

65936-7

65936-7

No. 65936-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

CRAIG RICE, an individual,
Plaintiff/Appellant,

v.

OFFSHORE SYSTEMS, INC., a WASHINGTON CORPORATION,
Defendants/Appellees.

APPELLANT'S REPLY BRIEF

BADGLEY ~ MULLINS LAW GROUP PLLC
Donald H. Mullins, WSBA No. 4966
Mark K. Davis, WSBA No. 38713
Attorney for Appellant

701 Fifth Avenue, Suite 4750
Seattle, Washington 98104
Telephone: (206) 621-6566
Facsimile: (206) 621-9686

KHN

ORIGINAL

TABLE OF CONTENTS

Table of Authorities.....ii

I. REPLY 1

II. PRETEXT IS INTERPRETED BROADLY 2

**III. OSI’S CONTENTIONS MUST BE REJECTED BECAUSE
THEY DO NOT COMPORT WITH SETTLED LAW 4**

A. *OSI’s Evidence Must be Closely Scrutinized Because it Relied on
Subjective Criteria to Terminate Mr. Rice..... 5*

B. *Evidence of Mendacity Supports a Finding of Pretext and
Disproves OSI’s Alleged Honest Belief 9*

C. *Mr. Rice’s Evidence Raised Genuine Issues of Material Fact .. 12*

i. The Employer’s Perception is Limited to Issues of Job
Performance or Qualifications. 13

ii. Summary Judgment Was Inappropriate Because Mr. Rice Raised
Issues of Material Fact. 14

iii. OSI’s Legal Authorities Are Inapposite 15

D. *Evidence of Discriminatory Animus is Probative of Pretext 17*

IV. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Askin v. Firestone Tire & Rubber Co., 600 F.Supp. 751,(1985), *aff'd*, 785 F.2d 307 (6th Cir.1986) 17

Bell v. Bolger, 708 F.2d 1312 (8th Cir.1983) 5

Bergene v. Salt River Project Agric. Improvement & Power Dist., 272 F.3d 1136 (9th Cir.2001) 5

Carle v. McChord Credit Union, 65 Wn.App. 93 (1992)..... 2, 3

Davis v. Chevron, U.S.A., Inc., 14 F.3d 1082 (5th Cir.1994).....20

Desert Palace v. Costa, 539 U.S. 90 (2003)..... 17

Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71 (2004) 16, 18, 19

Estevez v. Faculty Club of University of Washington, 129 Wn. App. 774 (2005)..... 7, 8, 17

Ezold v. Wolf, Block, Schorr & Soli-Cohen, 983 F.2d 509 (3rd Cir. 1992)18

Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978) and *Int'l Bros. of Teamsters v. U.S.*, 431 U.S. 324 (1977)..... 2

Garrett v. Hewlett-Packard Co., 305 F.3d 1210 (10th Cir. 2002)..... 5

Giacoletto v. Amax Zinc Co., Inc., 954 F.2d 424 (7th Cir. 1992)..... 5, 6, 7

Godwin v. Hunt Wesson, Inc., 150 F.3d 1217 (1998)..... 19, 20

Griffith v. Schnitzer Steel Industries Inc., 128 Wn. App. 438 (2005)..... 16

Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355 (1988)... 13, 14, 15

Hatfield v. Columbia Federal Sav. Bank, 68 Wn. App. 817 (1993)..2, 3, 17

Hoffman v. MCA, Inc., 144 F.3d 1117 (7th Cir. 1998) 18

In re C.B., 61 Wn. App. 280 P.2d 518 (1991) 3

Int'l Bros. of Teamsters v. U.S., 431 U.S. 324 (1977).....2

<i>Johnson v. Express Rent & Own, Inc.</i> , 113 Wn. App. 858 (2002)	11
<i>Johnson v. Lehman</i> , 679 F.2d 918 (D.C.Cir.1982).....	7
<i>Korslund v. Dyncorp Tri-Cities Services, Inc.</i> , 156 Wn.2d 168 (2005) ...	13
<i>Lilly v. Harris-Teeter Supermarket</i> , 842 F.2d 1496 (4 th Cir. 1988).....	5, 6
<i>Lindsey v. Prive Corp.</i> , 987 F.2d 324 (5 th Cir.1993)	5
<i>Nidds v. Schnidler Elevator Corp.</i> , 113 F.3d 912 (9 th Cir. 1996).....	18
<i>Page v. Bolger</i> , 645 F.2d 227 (4 th Cir.).....	6
<i>Perfetti</i> , 950 F.2d 441 (1991).....	5
<i>Reeves v. Sanderson Plumbing Products, Inc.</i> , 530 U.S. 133 (2000)....	2, 3, 17, 18
<i>Russell v. Acme-Evans Co.</i> , 51 F.3d 64 (7 th Cir.1995)	10
<i>Schnidrig v. Columbia Mach., Inc.</i> , 80 F.3d 1406 (9 th Cir.1996), <i>cert.</i> <i>denied</i> , 519 U.S. 927 (1996).....	19
<i>Smith v. Chrysler Corp.</i> , 155 F.3d 799 (6 th Cir. 1998)	9, 10
<i>Smith v. Flax</i> , 618 F.2d 1062 (4 th Cir. 1980)	13
<i>Stegall v. Citadel Broadcasting Co.</i> , 350 F.3d 1061 (2004).....	3
<i>Subia v. Riveland</i> , 104 Wn. App. 105 (2001)	2, 3
<i>Texas Dept of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981).....	2

I. REPLY

The predominant theme of Appellee's ("OSI") brief is the contention that the issue of pretext should be viewed through a narrow prism guided by its subjective perception of the facts. Inherent within this argument is the implication that the element of pretext can only be established in limited circumstances and that evidence of discriminatory animus is not probative to a showing of pretext. However, the law does not support OSI's position. It is settled that the *McDonnell-Douglas* burden shifting test, which includes the pretext analysis, is a flexible standard to be interpreted liberally. In addition, there is a wealth of case law demonstrating that employees can establish pretext in a myriad of ways. Courts are required to analyze the totality of an employee's evidence, including the evidence establishing a prima facie case and showing discriminatory animus. None of the legal authorities cited by OSI alters this framework. A cumulative analysis of this case reflects the fact that there is specific and substantial evidence for a reasonable jury to conclude that OSI discriminated against Mr. Rice. Thus, it is critical that the Court remand this case for a jury trial and reject OSI's arguments because they are without merit and will set a dangerous precedent by which employers will conceal discriminatory conduct in the future.

II. PRETEXT IS INTERPRETED BROADLY

Generally speaking, an employee can establish pretext directly or indirectly by demonstrating the employer's explanation is "unworthy of credence." *Carle v. McChord Credit Union*, 65 Wn. App. 93, 102 (1992), citing *Texas Dept of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). See also, *Hatfield v. Columbia Federal Sav. Bank*, 68 Wn. App. 817, 823 (1993). This burden can be met in a number of different ways depending upon the particular facts of the case. The flexibility regarding the sufficient level of proof necessary to establish pretext comports with the liberal application of the *McDonnell-Douglas* burden shifting test. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) and *Int'l Bros. of Teamsters v. U.S.*, 431 U.S. 324, 358 (1977).

Courts hold this standard is met where an employee undermines or discredits the employee's proffered explanation. *Subia v. Riveland*, 104 Wn. App. 105, 115 (2001); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In *Subia*, Division Two stated that:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

Subia, 104 Wn. App at 115, citing, *Reeves*, 530 U.S. at 147 (2000).

These authorities support the proposition that Mr. Rice can establish pretext by discrediting OSI's proffered explanation. These authorities also show that an analysis of Mr. Rice's prima facie case is probative to the element of pretext.

To be clear, Mr. Rice's burden is one of production and not persuasion at the summary judgment stage. A burden of production is intended to identify whether there is an issue of fact suitable for the trier of fact. *In re C.B.*, 61 Wn. App. 280, 283 P.2d 518 (1991). The burden of production is met when the plaintiff produces evidence sufficient to support a finding of each element of the cause of action. When it is met, it is said that the evidence is "sufficient" or "substantial." *Hatfield v. Columbia Federal Sav. Bank*, 68 Wn. App. at 823-825 (1993) citing *Carle*, 65 Wn. App. at 98. In order to determine whether Mr. Rice has produced substantial evidence of pretext, the Court must engage in a cumulative analysis based upon a totality of the record. *Id.*, 65 Wn. App. at 104; ("Cumulated, this evidence was sufficient to support a reasonable inference of pretext and to meet the third facet of the burden of production"); *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1069 (2004) ("the District Court erred by examining each piece of Stegall's evidence in isolation").

Mr. Rice met his burden to produce substantial evidence of pretext including facts demonstrating: (1) a strong prima facie case of discrimination, (2) that Mr. Rice acted reasonably during the vessel fire, (3) inconsistencies, contradictions, and significant changes in OSI's preferred explanation, (4) OSI's preferred explanation had no basis in fact, and (5) ample evidence of age-related animus. Each of these grounds has been recognized by courts as valid means by which to establish pretext. Viewed cumulatively, and in a light most favorable to Mr. Rice, the evidence in the record requires a jury trial on the merits.

III. OSI'S CONTENTIONS MUST BE REJECTED BECAUSE THEY DO NOT COMPORT WITH SETTLED LAW

OSI argues that pretext was not established because the evidence should be viewed from the perception of the employer and, by using this framework, that Mr. Davis had a reasonable belief that Mr. Rice engaged in misconduct. However, these arguments are based upon a mis-characterization of the evidence and a flawed interpretation of the law. OSI's contentions must be rejected because: (1) OSI's reliance upon subjective criteria to terminate Mr. Rice requires the Court to closely scrutinize OSI's evidence, (2) there is substantial evidence of mendacity in the record disproving OSI's "honest belief", (3) Mr. Rice presented fact-based evidence to refute OSI's preferred explanation thereby creating

disputed issues of material fact, and (4) evidence of age-related animus must be considered when analyzing the issue of pretext.

A. OSI's Evidence Must be Closely Scrutinized Because it Relied on Subjective Criteria to Terminate Mr. Rice

The explanations provided by OSI to support its employment decision were largely, if not entirely, subjective conclusions regarding Mr. Rice's personality and communication style. A jury may reasonably consider subjective reasons as pretexts for discrimination. *Giacoletto v. Amax Zinc Co., Inc.*, 954 F.2d 424, 427-428 (7th Cir. 1992); *See generally, Perfetti*, 950 F.2d 441, 457-58 (1991). Many courts have reached similar results and hold that the use of subjective criteria in an employer's decision making process is evidence of pretext. *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1506 (4th Cir. 1988); *Lindsey v. Prive Corp.*, 987 F.2d 324, 327 (5th Cir.1993) (subjective employment criteria may provide opportunities for unlawful discrimination); *Bell v. Bolger*, 708 F.2d 1312, 1319-20 (8th Cir.1983) ("subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse."); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1142 (9th Cir.2001) (subjective criteria evidence of pretext); *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1218 (10th Cir. 2002).

In *Lilly*, the employer only considered subjective criteria in making promotion decisions, including such intangibles as correct attitude and the desire to “get ahead.” *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1506 (4th Cir. 1988). In view of this evidence the district court was bound to scrutinize “particularly closely” the employer’s alleged non-discriminatory reasons for not promoting the plaintiffs. *Id.*, citing, *Page v. Bolger*, 645 F.2d 227, 230 (4th Cir.) (en banc), cert. denied, 454 U.S. 892 (1981). In *Giacoletto*, the Seventh Circuit upheld a jury verdict in favor of an employee where the employer relied on subjective criteria to support its employment decision. There, the employer argued that the plaintiff was terminated because he “had poor interpersonal skills as a manager; he was rude and uncommunicative.” *Giacoletto*, 954 F.2d at 426. The plaintiff rebutted this contention with evidence, including positive performance evaluation, that he had been an effective manager for many years. The Court held that, even though the employer produced strong evidence that the plaintiff “was in fact rude and uncommunicative,” the jury was entitled infer pretext because the company had kept the plaintiff in its employ for 14 years despite his poor interpersonal skills. *Id.*

This case is analogous to *Giacoletto*. Both employers argued that the plaintiffs’ poor interpersonal skills supported their termination. OSI specially argued that Mr. Rice’s management style consisted of a

substantial amount of yelling and berating his subordinates. CP 28. Mr. Davis cited to these subjective criticisms as part of his termination decision, to wit: “The extremely poor treatment of employee that has been happening for many years...” CP 245. Mr. Davis then relied on his personal views of Mr. Rice to reach the conclusion that: “It is my firm belief that that Craig’s actions detailed in the Police Report are not only accurate, but somewhat understated.” *Id.* These facts show that Mr. Davis’ decision making process was based upon his critical views of Mr. Rice’s personality and management style. As in *Giacoletto*, a jury is entitled to infer pretext from the evidence in this case because Mr. Rice’s performance was never at issue.¹ To the contrary, OSI conceded that Mr. Rice’s performance was satisfactory and retained him as an employee for many years despite the alleged personality concerns.

The use of subjective criteria to terminate an employee also supported a finding of pretext in a recent Washington decision. *Estevez v. Faculty Club of University of Washington*, 129 Wn. App. 774 (2005). The

¹ The *Giacoletto* court also upheld a finding of pretext based upon evidence that the employer had failed to comply with its own policies when terminating the plaintiff. *Giacoletto.*, 954 F.2d at 427, citing, *See, e.g., Johnson v. Lehman*, 679 F.2d 918, 922 (D.C.Cir.1982) (“departure from internal hiring procedures is a factor that the trier of fact may deem probative”). Here, OSI failed to follow its own policies and procedures by failing to give Mr. Rice a chance to explain his actions, by failing to notify Mr. Rice that he might be terminated for his actions, by failing to follow its policy on progressive discipline, and by failing to adhere to its policy of having two managers on site at all times.

plaintiff was terminated for her “stressful vibe” and told that she was not a “good fit” for the club because she had allegedly told vulgar stories, used profanity, and was unable to work well with her staff and co-workers. *Id.*, at 802. The plaintiff denied the allegation that she had shared vulgar stories and explained that profanity was commonplace in the kitchen. *Id.*, at 788. The Court reversed the grant of summary judgment because the plaintiff provided “reasonable explanations for the various incidents of improper conduct” and held that the evidence “supports a reasonable inference that the explanations given for Estevez’s termination were pretextual...” *Id.*, at 802.

Estevez supports a finding of pretext here because Mr. Rice also presented a reasonable explanation for his behavior during the vessel fire. Mr. Rice also introduced evidence that OSI employees and customers alike commonly used profanity in the workplace. CP 340-342. Finally, Mr. Rice rejected OSI’s contentions that he used bigoted language or assaulted a police officer, much like the *Estevez* plaintiff refuted allegations that she shared vulgar stories with co-workers.

In sum, the use of subjective criteria in an employment decision requires courts to increase the level of scrutiny of the employer’s evidence. Here, Mr. Davis terminated Mr. Rice based upon subjective criteria, including his opinion that Mr. Rice was abusive towards co-

workers and created bad relations with customers.² Thus, the trial court was required to “closely scrutinize” the evidence presented by OSI. Simply put, the trial court committed reversible error by failing to recognize the subjective grounds for OSI’s employment decision and critique the evidence accordingly.

B. Evidence of Mendacity Supports a Finding of Pretext and Disproves OSI’s Alleged Honest Belief

A finding of pretext is further supported by evidence of OSI’s mendacity which is established by the numerous inconsistencies and contradictions in OSI’s proffered explanation. In its response brief, OSI argues that Mr. Davis had a reasonable belief that the allegations against Mr. Rice were accurate and therefore its reasons for termination had a basis in fact. However, the “honest belief” defense is not absolute and should not apply in this case because there is ample evidence of mendacity. *Smith v. Chrysler Corp.*, 155 F.3d 799, 807-808 (6th Cir. 1998). In *Smith*, the Sixth Circuit held that if an:

...employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process “unworthy of credence,” then any reliance placed by the

² OSI did not produce any evidence to support Mr. Davis’ allegation in this regard. This statement serves as but one example of Mr. Davis’ statements that should be struck from the record because it is not based in fact and therefore is speculative, conclusory, and self serving.

employer in such a process cannot be said to be honestly held.

This holding is based on the premise that courts cannot “blindly assume that an employer's description of its reasons is honest” and that “a multitude of suspicious explanations may itself suggest that the employer's investigatory process was so questionable that any application of the “honest belief” rule is inappropriate.” *Id.*; *See also, Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir.1995) (“There may be cases in which the multiple grounds offered by the defendant for the adverse action of which the plaintiff complains are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff could withstand summary judgment.”). Thus, an employer’s “honest belief” is inapplicable where an employer fails to engage in a reasonably informed and considered employment decision based upon particularized facts. *Smith*, 155 F.3d at 807-808.

Here, the evidence shows that OSI based its decision to terminate Mr. Rice on unfounded and contradictory allegations as well as subjective evaluations of Mr. Rice’s personality. Of particular importance is evidence presented by Mr. Rice to show that Mr. Davis fabricated grounds for his termination. For instance, Mr. Davis stated that customers and co-workers complained about Mr. Rice. However, OSI could not identify the

name of even a single person who had filed a complaint against Mr. Rice. CP 336. Nor could OSI produce any documentary evidence to support this allegation, such as a written complaint or reprimand. In fact, the only evidence regarding this issue was produced by Mr. Rice, who submitted a declaration from an OSI customer. This declaration directly refuted OSI's allegations that customers disliked or complained about Mr. Rice. CP 351-352. In addition, OSI significantly changed the grounds for its employment decision after Mr. Rice explained that their explanation was preposterous. Based on this evidence, a jury could conclude that OSI fabricated grounds to terminate Mr. Rice in order conceal a discriminatory motive.

These facts are similar to those presented in *Johnson v. Express Rent & Own, Inc.*, 113 Wn. App. 858, 862 (2002). In *Johnson*, the Court concluded that a jury could find "mendacity" where, among other things, (1) the plaintiff presented evidence that he used no more profanity than other employees and (2) a supervisor who overheard the plaintiff make hundreds of calls never heard the plaintiff state that he owned the store, contrary to the employer's position. Based on this, the *Johnson* court concluded that the plaintiff had produced "sufficient evidence of conscious wrongdoing by Express and that a jury could find a discriminatory motive behind his termination." *Id.*

The evidence presented by Mr. Rice leads to a similar result and requires remand for a jury trial. This conclusion is further supported by evidence that OSI failed to provide Mr. Rice with an opportunity to explain his account of the events at any time prior to terminating his employment. CP 320-321 and 349-350. This glaring omission contravened OSI's policy and practice when disciplining employees. CP 349. Combined with evidence that OSI significantly altered its grounds for terminating Mr. Rice, it is reasonable to conclude that OSI's proffered explanation was untruthful. Therefore, the evidence in the record gives rise to a reasonable inference of mendacity precluding OSI's "honest belief" and lending further support for a finding of pretext.

C. Mr. Rice's Evidence Raised Genuine Issues of Material Fact

Mr. Rice presented objective evidence that raised genuine issues of material fact regarding the truth of OSI's proffered explanation. OSI argues that, because Mr. Davis allegedly had a reasonable belief for his decision to terminate Mr. Rice, the evidence must be viewed in a light favorable to OSI. The thrust of OSI's position is that the evidence must be viewed from Mr. Davis' subjective viewpoint. This is not the law. The honest belief defense does not alter the summary judgment standard whereby all of the evidence and reasonable inferences therefrom must be construed in a light most favorable to the non-moving party. *Korlund v.*

Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 177 (2005).

Furthermore, where an employee presents evidence of objective facts to support a finding of pretext, a disputed issue of material fact is created thereby precluding summary judgment. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 360 (1988). Thus, summary judgment was inappropriate because Mr. Rice did not rely upon subjective evidence or conclusory statements. Rather, Mr. Rice premised his arguments on objective evidence that is based in fact.

i. The Employer's Perception is Limited to Issues of Job Performance or Qualifications.

In *Grimwood*, the plaintiff argued that his performance was not substandard without producing any objective evidence that he had performed at an acceptable level. Within this context, the *Grimwood* Court, citing a Fourth Circuit decision, stated that the perception of the employee was not relevant as it pertained to evaluations of job performance. *Id.*, at 360, citing *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980). In *Smith*, the plaintiff argued that he was qualified for another position within the company. However, the court stated that “[the employee's] perception of himself ... is not relevant. It is the perception of the decision maker which is relevant.” *Id.* This statement concerned the employee's statements regarding his own job qualifications.

Nothing in the *Grimwood* or *Smith* cases supports OSI's contention that all evidence of pretext must be viewed through the biased perception of the employer. Thus, OSI's perception is irrelevant to the issue of pretext because Mr. Rice's job performance and/or qualifications are not in dispute. In fact, OSI conceded that Mr. Rice was an experienced, knowledgeable, and valued employee who excelled at his position.

ii. Summary Judgment Was Inappropriate Because Mr. Rice Raised Issues of Material Fact.

The plaintiff in *Grimwood* suffered from a number of evidentiary failings. He failed to rebut the underlying facts of the allegations against him and simply argued the misconduct at issue was "much ado about nothing." He also failed to present evidence that he was subjected to discrimination. Instead, the plaintiff merely offered that "I don't feel I was given sufficiently good reason for my termination so I feel it has to be fundamentally another reason and that's all I can come up with." *Grimwood*, 110 Wn.2d at 361. Summary judgment was affirmed based upon these facts.

However, the *Grimwood* court stated that, under different circumstances, an employee can establish pretext by disputing the underlying facts which support an employer's termination decision. The *Grimwood* court specifically held that an employee's statements about

objective facts, as opposed to opinion or supposition, will create issues of material fact, to wit: “It would be different if plaintiff had claimed the incidents did not occur; for example, had he said that he had, in fact, completed all employee evaluation forms when defendant said he did not, **an issue of fact would have existed.**” *Id.*, (emphasis added). The critical distinction is whether the employee sets forth facts as opposed to conclusions.

Here, Mr. Rice successfully created a dispute issue of material fact regarding pretext by setting forth objective facts which undermine OSI’s preferred explanation. For instance, Mr. Rice testified that he only had two drinks with dinner hours before the fire. CP 344-345. This evidence created an issue of material fact as to whether Mr. Rice was drunk that can only be decided by a jury. Mr. Rice also denied assaulting or using bigoted language towards a police officer. CP 347-348. This evidence creates an issue of material fact as to whether Mr. Rice was belligerent especially where the police reports offered by OSI contain no mention of such behavior. Thus, the trial court erred because it resolved disputes issues of material fact thereby invading the province of the jury.

iii. OSI’s Legal Authorities Are Inapposite

OSI’s other legal authorities are factually distinct and fail to undermine the probative value of Mr. Rice’s evidence noted above.

Griffith v. Schnitzer Steel Industries Inc., 128 Wn. App. 438 (2005) and *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71 (2004). The facts in *Griffith* presented the same problems present in *Grimwood* including the plaintiff's failure to present evidence sufficient to create a factual dispute. Much like *Grimwood*, the plaintiff in *Griffith* testified that "I don't have anything I can lay a tangible hold on as to why I was released." *Griffith*, 128 Wn. App. at 455. This is vastly different from the present case, where Mr. Rice produced specific and substantial evidence that OSI's proffered explanation was untruthful.

Similarly, the facts in *Domingo* are readily distinct from the case at bar because the misconduct was objectively verifiable and the plaintiff admitted to engaging in threatening misconduct: "...during a meeting at work, she yelled at a coworker and threatened that Domingo's family "[wouldn't] be happy about" the way the coworker was acting." *Domingo*, 124 Wn. App at 77. In addition, Domingo was provided with at least two opportunities to present her side of the story. She refused these offers presumably because she knew that the videotape evidence of her violent behavior would be particularly damning and un-refutable. In sum, the decisions in *Domingo*, *Grimwood*, and *Griffith* are inapposite because there was no evidence of mendacity or discrimination to discredit the truthfulness of the employer's proffered explanation.

D. Evidence of Discriminatory Animus is Probative of Pretext

The ultimate question in employment discrimination cases is whether a discriminatory purpose was a substantial factor in the employment decision. *Estevez v. Faculty Club*, 129 Wn. App. 774, 800 (2005), citing *Desert Palace v. Costa*, 539 U.S. 90, 101 (2003). (“At the summary judgment stage of pretext, the employee's evidence must support an inference that the discriminatory purpose...was a substantial factor motivating the employment decision.”). *See also, Hatfield v. Columbia Federal Sav. Bank*, 68 Wn. App. 817, 823-825 (1993). In *Hatfield*, Division Three held that an employee’s evidence of pretext “must also be probative of age discrimination.” *Id.*, citing, *Askin v. Firestone Tire & Rubber Co.*, 600 F.Supp. 751, 755 (1985), *aff’d*, 785 F.2d 307 (6th Cir.1986). Contrary to OSI’s contention, these authorities show that evidence of discriminatory animus is probative of pretext.

The law governing the *McDonnell-Douglas* standard expressly states that evidence of discriminatory animus is a factor which must be considered when analyzing the issue of pretext. *Reeves*, 530 U.S. 133 (2000). In *Reeves*, the Supreme Court specifically admonished the Fifth Circuit because it ignored evidence of age-related animus as it pertained to the element of pretext, to wit: “Again, the court disregarded critical evidence favorable to petitioner-namely, the evidence supporting

petitioner's prima facie case and undermining respondent's nondiscriminatory explanation." *Id.*, at 152. This language demonstrates that the trial court committed error in this case by disregarded Mr. Rice's evidence of age-related animus.

OSI offers no authority to challenge the critical importance of the discriminatory evidence in this case. While OSI characterizes Mr. Davis's statements as friendly banter its legal citations fail to support this position. *Ezold v. Wolf, Block, Schorr & Soli-Cohen*, 983 F.2d 509 (3rd Cir. 1992); *Nidds v. Schnidler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1996); *Hoffman v. MCA, Inc.*, 144 F.3d 1117 (7th Cir. 1998); *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71 (2004). For instance, in *Ezold*, a gender based comment was made before the plaintiff was hired and *five years* before the challenged employment decision. By this time, the person who made the allegedly discriminatory comment was no longer employed and certainly was not involved in the decision making process.³ Similarly, the alleged remarks in *Domingo* were insufficient because they occurred *six years* before the termination and were made by individuals

³ *Hoffman* is distinct because the discriminatory remarks were made by someone other than the decision maker. Moreover, the age related comments in *Nidds* were isolated and were ambiguous as to their intent and intended recipient.

who were not involved in the termination decision. *Domingo*, 124 Wn. App. at 89-90.⁴

Conversely, Mr. Davis, as the person who decided to terminate Mr. Rice, engaged in discriminatory conduct and made discriminatory statements that were unequivocally directed at Mr. Rice. Mr. Rice's declaration established that the discriminatory remarks were ongoing since 2005 and continued up to the time of his termination. This conduct was so consistent and pervasive that subordinate employees openly demeaned Mr. Rice as "senile." CP 344. As a result, Mr. Rice's evidence is more properly analogized to the facts in *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir.1996), *cert. denied*, 519 U.S. 927 (1996) (summary judgment reversed where the employee was told on three occasions that the Board wanted somebody younger for the job).

This pattern of discriminatory conduct by Mr. Davis and OSI serves as direct evidence of discrimination. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (1998). In *Godwin*, the Ninth Circuit announced the standard by which direct evidence is to be analyzed, to wit:

Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption. When the plaintiff offers direct evidence of

⁴ While one potentially discriminatory comment was made by a decision maker in *Domingo*, it was a single isolated comment. Unlike the present case, the *Domingo* plaintiff was unable to offer any context to show that the comment was intended or understood as a discriminatory remark.

discriminatory motive, a triable issue as to the actual motivation of the employer is created *even if the evidence is not substantial.*”

Id., (emphasis added), quoting *Davis v. Chevron, U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir.1994). Here, OSI did not rebut Mr. Rice’s allegations that Mr. Davis attempted to undermine his authority by transferring his responsibilities to a younger employee. Thus, these facts stand as undisputed evidence of age discrimination. Moreover, Mr. Rice’s replacement, Mr. Reed, testified that other employees openly chided Mr. Rice for being senile. This evidence of discrimination is further buttressed by Mr. Rice’s declaration documenting that Mr. Davis used age related insults to demean him as an old man who could no longer perform his duties because of his age. CP 344. This constitutes direct evidence that OSI harbored a discriminatory purpose when it chose to terminate Mr. Rice. Thus, the trial court committed reversible error by ignoring the evidence of age-related animus presented by Mr. Rice because such evidence was directly probative to the issue of pretext.

IV. CONCLUSION

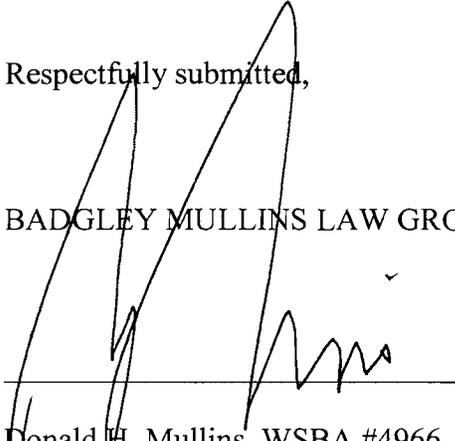
This Court should reject OSI’s “honest belief” based on the strong showing of mendacity and settled law rejecting OSI’s contention that all evidence must be viewed from its subjective perception. Under the proper standard, the record establishes the trial court erred by failing to consider

the subjective nature of OSI's evidence, viewing Mr. Rice's evidence in isolation, deciding disputed issues of material fact, and ignoring critical evidence probative to the issue of pretext. The trial court also erred by refusing to strike OSI's unauthenticated and inadmissible hearsay evidence from the record.⁵ Thus, remand for a jury trial on the merits is warranted because the facts amply demonstrate a showing of pretext.

Dated this April 15, 2011

Respectfully submitted,

BADGLEY MULLINS LAW GROUP PLLC



Donald H. Mullins, WSBA #4966
Mark K. Davis, WSBA #38713
Attorneys for Appellant

⁵ Mr. Rice has identified the offending portions of OSI's inadmissible submissions which should be struck from the record in prior briefing. See, CP 166-168. Similarly, Mr. Rice's has already submitted detailed briefing explaining the grounds to exclude OSI's improper evidence. See, CP 16-172 and 259-268.

FILED
2011 APR 15 PM 4:00

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

CRAIG RICE, an individual,)	
)	
Appellant,)	No. 65936-7-I
v.)	
)	
OFFSHORE SYSTEMS, INC., a)	PROOF OF SERVICE
Washington Corporation,)	
)	
Respondent.)	
_____)	

I, Stefanie Baines, paralegal for BADGLEY~MULLINS LAW GROUP, attorneys for plaintiff Craig Rice in the above entitled action, hereby certify that I am over the age of eighteen (18), and am competent to testify to the facts contained herein. On the 15th day of April, 2011, I served by sending a true and correct copy in the manner indicated below of the following documents:

1. Appellant's Reply Brief; and

ORIGINAL

2. Proof of Service.

upon the attorneys of record herein, as follows, to wit:

Matthew C. Crane
Bauer Moynihan & Johnson LLP
2101 Fourth Avenue, Suite 2400
Seattle, WA 98121-2320
Attorneys for Offshore Systems, Inc.

via hand delivery

Dated this 15th day of April, 2011.


Stefanie Baines