No. 93731-1

IN THE SUPREME COURT OF THE 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

Plaintiff-Petitioner Kim Mikkelsen seeks review of a Court of Appeals decision affirming summary judgment dismissal of Ms. Mikkelsen's action against Defendants-Respondents Public Utility District #1 of Kittitas County ("the PUD"), individual PUD Commissioners, and Charles Ward. After she was terminated from her position with the PUD, Ms. Mikkelsen sued Respondents alleging age and sex discrimination, breach of employment policy, the PUD's negligent hiring and supervision of Mr. Ward, and intentional infliction of emotional distress. The trial court dismissed all of Ms. Mikkelsen's claims on summary judgment and the Court of Appeals affirmed.

This Court should deny Ms. Mikkelsen's Petition for Review because she fails to satisfy the criteria enumerated in RAP 13.4(b).

The first issue raised by Ms. Mikkelsen concerns the pretext prong of the *McDonnell Douglas*[1] summary judgment framework. This Court recently examined this same issue in *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014); numerous Court of Appeals' decisions likewise address this issue. Given the extensive judicial treatment on the

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[1] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973).

precise issue raised by Ms. Mikkelsen, this issue is not one of substantial public interest.

Ms. Mikkelsen further asks the Court to consider issues pertaining to judicial treatment of language contained in employee handbooks at summary judgment. Ms. Mikkelsen fails to assert any grounds justifying discretionary review of these issues and such grounds do not exist. Further, Mr. Ward is not liable under Ms. Mikkelsen's breach of employment policy claim because he was not Ms. Mikkelsen's employer and was not a party to the alleged contract.

Mr. Ward respectfully requests that the Court deny Ms. Mikkelsen's Petition for Review.

II. COURT OF APPEALS' OPINION

The Court of Appeals affirmed summary judgment dismissal of Ms. Mikkelsen's age and gender discrimination claim because Ms. Mikkelsen failed to meet her burden to show that the PUD and Mr. Ward's reasons for terminating her were pretext for discriminatory reasons or a that a "substantial motivating factor" in the PUD and Mr. Ward's decision to terminate Ms. Mikkelsen were discriminatory reasons. *Mikkelsen v. PUD #1 of Kittitas Cty. et al.*, Slip Op. No. 33528-3-III (Wn. App. Div. 3, Sept. 13, 2016) (hereinafter, "Opinion") at 24-31.

The Court of Appeals affirmed dismissal of Ms. Mikkelsen's breach of employment policy claim because she failed to show that the PUD's corrective action policy modified her at-will status or contained promises of specific treatment in specific situations on which she could justifiably rely. Opinion at 31-38.

The Court of Appeals affirmed dismissal Ms. Mikkelsen's negligent hiring and supervision claims against the PUD. These claims were not asserted against Mr. Ward. Opinion at 38-40.

The Court of Appeals affirmed summary judgment dismissal of Ms. Mikkelsen's intentional infliction of emotional distress claim because she failed to show that the PUD and Mr. Ward's conduct gave rise to "unendurable" emotional distress. Opinion at 40-43.

The Court of Appeals did not reach the issue of Mr. Ward's individual defenses based on RCW 4.24.470 and 54.12.110 because it dismissed Ms. Mikkelsen's other claims on the merits. *See* Opinion at 13, n.2.

III. COUNTERSTATEMENT OF ISSUES

1. Whether discretionary review of Ms. Mikkelsen's assignment of error relating to the pretext prong of the *McDonnell Douglas* summary judgment framework is warranted where this Court and the Court of Appeals have already addressed and clarified this issue.

2. Whether discretionary review of Ms. Mikkelsen's assignments of error relating to her breach of employment policy claim is warranted where she fails to articulate any basis for review under RAP 13.4(b) and where Mr. Ward is not liable under this claim as he is not a party to the alleged contract.

IV. COUNTERSTATEMENT OF FACTS

Mr. Ward, as general manager of the PUD, supervised Ms. Mikkelsen, the PUD's finance manager. Although they initially got along well, their working relationship gradually deteriorated and, with the PUD's approval, Mr. Ward terminated Ms. Mikkelsen's employment. Mr. Ward and Ms. Mikkelsen's relationship began to deteriorate when they did not see eye-to-eye on issues involving PUD policies (CP at 178-82, 187, 191, 425-26), union negotiations (CP 145-46, 192, 415), and administrative/accounting issues (CP at 177, 182-84, 187, 191, 334, 337, 428-29, 436-37). The fact that Ms. Mikkelsen worked part-time for the PUD and also ran her own consulting business also strained Mr. Ward and Ms. Mikkelsen's relationship as Ms. Mikkelsen would use PUD resources for her consulting business (CP at 76, 79, 194-95, 213-14, 444-45) and Mr. Ward thought Ms. Mikkelsen prioritized her business over her job with the PUD (CP at 145-46). Mr. Ward found Ms. Mikkelsen

insubordinate. (CP at 188-89.) Ms. Mikkelsen did not approve of Mr. Ward's management style. (CP at 109-10, 113-14, 236.)

These types of issues eventually led to, in Ms. Mikkelsen's words, a mutual "communication breakdown." (CP at 114.) Ms. Mikkelsen lost her trust in Mr. Ward and felt like her job was in jeopardy. (CP at 123, 130.)

Mr. Ward and Ms. Mikkelsen's strained relationship came to a head when, while Mr. Ward was on vacation, she proposed that the PUD Commissioners circulate an anonymous survey asking for the PUD's employees' opinions concerning a variety of workplace matters, including issues with Mr. Ward's management. (CP at 82-84, 93-97, 248-267, 318-19.) The survey included questions asking whether the survey takers agreed with statements such as "The General Manager is biased on the basis of race," and "The General Manager is biased on the basis of gender." (CP at 265.) Ms. Mikkelsen knew that in proposing the survey she was going behind Mr. Ward's back and knew that Mr. Ward would not approve of her actions. (CP at 96-97.) One of the Commissioners informed Ward of the survey. (CP at 149.) Mr. Ward knew that Ms. Mikkelsen had brought complaints against the PUD's prior general manager, which ultimately led to the general manager's resignation. Mr. Ward suspected that Ms. Mikkelsen was likewise trying to have him fired.

(CP at 148.) As a result of Ms. Mikkelsen's attempt to circulate this survey behind his back, Mr. Ward "lost all trust and all confidence in [Ms. Mikkelsen]" and asked the Commissioners whether it would be within his rights to terminate her. (CP at 174-77, 203.)

Mr. Ward fired Ms. Mikkelsen, telling her "it wasn't working out." (CP at 99.) At the time of her termination, Mikkelsen was 57 years old. (CP at 75, 89.) After Ms. Mikkelsen's termination, the PUD hired Genine Pratt, a Certified Public Account, as finance manager. (CP at 65, 383.) At the time she was hired, Ms. Pratt was 51 years old. (CP at 383.)

V. LEGAL STANDARD

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (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.

RAP 13.4(b). An issue is of substantial public interest if it "immediately affects significant segments of the population, and has a direct bearing on

commerce, finance, labor, industry, or agriculture." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 803, 83 P.3d 419 (2004).

VI. ARGUMENT

A. The Court of Appeals Did Not Err in Applying the *McDonnell Douglas* Framework and This Court's Review of How Plaintiffs May Overcome Summary Judgment at the Pretext Prong of the *McDonnell Douglas* Framework Is Unnecessary Because Decisions of This Court and the Court of Appeals Already Provide Ample Guidance on This Issue.

Ms. Mikkelsen argues that "[t]he legitimate, non-discriminatory reason for termination of Mikkelsen stated by defendants was 'it wasn't working out.'" Pet. for Rev. at 9 (citing CP 398-99). Ms. Mikkelsen further argues that "[i]f that is the case, there will never again be a discrimination case brought because all an employer will have to say is that, 'it just wasn't working out'; and according to the published portion of the Court of Appeals decision, that assertion will establish, as a matter of law, that summary judgment is appropriate for the employer." Pet. for Rev. at 9. Despite Ms. Mikkelsen's incorrect and bold prediction, she fails to show how this issue constitutes an issue of public interest or otherwise satisfies RAP 13.4(b). This Court recently addressed the precise issued raised by Ms. Mikkelsen in *Scrivener v. Clark College*, 181 Wn.2d 439,

334 P.3d 541 (2014) and the facts of this case do not justify further treatment of the issue raised by Ms. Mikkelsen.

In *Scrivener*, this Court clarified that a plaintiff may satisfy the pretext prong by proving one of the four following factors: (1) "that the [employer's] reason has no basis in fact," (2) "it was not really a motivating factor for the decision," (3) "it lacks a temporal connection to the decision," or (4) "was not a motivating factor in employment decisions for other employees in the same circumstances." *Id.* at 447-48 (subsequent citation omitted). Alternatively, "the plaintiff may . . . satisfy the pretext prong by presenting sufficient evidence that discrimination . . . was a substantial factor motivating the employer." *Id.* at 448.

In *Scrivener*, plaintiff, Scrivener, sued Clark College for age discrimination after the college decided not to hire her as an English instructor, but instead hired two instructors who were under the age of 40. The trial court granted summary judgment in favor of the college, finding that Scrivener was unable to show that the college's legitimate reasons to terminate her were pretext for discriminatory reasons. The Court of Appeals affirmed, but this Court reversed. This Court held that Scrivener had presented sufficient evidence to show that there were genuine issues of material fact about whether the college's articulated reasons for terminating Scrivener were pretext.

The Court found that the following evidence presented by Scrivener satisfied her burden to show genuine issues of material fact concerning whether her age was a substantial factor motivating the college:

- The college hired two applicants under the age of forty (Scrivener was 55 years old);
- In a "State of the College" speech, the college president stated there was a "glaring need" for younger talent within the college's faculty;
- In a public forum, the college president advocated requiring no experience for the English positions;
- The college president hired many people under age 40 (only 44 percent of the tenure track faculty hires were 40 years of age or older during the 2005–06 school year);
- The college president requested applicants with "funk," i.e., "youthfulness"; and,
- Scrivener "fulfilled all the minimum requirements and the desired qualifications, while neither of the hired candidates fulfilled all of the desired qualifications."

Id. at 443, 448. Viewing this evidence in the light most favorable to Scrivener, this Court held that Scrivener created a genuine issue of

material fact concerning whether age was a substantial motivating factor in the college's decision not to hire her. *Id.* at 450.

Decisions of the Court of Appeals are in accord with *Scrivener* and offer additional guidance on how Washington courts and litigants should proceed under the *McDonnell Douglas* framework, particularly the pretext prong. *E.g.*, *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 89, 272 P.3d 865 (2012); *Simmons v. Microsoft Corp.*, 194 Wn. App. 1049, 2016 WL 3660805 (July 5, 2016).

In *Rice*, the Court of Appeals reversed the trial court's grant of summary judgment because it found that the plaintiff had put forth evidence satisfying the plaintiff's burden to show that the employer's proffered reasons were pretext to discriminatory reasons. 167 Wn. App. at 89. Like *Scrivener*, the Court of Appeals in *Rice* explained the different ways a plaintiff can prove pretext and concluded, based on the summary judgment record, that the plaintiff in that case had put forth sufficient evidence to defeat summary judgment. *Id.* at 90-93. In that case, plaintiff, Rice, sued his employer, OSI, for age discrimination after he was fired. Although OSI offered legitimate reasons for terminating Rice, it found that Rice presented sufficient evidence to show these reasons were pretext. Rice's evidence included (1) Rice's supervisor "routinely made age-related comments [for approximately two years]"; (2) Rice was replaced

by a "much younger, less experienced employee"; and, (3) OSI gave inconsistent reasons for terminating Rice.

Ms. Mikkelsen completely ignores the guidance provided by these cases on how courts should treat, and how plaintiffs may prove, the pretext prong of the *McDonnell Douglas* summary judgment framework. The Court of Appeals cited *Scrivener* (Opinion at 14) and is consistent with both *Scrivener* and *Rice*. The only evidence Ms. Mikkelsen could put forth regarding Mr. Ward's alleged age and gender discrimination was her own subjective belief and speculation that she had been discriminated against and some uncorroborated and innocuous off-the-cuff remarks and gestures allegedly made by Mr. Ward.

The Court of Appeals decision thoroughly explains how this evidence, when viewed in the light most favorable to Ms. Mikkelsen, does not satisfy the pretext prong of the *McDonnell Douglas* framework. Opinion at 24-31. Unlike the plaintiffs in *Scrivener* and *Rice*, Ms. Mikkelsen could not show that the PUD replaced her with someone younger. Ms. Mikkelsen's replacement, Ms. Pratt, was 51 years old when hired. Ms. Mikkelsen could not present any evidence of discriminatory intent on the part of Mr. Ward or the PUD such as the college president's public remarks in *Scrivener* or the pattern of ageist comments tolerated by the employer in *Rice*. Finally, unlike the plaintiff in *Scrivener*,

Ms. Mikkelsen did not show that her replacement, Ms. Pratt, lacked the minimum requirements or the desired qualifications for the position.

Based on the evidence presented by Ms. Mikkelsen, the trial court properly found that Ms. Mikkelsen was unable to show a genuine issue of material fact that age or gender was a substantial motivating factor in Mr. Ward and the PUD's decision to terminate her. For Ms. Mikkelsen to prevail at the pretext prong of the *McDonnell Douglas* framework, she needed to put forth evidence like the plaintiffs in *Scrivener* and *Rice*. Ms. Mikkelsen failed to put forth comparable evidence. Washington courts have consistently and thoroughly explained what evidence plaintiffs must present to defeat summary judgment at the pretext prong of the *McDonnell Douglas* framework. Further judicial treatment of this subject is not necessary. Ms. Mikkelsen's Petition for Review should be denied.

B. This Court Should Deny Ms. Mikkelsen's Petition for Review Because Ms. Mikkelsen Fails to Show How Her Assignments of Error Regarding Her Breach of Employment Policy Claim Satisfy Any Criteria of RAP 13.4(b). Further, Mr. Ward was Not a Party to the Alleged Employment Contract and Cannot Be Held Personally Liable for Breach of the Alleged Contract under the Theories Asserted by Ms. Mikkelsen.

Ms. Mikkelsen asks this Court to address two issues pertaining to her breach of employment policy claim (a claim that plaintiffs can pursue under either a breach of contract/contract modification theory or a "promises of specific treatment" theory).

First, under a breach of contract theory, Ms. Mikkelsen asks the Court to clarify the language necessary to disclaim employer policy procedures and determine when the issue can be decided on summary judgment. Pet. for Rev. at 12-14. Second, regarding her promises of specific treatment theory, Ms. Mikkelsen asks this Court to clarify the proof elements necessary on a summary judgment motion to enforce specific treatment terms of the employment policy. *Id.* at 12, 15-18. This Court should deny review of these issues because Ms. Mikkelsen fails to assert grounds for discretionary review under RAP 13.4(b) and because Mr. Ward is not liable to Ms. Mikkelsen under these theories.

At no point in her discussion of issues regarding her breach of employment policy claim does Ms. Mikkelsen articulate any basis under RAP 13.4(b) justifying discretionary review of these issues. Instead, Ms. Mikkelsen simply alleges that the Court of Appeals improperly decided a factual issue as a matter of law and applied the "wrong standard" to her implied contract claim. Ms. Mikkelsen invites this Court to "clarify" what language is necessary to include in an employee handbook so, as a matter of law, it does not create an employment contract. Pet. for Rev. at 14. Ms. Mikkelsen further invites this Court to "weigh in on the issue" on the evidence required to show an employer's specific treatment as would support an implied contract claim. *Id.* at 17.

Ms. Mikkelsen does not articulate how the Court of Appeals' decision below conflicts with a decision of this Court or a published decision of the Court of Appeals. Ms. Mikkelsen likewise does not argue that this issue pertains to a significant question of law or involves an issue of substantial public interest. The Court should decline Ms. Mikkelsen's invitation to "weigh in" on this issue and deny review of Ms. Mikkelsen's Petition for Review as she fails to assert any legitimate grounds for discretionary review of the issues pertaining to her employment policy claim.

Furthermore, the issues raised by Ms. Mikkelsen pertaining to her breach of employment policy claim do not apply to Mr. Ward because he was not a party to the alleged contract and cannot be held personally liable for breach of the contract under either theory asserted by Ms. Mikkelsen. Mr. Ward cannot be liable for breach of the PUD corrective action policy because he was not a party to the alleged contract. *Houser v. City of Redmond*, 16 Wn. App. 743, 747, 559 P.2d 577 (1977), *aff'd* 91 Wn.2d 36, 586 P.2d 482 (1978). An employee, acting on behalf of his employer in an official capacity in regards to contracts between the employer and other employees, or third parties, cannot be held personally liable for his employer's breach. *Id.* In this case, there is no dispute that Mr. Ward was Ms. Mikkelsen's direct supervisor, the general manager of the PUD, and himself an employee of the PUD. As such, Mr. Ward cannot be held

personally liable for the alleged breach by the PUD of the corrective action policy. Accordingly, summary judgment dismissing Ms. Mikkelsen's breach of employment policy claim was proper, at least as to Mr. Ward.

At neither the trial court nor the Court of Appeals level did Ms. Mikkelsen argue that Mr. Ward was liable under this claim. The Petition for Review likewise contains no argument refuting Mr. Ward's defense. Further, no cases cited by Ms. Mikkelsen involve a breach of employment policy claim against the plaintiff's manager much less hold a manager liable under that theory. The Petition for Review should be denied because Ms. Mikkelsen fails to assert grounds justifying discretionary review of her breach of employment policy claim under RAP 13.4(b) and because review would be frivolous as Mr. Ward is not liable under this claim.

CONCLUSION

For the foregoing reasons, Mr. Ward respectfully requests that the Court deny Ms. Mikkelsen's Petition for Review. Should he be the substantially prevailing party, Mr. Ward also requests costs incurred in responding to Ms. Mikkelsen's Petition for Review. RAP 14.2.

RESPECTFULLY SUBMITTED this 14th day of December, 2016.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was sent via email and regular mail, postage prepaid, on this day, to:

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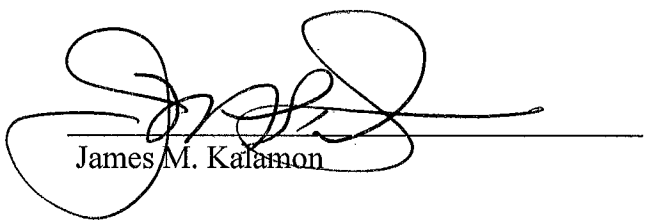

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