden shifting framework. CP 23. Ms. Simmons asserted in her response that the trial court should deny Microsoft's summary judgment motion because Ms. Simmons raised a

question on fact whether age and race were substantial factors in the firing of Ms. Simmons, violating the WLAD.

The Superior Court granted Microsoft's summary judgment motion on July 31, 2015. CP 582. 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.* at 582-83.

b. The Court of Appeals Decision

Ms. Simmons appealed the Superior Court's dismissal of her claim, arguing that at the third prong of the burden-shifting analysis, she needed only to demonstrate a reasonable inference that age and/or race discrimination played a "substantial factor" in Arsenault's decision to fire her to defeat summary judgment. *Opening Brief of Appellant,* 1-2. Microsoft responded that none of the arguments presented by Ms. Simmons presented a genuine issue of material fact that Mr. Arsenault's stated "legitimate, non-discriminatory reason for termination was instead a pretext for unlawful discrimination based on animus towards Ms. Simmons because of her age and/or race." *Respondent's Answering Brief,* 24. Ms. Simmons replied that she had successfully raised a question of fact as to whether age and/or race were substantial factors in Mr. Arsenault's decision to terminate Ms. Simmons' employment and to

replace her with a younger white employee, which was sufficient to show that Mr. Arsenault's proffered reasons were not the only reasons, and the statement that these were the only considerations was untrue, and that, therefore, summary judgment was not appropriate under *Scrivener v. Clark College*, 181 Wn.2d 439, 447, 334 P.3d 541 (2014). *Reply Brief of Appellant*, 4-5.

Division I upheld the Superior Court's summary dismissal of Ms. Simmons' WLAD complaint, holding: that the *McDonnell Douglas* burden-shifting framework was applicable to this case, *Opinion*, 13, and that Ms. Simmons failed to show pretext because "replacing Ms. Simmons with a younger individual in and of itself does not raise a reasonable inference that Simmons' age was a significant motivating factor in Arsenault's decision to terminate her" *Opinion,* 15; that *Scrivener* was distinguishable because there, the defendant "made remarks indicating a preference to hire younger people and hired many individuals under 40 but few over 40" *Opinion*, 16; and that "[e]ven viewed in the light most favorable to Simmons, Arsenault's [real kahuna] statement does not . . . raise a reasonable inference that Simmons' race was a significant motivating factor in Arsenault's decision to terminate her." *Opinion*, 17. In so deciding, the Court of Appeals reasoned that Ms. Simmons' argument was "based purely on her subjective opinion of the meaning of

Arsenault's statement and does not lead to a reasonable inference of racial discrimination." *Opinion*, 17.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Summary of Argument

Division I's opinion misinterprets this Court's ruling in *Scrivener* and undermines Washington's established substantial factor standard analysis in employment discrimination cases.

In doing so, Division I's opinion sets a standard for trial courts to deal with discriminatory remarks made by employers and decision makers that contradicts the letter and spirit of WLAD and severely undermines an employee's ability to establish pretext at the summary judgment stage of a lawsuit.

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 a discriminatory, racially charged remark made by the decision maker was factually insufficient because of Appellant's "purely subjective" opinion of its meaning.

2. There is a direct conflict between a Washington State Supreme Court Ruling and this Division I Court of Appeals ruling.

In *Scrivener*, the Court articulated the basic tenet of the burden of proof that the WLAD plaintiff caries at trial: she must ultimately prove that [the protected characteristic] was a "significant motivating factor bringing about the employer's decision." *Scrivener*, 181 Wn.2d at 444. The Court instructed that "[that] does not mean that the protected characteristic was the sole factor in the decision." *Id.* The Court in *Scrivener* focused the bulk of its analysis on the pretext prong of the *McDonnel Douglas* analysis at summary judgment. *See id.* It clarified that "the less onerous standard" than the standard applied by the Court of Appeals applied and that "an employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." *Id.* at 446-47. Most importantly, the Court held that "[a]n employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under WLAD." *Id.* at 477.

Similarly to the Court of Appeals in *Scrivener*, Division I disregarded the remarks by the decision maker as insufficient to give rise

to an inference of discriminatory intent. *Opinion*, 16, and Ms. Simmons' evidence of inconsistent reasons for her termination. As this Court instructed in *Scrivener*, whether or not such "statements alone would be sufficient to show pretext or that [the plaintiff's protected characteristic] was a substantially motivating factor, they are circumstantial evidence probative of discriminatory intent." *Scrivener* at 450. Without due deference to the evidence proffered by the plaintiff, and certainly not in the light most favorable to the nonmoving party, Division I in contravention of the standard this Court prescribed in *Scrivener* imposed far too onerous of a burden on the plaintiff at summary judgment.

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

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

When the Washington State Legislature enacted the WLAD, it declared that in doing so, it was exercising 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." RCW 49.60.010. The legislature declared discriminatory practices to be a menace to "the institutions and foundation of a free democratic state." *Id.* The Supreme Court of the State of

Washington has time and again reiterated that the legislature directed the judiciary "to construe the WLAD liberally." *Scrivener v. Clark* College, 181 Wn.2d 439, 441, 334 P.3d 541 (2014); RCW 49.60.020. *See also*, *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994). Division I's opinion effectively narrows the broad scope of the protections that the legislature intended at the summary judgment stage of litigation.

b. The objective/subjective standard for evaluating discriminatory remarks is inappropriate for summary judgment analysis in this employment discrimination case and is too deferential to employers in Washington State.

Division I's interpretation of the plaintiff's burden at the pretext stage of the *McDonnell Douglas* analysis is inconsistent with Washington State law and places an insurmountable burden on the plaintiff in showing pretext at the summary judgment stage. It has been an established principle under Washington State law that circumstantial and inferential evidence is sufficient to discharge the plaintiff's burden under the pretext stage of the *McDonnell Douglas* analysis. *Scrivener*, 181 Wn.2d at 448; *see also Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). By characterizing plaintiff's argument that she found the racially charges remark in question to be offensive as "based purely on her subjective opinion of [its] meaning" that "does not lead to a reasonable inference of racial discrimination," *Opinion*, 17, the Court of

Appeals incorrectly held that an employee's perception of a decision maker's remarks has no bearing on pretext and that remarks by decision makers have to be viewed from a strictly objective standpoint. So holding would require the plaintiff to show that the employer's explanation is "unworthy of credence," *Burdine* at 256. This adds an additional burden to plaintiffs that do not exist under Washington State law.

Division I's Opinion relied on only one of several potential interpretations of the racially charged remark without taking into consideration the context and the racial/ethnic implications of the remark to the person to whom the remark was addressed. Imposing this strictly objective standard is inappropriate at the summary judgment stage of the analysis of a WLAD claim as detrimental to the public interest of Washington State citizens with respect to the "elimination and prevention of discrimination in employment." RCW 49.60.010. Relying solely on the objective meaning of the remark in question, while disregarding the context in which the comment is made by an employer to a member of a protected group, would set a dangerous precedent in Washington State for pursuing remedies where employees are often "managed out" for unlawful reasons incompatible with the privileges that a democratic state confers on its citizens. If relying only on the objective meaning of terms like "real kahuna" could be used to determine whether racially charged comments

could be used to produce such a showing of racial pretext, an employer could get away with subjecting workers in Washington State to volumes of subtly racist, ageist, or otherwise disconcerting comments by arguing that an employee's interpretation of such comments was her subjective interpretation, and nothing more. Instead, it should be the factfinder's task to determine whether what took place was, in fact, grounded in an unlawful pretext; interpreting the pretext showing requirement otherwise substantially impedes an employee's chances to move past summary judgment.

This Court has previously looked at the context and the subjective meaning of a remark in conjunction with a hostile work environment claim in *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 285 P.3d 854 (2012). In that case, this Court looked at the context of a comment ("angry man") made in the presence of the plaintiff and reasoned that a jury may make a reasonable inference that the comment had a "special meaning" intended for the plaintiff. *Loeffelholz*, 175 Wn.2d at 276. Although in *Loeffelholz* the Court was analyzing a prima facie hostile work environment claim, the same type of analysis should govern at the summary judgment stage of any WLAD claim to be consistent with the overarching policy considerations that the legislature intended.

Division I Opinion cites several federal cases that are readily distinguishable factually. More importantly, the reasoning and the relevant dispositive issues in the cases that Division I relies on in its analysis of the pretext prong of the *McDonnell Douglas* analysis contradicts the type of analysis this Court has set forth in *Scrivener*. Relying primarily on *Ya-Chen Chen v. City Univ. of N.Y.*, 805 F.3d 59 (2d Cir. 2015), Division I reasoned that the plaintiff's argument here was "based purely on her subjective opinion of the meaning of [the decisionmaker's] statements and does not lead to a reasonable inference of racial discrimination." *Opinion*, 17. The opinion of the Second Circuit simply states that "[Q]uite simply, even if sincerely held, a plaintiff's "feelings and perceptions of being discriminated against" do not provide a basis on which a reasonable jury can ground a verdict." (quoting *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 456 (2d Cir.1999) (brackets omitted).

The interpretation by Division I of the plaintiff's burden of establishing pretext not only fails to address the context of the statement or remark in light most favorable to the nonmoving party, but, more importantly, confuses the defendant's burden of furnishing proof of a legitimate nondiscriminatory reason with the plaintiff's burden of establishing pretext. In doing so, it allows the defendant to shift the burden on the plaintiff once again, beyond the *McDonnell Douglas* stages, by

asserting that the defendant's comments were innocuous or could have had a neutral meaning, leaving the plaintiff having to disprove the neutrality of the language in question. This analysis by Division I creates too onerous a burden on the plaintiff in a discrimination case.

The Court of Appeals' citation to Webster's Third New International Dictionary in its opinion underscores the inapplicability of the strictly objective approach Division I relied on in its determination of pretext at the summary judgment stage. The definition that Division I provides and relies on, that of a "native master of a craft or vocation," *Opinion*, 17, is both unhelpful and misleading because instead of analyzing the actual comment made by the decisionmaker, "real kahuna," it focuses on the word "kahuna," that, if isolated and taken out of context, produces a much less favorable result for the plaintiff. *See id.*

The facts and the analysis in *Montes v. Greater Twin Cities Youth Symphonies,* 540 F.3d 852 (8th Cir. 2008), a decision that Division I cites to buttress its conclusion that the defendant's disconcerting use of racially charged language "does not lead to a reasonable inference of racial discrimination," Opinion 17, is readily distinguishable. In that case, the plaintiff, Dr. Jean Montes, alleged that the plaintiff's use of the phrase *la bête noire* evinced discrimination. The court there held that Montes, who was of Haitian descent, did not provide evidence that, *after using the*

phrase himself, he told the defendant it was offensive and evinced racial discrimination. *Montes,* 540 F.3d at 859 (emphasis added). Appellant here never used the phrase "real kahuna" herself, did not approve of the use of the phrase by the defendant, and could have been reluctant to voice her disapproval for fear of retaliation by defendant. Therefore, *Montes* has no bearing on the issue of "reasonableness" at the pretext prong of the *McDonnell Douglas* analysis here.

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

The standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. "In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Courts are to "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.* In relying on Microsoft's disputed reasons for terminating Ms. Simmons that the Division I deemed legitimate at the second prong of its *McDonnell Douglas* analysis, *Opinion*, 14, the Court of Appeals essentially gave credence to assertions that were contradicted and impeached again at the pretext stage of its analysis without giving credence to the evidence of the nonmovant. *Id.*

Furthermore, the Court of Appeals put itself in the position of the fact finder by analyzing and evaluating the quality of Ms. Simmons' performance relative to the proffered reasons for her termination. *Opinion*, 15. The Court believed the defendant's reasons for termination were more credible, thereby failing to consider plaintiff's pretext argument in a light most favorable to her. If contradictory evidence exists regarding a material fact, then summary judgment is inappropriate especially when viewed in plaintiff's favor.

REQUEST FOR ATTORNEYS' FEES

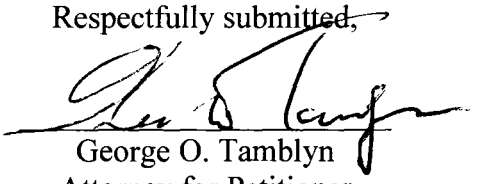
Petitioner's counsel makes its request for attorneys' fees and costs on appeal, pursuant to RAP 18.1 and RCW 49.60.030(2).

CONCLUSION

Simmons' petition for review should be granted because Division I's opinion effectively creates an insurmountable standard for employees to demonstrate pretext at summary judgment under WLAD, involves an issue of substantial public interest, and is contradictory to this Court's opinion in *Scrivener*.

Dated September 2nd, 2016.

Respectfully submitted,



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APPENDIX A

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

MARNIE L. SIMMONS, Appellant, v. MICROSOFT CORPORATION, a Washington Corporation, Respondent.	)	No. 73849-6-I UNPUBLISHED OPINION FILED: July 5, 2016

SCHINDLER, J. — Marnie L. Simmons appeals summary judgment dismissal of her lawsuit against Microsoft Corporation alleging age and race discrimination in violation of the Washington Law Against Discrimination, chapter 49.60 RCW. We affirm.

FACTS

Marnie L. Simmons was born in October 1969. Her father is of Norwegian and German descent. Her mother is Hawaiian. Simmons identifies as a Pacific Islander.

In 2006, Microsoft Corporation (Microsoft) hired Simmons as a Business Administrative Assistant. In October 2008, Simmons started working as the Executive Business Administrator to Microsoft Corporate Vice President Rosanna Ho. Ho gave Simmons generally positive performance evaluations but noted concerns about her

interpersonal skills. For example, in the 2009 mid-year evaluation, Ho states, "[Y]ou have a bright future ahead of you here at Microsoft," but suggests Simmons "work on" her "interpersonal and communication skills" so they do not "become obstacles in your career." Ho states, "You sometimes become angry quickly," and notes this is "not acceptable at the [Executive Business Administrator] levels." In the 2009 annual performance review, Ho encouraged Simmons to "[i]mprove tone in verbal and written communications and ensure clarity in your communications when working with others."

In 2011, Simmons applied to work as the Executive Business Administrator to Bret Arsenault. Arsenault was the Chief Information Security Officer and head of the Information Security Risk Management (ISRM) team. Arsenault was "responsible for enterprise-wide information security, compliance, and business continuity efforts" and oversaw "hundreds of employees."

Simmons interviewed with members of the ISRM team. The ISRM team members recommended Simmons for hire but raised some concerns about her "interpersonal skills." When Arsenault interviewed Simmons, he also "had some concerns based on the feedback from other interviewers, but . . . felt she was a good candidate for the job." Arsenault's first choice to fill the position was a temporary employee who had worked as his Interim Executive Business Administrator for about one year. When that employee did not accept the position, Arsenault offered Simmons the job as his Executive Business Administrator.

Simmons started working for Arsenault in May 2011. Simmons was responsible for managing Arsenault's calendar, scheduling meetings, ensuring meeting agendas were accurate, and coordinating travel arrangements. Simmons' work "affect[ed] the

productivity of the group overall." For example, if Simmons scheduled a meeting at a time when other members of the ISRM team were unavailable, "50 other people [would] have to reschedule."

For the 2011 annual performance review, Arsenault relied "largely on [Simmons'] performance in her previous position" and only to a limited extent on her time as his Executive Business Administrator. Arsenault rated Simmons as a "2." The rating scale is 1 to 5; 1 is the highest rating and 5 is the lowest. Arsenault states Simmons is a "great hire" with a "bright future" but notes her "very direct approach" could "land[ ] . . . negative[ly]" with other members of the team, and suggests she "spend time on . . . interpersonal awareness."

In September 2011, Arsenault hired Ken Sexsmith as the ISRM team Business Manager. Sexsmith was responsible for scheduling and setting the agenda for ISRM team meetings. When selecting meeting dates, Sexsmith had to coordinate with Simmons. Sexsmith also was responsible for arranging Arsenault's "speaking engagements." After Sexsmith determined potential speaking engagement dates, he would "go back and forth" with Simmons to determine what days Arsenault was available. Simmons and Sexsmith had a "strained" relationship and "there was often confusion as to how [their] job responsibilities overlapped."

In late 2011, Arsenault hired Brian Fielder as the ISRM team Principal Information Technology Service Engineer Manager. Arsenault worked with Fielder in the past and considered him a personal friend. Arsenault referred to Fielder as "the real kahuna." Fielder is Pacific Islander.

In January 2012, Arsenault sent Simmons and Sexsmith an e-mail about the need to improve their working relationship and to work collaboratively and effectively.

> I have had time to review both of your feedback on [the] working relationship you have in ISRM. As I pointed out in those sessions and previously the working relationship between the leader, [Executive Business Administrator,] and [Business Manager] is cornerstone to an overall strong leadership team. You both have some work to do to improve your working relationship and it is my expectation that you will focus on this area to ensure you can collaborate and partner effectively. I am happy to meet with you and provide coaching.

Arsenault asked Simmons and Sexsmith to draft three requests and three commitments to improve their relationship.

Arsenault was "disappointed" by Simmons' response. Arsenault felt Simmons merely stated she would "continue to do what she did since October but is open to feedback." Arsenault contacted the Human Resources Department to "figure out how to help [Simmons and Sexsmith] both be more engaged."

In January 2012, Arsenault met with Simmons to discuss "concerns about her interactions with others on the team." Arsenault advised Simmons that she "needed to show immediate and sustained improvement to succeed in her role." Following the meeting, Arsenault said Simmons' interactions with others improved.

In the 2012 mid-year evaluation, Arsenault states Simmons is "very helpful" in certain areas and "very passionate about the work." But Arsenault notes Simmons has a "very direct approach," she has "a negative impact on productivity and perception," and her improvement since January in how she interacts with others needs to be "sustained." In June, Arsenault "again asked Human Resources for guidance on how to address Ms. Simmons' performance issues and help her meet basic performance expectations."

In August, Arsenault met with Simmons to "discuss her performance, including how critical it was that she be able to work cooperatively with Mr. Sexsmith." In a follow-up e-mail to Simmons, Arsenault states that despite months of effort, she was "not meeting expectations" in working with Sexsmith, resulting in a significant negative "impact on our business" and the ISRM team. The e-mail from Arsenault to Simmons states, in pertinent part:

> As I mentioned in our previous 1:1 and again in this month[']s, I am concerned about the importance of being able to partner with the Business [M]anager role as it is critical to the success of the organization. This core requirement for your role was something we made clear upon your arrival and you are not meeting expectations. This was so key we ensured you were integral to the hiring of the new Business Manager. Unfortunately this partnership is still not meeting expectations despite months of my effort to reconcile via coaching, joint meetings etc. This is having a significant impact on our business and affecting individuals beyond you and the Business manager, not to mention the clear impact on both of you directly.

Simmons responded, "I do not have a partnering problem with anyone else in the [organization]." Simmons asserted it is "incredibly difficult that you continuously lay 100% blame on [Sexsmith's] inability to partner on me."

In response, Arsenault sent an e-mail to Simmons clarifying that he "never blamed this 100% on you," that her "partnering assertions are not shared by all in [ISRM]," and that she should "seek to understand why rather than be defensive."

> To be clear [M]arnie I am just following up on our 1 on 1. . . . I have never blamed this 100% on you and have specifically corrected you on that perspective before and remind you again that is not now nor has never been my assertion. Ken has a part to play and as his manager I deal directly with him on that. However, this is feedback to you re my expectations of your role. On options, we have tried various iterations with little improvement as you acknowledged in the last two 1 on 1's. [T]he last feedback I asked for took over a month to get a response and only with continual reminders. I want to be sure you understand that your partnering assertions are not shared by all in [ISRM] or with our partners.

> It would behoove you to seek to understand why rather than be defensive as there could be key learning's [sic] to help drive interpersonal awareness.

In the September 2012 annual performance review, Arsenault gave Simmons the lowest rating. Arsenault notes Simmons "continues to be a very hard worker" who "takes pride in her strong work ethic." However, "results in FY12[1] . . . were below expectations" and there were "significant challenges with cross team collaboration and difficult communications. . . . Marnie has struggled with treating people equitably and with appropriate respect."

> Marnie's results in FY12 against commitments, how the work was accomplished, and overall impact to the business were below expectations. This was a very tough year and we had inconsistencies with Calendar management and travel logistics (particularly international travel). Additionally we had significant challenges with cross team collaboration and difficult communications. While Marnie has the best interest of the group in mind "how" that gets communicated in difficult situations is having a negative impact on our business, several of our partners and the team. Feedback during the review process and my own experience demonstrate that Marnie has struggled with treating people equitably and with appropriate respect. This is not isolated but was particularly acute with her relationship with our Business Mangers and Recruiting Partner. Several escalations were raised and numerous attempts to resolve the issues failed to yield acceptable results.

Arsenault also noted Simmons was "on occasion demeaning to others," "quick to point out what was wrong in others [sic] people work," and needed to "demonstrate significant improvement in [her] performance for [her] to meet expectations and be successful in [her] role and at Microsoft."

> Lastly I was concerned how Marnie would shut down and shut others out. She was on occasion demeaning to others and would isolate others form [sic] decision making and information. There were several complaints about people being removed from message threads and then not updated on the final outcome. In addition she was quick to point out what was wrong in others [sic] people work without engaging in "how" to fix it. This

[1] Fiscal year 2012.

> behavior drained the energy and inadvertently created a fear of directly engaging with Marnie on sensitive issues. . . . You need to demonstrate significant improvements in your performance for you to meet expectations and be successful in your role and at Microsoft.

Arsenault asked Simmons to prepare a "performance plan" and "suggested she take a training class on interpersonal awareness." Simmons "disagreed" with Arsenault's assessment of her performance and refused to sign her review.

In early January 2013, Arsenault sent Simmons an e-mail identifying a number of areas where he had "not seen the attention or demonstrated improvements" and areas "to focus on for improvement." These issues included "Communications: Follow up and Prioritization;" "Collaboration / treating others with Respect;" and "The Planning, Organizing and Coordinating components of the role." Arsenault noted an "ongoing pattern of behavior from FY12" that "continues into FY13" and that Simmons was "not meeting expectations."

> The above [set of concerns] has been an ongoing pattern of behavior from FY12 and continues into FY13. I was explicit during your performance review on FY13 expectations for your role. This continuing behavior of lack of initiative to increase your capability expected in your role deprives you of the ability to course correct when you are receiving feedback not only from me but others that may also provide it to you. I expect you to be able to take, understand and incorporate feedback continuously to demonstrate improvement and meet expectations for your role. . . . You are not meeting expectations for your role.

Arsenault continued to work with the Human Resources Department regarding his concerns and asked for assistance to help Simmons improve. Meanwhile, other team members expressed "concerns" about Simmons to Arsenault and the Human Resources Department.

By late January, Simmons still had not provided the performance plan Arsenault requested after her September 2012 performance review. On January 21, Arsenault

sent Simmons an e-mail about the failure to deliver the performance plan. Arsenault states he has "not seen any improvement" and Simmons continues "not to meet expectations" for her role.

> You have failed to deliver your performance plan after **4** months. . . . This is another miss on delivering your plan but more importantly an example of where you are not taking the feedback and working on the agreed upon deliverable. . . . Marnie I have not seen any improvement relative to the feedback in your annual review nor any concerted effort to address the concerns raised despite resources being offered from various [Human Resources] personnel and [leadership team] members.
>
> I have been explicit regarding expectations for your role and deliverables. You continue not to meet expectations for your role.

On February 11, 2013, Arsenault and a Human Resources Department representative met with Simmons and terminated her employment. The termination letter states, "Your employment is being terminated because your job performance and competency levels have not met minimum performance standards and expectations for your position."

In March 2013, Sara Young began working as Interim Executive Business Administrator to Arsenault. ISRM team member Chris Hildenbrand had hired Young in approximately January 2012 to work as his Business Administrator. Young applied to fill the Executive Business Administrator position permanently. Arsenault interviewed four candidates for the position. Arsenault hired Young for the position. Young was 32 years old at the time.

On September 8, 2014, Simmons filed a lawsuit against Microsoft alleging age and race discrimination in violation of the Washington Law Against Discrimination, chapter 49.60 RCW.

Microsoft filed a motion for summary judgment dismissal of the lawsuit. Microsoft argued there were legitimate nondiscriminatory reasons to terminate Simmons based on "significant performance issues." Specifically, lack of "interpersonal, communication and collaboration skills" and ongoing conflicts with Business Manager Sexsmith and others. Microsoft argued there was "nothing to suggest . . . pretext for unlawful discrimination" based on Simmons' age or race.

In support, Microsoft submitted deposition excerpts; copies of the 2009 mid-year evaluation and annual performance review, the 2010 mid-year evaluation, the 2011 annual performance review, and the 2012 mid-year evaluation and annual performance summary; copies of numerous e-mails between Arsenault and Simmons; copies of e-mails between Arsenault and the Human Resources Department; and declarations from several people including Ho, Young, and Arsenault.

Ho states that "[d]uring the time I managed Ms. Simmons, I had several conversations with her about her communication style." Ho states Simmons "also had conflicts with one of my business managers."

Young states she began working at Microsoft in 2009 and from January 2012 to May 2013, "on an as-needed basis, supported Mr. Arsenault's entire organization."

> From approximately January 2012 to May 2013, I reported to one of Mr. Arsenault's direct reports, Chris Hildenbrand. In that role I supported three of Arsenault's direct reports, including Mr. Hildenbrand; acted as Mr. Arsenault's [Executive Business Administrator] when Ms. Simmons was out of the office; and, on an as-needed basis, supported Mr. Arsenault's entire organization, including his Business Manager, Ken Sexsmith.

In February 2013, Young "started managing Mr. Arsenault's calendar while still working full time for Mr. Hildenbrand and supporting the rest of Mr. Arsenault's organization." In

March 2013, Young began working as Interim Executive Business Administrator to Arsenault.

Arsenault describes the "issues and conflicts" while Simmons worked as his Executive Business Administrator and the steps he took to address the issues. Arsenault states he "had to spend inordinate amounts of time debating with Ms. Simmons about her performance issues and seeking to resolve conflicts between her and others." But Arsenault "did not see . . . improvement" in her performance and there was "no indication she would sufficiently improve in the near future." Arsenault states, "Ms. Simmons' ongoing performance issues, coupled with the demands of the business, drove the need for change." Arsenault also states, "When Ms. Simmons worked at Microsoft I did not know her age or if she was under or over age 40. Nor did I know her father was Caucasian or that she identifies as Pacific Islander."

In opposition, Simmons argued the decision to terminate was based on her age and race. Simmons noted the positive performance reviews she received as well as a "Kudos" award and a "Team Award."[2] Simmons argued Microsoft gave "inconsistent and ambiguous" reasons for her termination and her 2012 performance review was "entirely inconsistent" with her previous performance evaluations. Simmons asserted replacing her with a "much younger, less-experienced employee" was evidence of age discrimination, and Arsenault's use of the phrase "real kahuna" was evidence of race discrimination.

Simmons submitted a declaration, her deposition testimony, performance reviews from 2007 until 2012, and a copy of the January 2013 "Microsoft 360 Feedback"

[2] The record shows the Kudos award was merely a "Thank you" e-mail from a colleague. The Team Award was unrelated to Simmons' job duties and given to 11 other employees, including Young, for volunteering to help put on a company potluck.

report. In her deposition, Simmons states that near the time Arsenault hired Brian Fielder, Arsenault told her, "I'm bringing in the real kahuna." Simmons testified she interpreted the statement to mean that she was a "halfbreed" and "not the real deal, not the real Hawaiian." In her declaration, Simmons states the comment "was offensive to me because it implied that I was not a real Hawaiian/Pacific Islander."

The 2007 and 2008 performance reviews from her former supervisor, Walter Korn, are generally positive. The performance reviews from Ho are also generally positive but Ho notes concerns about interpersonal and communication skills. In the Microsoft 360 Feedback report, Arsenault and 12 of Simmons' other colleagues rated her in a number of categories including "Interpersonal Awareness" and "Communication Skills." Simmons' colleagues gave her higher scores than Arsenault. The combined scores show that Simmons received low ratings for Interpersonal Skills and Communication Skills.

Microsoft argued the undisputed record showed the reasons for terminating Simmons were "always focused on aspects of Ms. Simmons' performance and its impact on the business, particularly her communication style and difficulty working with others." Microsoft argued Simmons did not raise a reasonable inference of age or race discrimination. Microsoft asserted the fact that Arsenault hired Young to replace Simmons did not indicate age was a substantial factor in the termination decision, and Arsenault's use of the phrase "real kahuna" did not raise a reasonable inference of racial discrimination.

The court granted the motion for summary judgment and dismissed the lawsuit. Simmons appeals.

ANALYSIS

Simmons contends the court erred in dismissing her discrimination lawsuit against Microsoft. Simmons asserts there are genuine issues of material fact as to whether either age or race was a substantial factor in the decision to terminate her employment.[3]

Standard of Review

We review an order of summary judgment dismissal de novo, engaging in the same inquiry as the trial court. Citizens All. for Prop. Rights Legal Fund v. San Juan County, 184 Wn.2d 428, 435, 359 P.3d 753 (2015). Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014). We consider all facts and make all reasonable factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Speculation and "mere allegations, denials, opinions, or conclusory statements" do not create a genuine issue of material fact. Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (citing CR 56(e); Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988)).

Under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, it is an unfair practice for an employer to discharge any person from employment on the basis of age or race. RCW 49.60.180(2).

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[3] Simmons also seeks review of an order denying her CR 56(f) motion to continue but fails to assign error to the order or present any argument addressing the order in her briefing. Failure to assign error or provide argument precludes appellate consideration. RAP 10.3(a)(4), (6); Jackson v. Quality Loan Serv. Corp., 186 Wn. App. 838, 845-46, 347 P.3d 487 (2015).

Where there is no direct evidence of discrimination, we use the McDonnell Douglas/Burdine burden-shifting framework. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 257, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981);[4] Scrivener, 181 Wn.2d at 445; Davis v. Microsoft Corp., 149 Wn.2d 521, 546, 70 P.3d 126 (2003). The plaintiff bears the initial burden of establishing a prima facie case of discrimination. Burdine, 450 U.S. at 252-53; Scrivener, 181 Wn.2d at 446. The burden of production then shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. Burdine, 450 U.S. at 253; Scrivener, 181 Wn.2d at 446. The burden of the employer is not one of persuasion, but rather a burden of production. Grimwood, 110 Wn.2d at 364. If the employer articulates a legitimate nondiscriminatory reason, the burden shifts back to the plaintiff to produce evidence that the legitimate nondiscriminatory reason for the employment action is a pretext for a discriminatory purpose. Scrivener, 181 Wn.2d at 446.

For the first time on appeal, Simmons claims Microsoft did not present evidence showing that Microsoft terminated her for a legitimate nondiscriminatory reason. "Under RAP 9.12, arguments not brought to the attention of the trial court at the time of summary judgment may not be considered by the appellate court." Houk v. Best Dev. & Const. Co., Inc., 179 Wn. App. 908, 915, 322 P.3d 29 (2014); Nelson v. McGoldrick, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995). In any event, the record establishes Microsoft articulated legitimate nondiscriminatory reasons to terminate Simmons.

[4] Because the WLAD substantially parallels Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-2(a), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. section 623(a), we may look to federal case law for guidance. Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 490-91, 325 P.3d 193 (2014); Grimwood, 110 Wn.2d at 361.

Specifically, that Simmons lacked "interpersonal, communication and collaboration skills and had ongoing conflicts with the group's Business Manager (Mr. Sexsmith) and others."

The plaintiff may meet the pretext prong by offering sufficient evidence to create a genuine issue of material fact (1) that the employer's reason is pretextual or (2) that although the employer's stated reason is legitimate, "discrimination nevertheless was a substantial factor motivating the employer." Scrivener, 181 Wn.2d at 446-47. "A 'substantial factor' means that the protected characteristic was a significant motivating factor bringing about the employer's decision." Scrivener, 181 Wn.2d at 444.

Inconsistent reasons for a defendant's employment decisions may support an inference that the employer's articulated reason is a pretext for discrimination. See Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 91, 272 P.3d 865 (2012); Sellsted v. Wash. Mut. Sav. Bank, 69 Wn. App. 852, 863, 851 P.2d 716 (1993). Simmons asserts Microsoft provided "inconsistent" reasons for her termination. Simmons points to the portions of Arsenault's declaration where he states he "met with Ms. Simmons to discuss my concerns about her interactions with others on the team" and "again addressed her performance issues." Neither of Arsenault's statements is inconsistent with the articulated reason for terminating Simmons' employment and do not raise a reasonable inference that Microsoft's articulated reason is a pretext for race or age discrimination. Microsoft consistently stated it terminated Simmons because of her performance issues related to lack of interpersonal, communication, and collaboration skills as well as her ongoing conflict with Sexsmith.

Simmons also asserts her "overwhelmingly positive" performance reviews create a reasonable inference that Microsoft's articulated reason for terminating her employment is a pretext for race and age discrimination.

The fact that Simmons received generally positive performance reviews from previous supervisors does not lead to a reasonable inference that Microsoft's articulated reason for terminating her employment was a pretext for discrimination based on age or race. McCann v. Tillman, 526 F.3d 1370, 1377 (11th Cir. 2008) (Previous supervisor's "satisfactory ratings" and commendation from colleagues did not raise reasonable inference of pretext because " '[d]ifferent supervisors may impose different standards of behavior.' ") (quoting Rojas v. Florida, 285 F.3d 1339, 1343 (11th Cir. 2002)). An employee's "subjective beliefs and assessments as to h[er] performance are irrelevant" to show pretext. Griffith v. Schnitzer Steel Indus., Inc., 128 Wn. App. 438, 447, 115 P.3d 1065 (2005).[5]

Simmons argues she produced sufficient evidence of age discrimination. Without citation to authority, Simmons asserts that "replacement by a younger employee creates a presumption of discriminatory intent." But replacing Simmons with a younger individual in and of itself does not raise a reasonable inference that Simmons' age was a significant motivating factor in Arsenault's decision to terminate her. See Thomas v. Corwin, 483 F.3d 516, 529 (8th Cir. 2007) (finding that plaintiff could not show the employer's reasons for her termination were a pretext for age discrimination

[5] Simmons also asserts Arsenault "judged" her performance "differently" than that of younger or non-Pacific Islander employees. Nothing in the record indicates how Arsenault evaluated the performance of other employees. This conclusory allegation does not raise a material issue of fact as to Simmons' age discrimination claim. Int'l Ultimate, 122 Wn. App. at 744; Grimwood, 110 Wn.2d 365.

where the plaintiff's only evidence was that she was replaced by someone younger).[6]

For the first time on appeal, Simmons claims Arsenault treated her "differently than similarly situated young employees" and was "biased against Ms. Simmons." We decline to address arguments not brought to the attention of the trial court at the time of summary judgment. RAP 9.12; Houk, 179 Wn. App. at 915; Nelson, 127 Wn.2d at 140. Moreover, these conclusory allegations and opinions do not amount to material facts admissible in evidence showing there is a genuine issue for trial as to Simmons' age discrimination claim. Int'l Ultimate, 122 Wn. App. at 744; Grimwood, 110 Wn.2d 365.

Scrivener and Rice are distinguishable. In Scrivener, in addition to hiring a younger candidate, the college president made remarks indicating a preference to hire younger people and hired many individuals under 40 but few over 40. Scrivener, 181 Wn.2d at 442-43. In Rice, in addition to replacing the plaintiff with a much younger employee, the employer offered inconsistent reasons for termination, and the plaintiff's supervisor "routinely made age-related comments." Rice, 167 Wn. App. at 90-91.

The only evidence Simmons relies on to argue her race was a significant factor in the decision to terminate her employment is her recollection that near the time Arsenault hired Brian Fielder, Arsenault told her he was "bringing in the real kahuna."[7] The record shows Simmons did not mention the remark to Arsenault or ask what he meant. Simmons testified the meaning of "kahuna" "can range from a lot of different things," but she construed the comment to mean she was a "halfbreed" Pacific Islander

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[6] See also Griffith, 128 Wn. App. at 456 (evidence "insufficient as a matter of law" to support age discrimination claim where "only evidence" presented was that plaintiff's "replacement was younger than he was"); Tusing v. Des Moines Indep. Cmty. Sch. Dist., 639 F.3d 507, 517 (8th Cir. 2011) (hiring of employees younger than plaintiff "standing alone, does not create an inference" that the employer discriminated against plaintiff on the basis of her age).

[7] In her reply brief, Simmons claims Arsenault called her a "real kahuna." But Simmons' deposition testimony clearly states that Arsenault was referring to Brian Fielder.

and thus not the "real kahuna."[8] Simmons asserts this "disconcerting comment" raises a reasonable inference that Arsenault's decision to terminate her was motivated by racial animus. We disagree.

Even viewed in the light most favorable to Simmons, Arsenault's statement does not indicate any animus toward individuals of Pacific Islander heritage or raise a reasonable inference that Simmons' race was a significant motivating factor in Arsenault's decision to terminate her. The record does not show the decision to terminate Simmons was related to Arsenault's comment. Arsenault made the comment more than one year before terminating Simmons. The undisputed evidence shows Arsenault had worked with Fielder before and considered him a personal friend. Simmons' argument is based purely on her subjective opinion of the meaning of Arsenault's statement and does not lead to a reasonable inference of racial discrimination. See Ya-Chen Chen v. City Univ. of N.Y., 805 F.3d 59, 74-75 (2d Cir. 2015) ("even if sincerely held, a plaintiff's 'feelings and perceptions of being discriminated against' do not provide a basis on which a reasonable jury can ground a verdict") (quoting Bickerstaff v. Vassar Coll., 196 F.3d 435, 456 (2d Cir.1999)); Montes v. Greater Twin Cities Youth Symphonies, 540 F.3d 852, 854, 858-59 (8th Cir. 2008)[9] (reference to Haitian employee on at least three occasions as "la bête noire"[10] did not raise reasonable inference that employer's legitimate reasons for termination were

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[8] Webster's Third New International Dictionary 1230 (2002) defines "kahuna" as a Hawaiian word meaning "native master of a craft or vocation."

[9] Alterations in original.

[10] In French, "la bête noire" translates literally to " 'the black beast.' " Montes, 540 F.3d at 854. The English language has incorporated the phrase as meaning " 'one that is particularly disliked or that is to be avoided.' " Montes, 540 F.3d at 854 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 174 (4th ed. 2006)).

pretext for racial discrimination even where employee testified that " 'in [his] opinion,' use of the phrase reflected 'a discriminatory perception of [his] being' ").[11]

Simmons also claims Arsenault treated "similarly situated younger white employee" Sara Young differently. But Simmons points to nothing in the record indicating Young's race. There is also no evidence in the record regarding Young's performance reviews.

We conclude Simmons did not create a genuine issue of material fact as to whether age or race was a substantial factor in the decision to terminate her employment, and affirm summary judgment dismissal of the lawsuit against Microsoft.

WE CONCUR:

[11] See also Weinstock v. Columbia Univ., 224 F.3d 33, 43-45 (2d Cir. 2000) (use of the words "nice" and "nurturing" to describe female assistant professor during tenure proceedings was not evidence that university's proffered reason for terminating her was pretext for sex discrimination).

PROOF OF SERVICE

I, Johanna Sappenfield, certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served: Petition for Review

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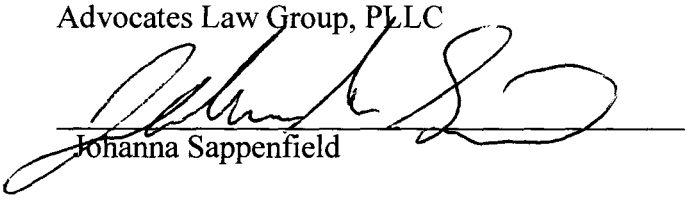
DATED this 2nd day of September, 2016.

Advocates Law Group, PLLC



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