No. 93731-1

IN THE SUPREME COURT OF
STATE OF WASHINGTON

KIM MIKKELSEN

Petitioner

v.

PUBLIC UTILITY DISTRICT #1 OF KITTITAS COUNTY, JOHN HANSON, PAUL ROGERS, ROGER SPARKS, and CHARLES WARD,

Respondents

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Public Utility District #1 of Kittitas County, John Hanson, Paul Rogers, and Roger Sparks respectfully request this Court deny review of the September 13, 2016 published in part opinion of the Court of Appeals' opinion in *Mikkelsen v. Public Utility District #1 of Kittitas County et al.*

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

1. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court.

2. The decision of the Court of Appeals is not in conflict with a decision of another decision of the Court of Appeals.

3. The decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or of the United States.

4. The decision of the Court of Appeals does not involve an issue of substantial public interest that should be determined by the Supreme Court.

III. STATEMENT OF THE CASE

Kim Mikkelsen was terminated from her employment with the Public Utility District #1 of Kittitas County ("the District") because "it just wasn't working out." CP at 319. Mikkelsen and her supervisor,

Charles Ward, had differing communication and management styles. CP 110, 115, 125, and 131. After a complete and mutual communication breakdown, they lost trust in one another and it became clear that they could no longer work together. CP 117, 123.

One final incident irrevocably undercut their working relationship and led to Mikkelsen's termination. While Ward was on vacation and without his knowledge or input, Mikkelsen suggested to one of the District's Commissioners that the Board send out an employee survey to evaluate, among other things, Ward's performance as a manager. CP 84. Ward was in the middle of union negotiations and his approval rating was "at an all-time low." CP 124. Ward believed that Mikkelsen's suggestion of a survey was an attempt to get him fired. CP 152. Ward fired Mikkelsen.

Mikkelsen asserts that such an unceremonious end to a 27-year career was unfair. She asserts that she should have received a lesser reprimand under the District's Corrective Action Policy. However, the policy, which was implemented by Mikkelsen herself, is expressly discretionary and promises no particular level of discipline.

There are no issues of fact regarding the circumstances which lead to Mikkelsen's termination. Mikkelsen was not fired because she was a woman or because she was over 40 years old. She was fired because she

had a personality conflict with her boss. Her termination was proper. The trial court granted summary judgment dismissing her claims. The Petitioner filed a timely appeal. On September 13 , 2016, Division III of the Court of Appeals affirmed the summary dismissal of her claims.

IV. ARGUMENT

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme court if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The petition for review does not set forth any issue that falls within the scope of RAP 13.4(b).

A. The Court of Appeals correctly applied the McDonnell-Douglas Test.

The burden shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) is commonly used where a plaintiff lacks direct evidence of discriminatory motive. *Hill v. BCTI Income Fund–I*, 144 Wn.2d 172, 180, 23 P.3d 440

(2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 354, 172 P.3d 688 (2007). Under this burden-shifting scheme, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Hill*, 144 Wn.2d at 181. If the plaintiff fails to establish a prima facie case, the defendant is entitled to judgment as a matter of law. *Id.*

If, however, the plaintiff succeeds in establishing a prima facie case, a " 'legally mandatory, rebuttable presumption' " of discrimination temporarily takes hold and the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment action. *Id.* If the defendant fails to meet its burden, the plaintiff is entitled to an order establishing liability as a matter of law because no issue of fact remains in the case. *Id.* at 181–82. If the defendant provides a nondiscriminatory reason for its employment action, the presumption established by the plaintiff's prima facie case is rebutted and it "simply drops out of the picture." *Id.* at 182 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510–11, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)).

The burden then shifts back to the plaintiff to show that the defendant's reason is actually pretext for what, in fact, is a discriminatory motive. *Hill*, 144 Wn.2d at 182; *Grimwood v. Univ. of Puget Sound, Inc.*,

110 Wn.2d 355, 364, 753 P.2d 517 (1988). If the plaintiff fails to make this showing, the defendant is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 182.

The PUD's reason for Mikkelsen's termination was that "it just wasn't working out." The Court of Appeals found that Mikkelsen and Ward had "conflicting management styles", which resulted in "overarching discord" and "loss of trust." A-25. In other contexts, "amorphous allegations" based upon "relationship problems" or "trust factors", may be rebutted on summary judgment, as Mikkelsen suggests, with a simple, "oh yeah, was not." (Br. p. 11). However, here Mikkelsen agrees that there was a complete and mutual communication breakdown and a lack of trust. CP 114, 123. Mikkelsen does not disagree with the reason for the discharge, but rather disagrees with Ward's characterization of its cause. The Court of Appeals declined to get "into the weeds" of specific conflicts, and concluded, that Mikkelsen "cannot show that PUD's reason was pretextual because her own testimony supports it." A-25.

Furthermore, even if both parties meet their requisite burdens, summary judgment is still proper if no rational trier of fact could conclude the action was discriminatory. *Hill,* 144 Wn.2d at 186, 188–89. The Court of Appeals found that Mikkelsen's evidence was "insufficient to

permit a rational finder of fact to infer that the termination of her employment by Ward was more likely than not substantially motivated by discrimination." A-31.

The Court of Appeals did not err in applying the *McDonnell-Douglas* test nor is its decision in conflict with a decision of the Supreme Court or a decision of another decision of the Court of Appeals.

B. A claim that an employer has made a contractual offer can fail as a matter of law when it is directly negated by other communications by the employer.

As a matter of law, the Court of Appeals found that Mikkelsen failed to demonstrate that the PUD's progressive discipline policy altered the at will nature of her employment. A-33. Mikkelsen seeks review of this decision asserting that the Court of Appeals failed to recognize the inquiry as an issue of fact.

The Court of Appeals correctly recognized the issue as a factual issue, but nonetheless found that because the claim of an offer was directly negated by "a number of provisions," reasonable minds could not differ as to its meaning. A-33 (citing *Swanson v. Liquid Air Corp.*, 118 Wn. 2d 512, 522, 826 P.2d 664, 669 (1992)). The Court of Appeals did not misstate the law nor is its decision in conflict with a decision of the Supreme Court or a decision of another decision of the Court of Appeals.

C. The use of discretionary language may defeat a claim of promise of specific treatment as a matter of law.

Mikkelsen also asserts that when the Court of Appeals determined that the PUD's corrective action policy did not promise specific treatment as a matter of law, it failed to view the evidence in the light most favorable to her. All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995).

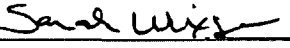
The corrective action policy is replete with discretionary language. CP 346-347. The policy contains one "mandatory" term which states, "Corrective action must be administered with due consideration of, and respect for, employee rights and expectations, whether those rights and expectations derive from employment policies, operation of law, or contract." CP 344. The Court of Appeals found that the term "must" is inconsequential because the use of corrective action is optional. "[I]f corrective action is used, then it must be administered with due consideration of employee rights and expectations." A-37 (emphasis in original).

Mikkelsen also asserts that she presented an issue of fact as to whether she had a reasonable expectation of corrective action. Two union employees received corrective action after the implementation of the policy. The Court of Appeals noted that "unlike the PUD's union-represented employees, Mikkelsen cannot point to any 'right or expectation' that needed to be considered or respected in taking corrective action against her." A-37.

Mikkelsen did not have evidence to support her reasonable expectation claims. Courts do not infer missing facts. The Court of Appeals did not apply the wrong standard nor is its decision in conflict with a decision of the Supreme Court or a decision of another decision of the Court of Appeals.

V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

By: 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 14th day of November, 2016, I caused a true and correct copy of the foregoing document, "Answer to Petition for Review," to be delivered to the following counsel of record:

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