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STATE OF WASHINGTON

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No. 40573-3-II  
DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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PHILIP GROH,

Plaintiff/Appellant

v.

MASON COUNTY FOREST PRODUCTS, LLC,  
a Washington Limited Liability Company, and  
PHILIP JOHNSON

Defendants/Respondents

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ON APPEAL FROM MASON COUNTY SUPERIOR COURT

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RESPONDENTS' BRIEF

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## I. SUMMARY INTRODUCTION

In 2005, Defendants Mason County Forest Products (“MCFP”) and MCFP President Philip Johnson (“Mr. Johnson”) hired Plaintiff Philip Groh (“Plaintiff”)<sup>1</sup> to work at a lumber mill in Winlock, Washington, when Plaintiff was 56 years old. Over the next four years, the domestic lumber market continued to slow, followed by the general economic downturn and recession, and MCFP was forced to engage in a series of systematic lay offs to downsize and restructure the company in order to keep it alive. In an effort to retain Plaintiff when the Winlock lumber mill closed, Mr. Johnson – who is Plaintiff’s age – transferred Plaintiff to the Company’s lumber mill in Shelton, Washington. Mr. Johnson thereafter paid for Plaintiff’s lodging, promoted him and gave him a raise. Eventually, however, Mr. Johnson was forced to make the difficult decision to include Plaintiff in the ongoing lay offs. No new employee was hired to replace Plaintiff. Instead, as is common in downsizing and restructuring, a number of employees subsumed Plaintiff’s former duties. One of those employees is Daniel Poppe (“Mr. Poppe”).

Plaintiff alleges that Defendants terminated him because of his age in violation of the Washington Law Against Discrimination (“WLAD”),

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<sup>1</sup> Pursuant to RAP 10.4(e), MCFP refers to Appellant Philip Groh as “Plaintiff” and refers to Respondents MCFP and Mr. Johnson as “Defendants” or by name.

RCW Chapter 49.60. On Defendants' Motion for Summary Judgment, the trial court correctly dismissed Plaintiff's claim as a matter of law. Importantly, Plaintiff has failed to answer the question: If Defendants were opposed to employing older workers, why would Defendants have hired Plaintiff at the age of 56, promoted him, provided him a raise and paid for his lodging in an effort to keep him employed throughout the systematic lay offs?

Plaintiff also alleges in his Complaint that he suffered from emotional distress damages; however, he testified in his deposition that he did not have any emotional complaints related to his termination. Plaintiff also failed to identify any witnesses or documents to support this claim. After the close of discovery, Plaintiff filed a Motion to Allow an Additional Witness, requesting to add his wife, Carolyn Groh ("Ms. Groh"), as a trial witness to testify on the issue of Plaintiff's emotional distress. The trial court correctly denied Plaintiff's motion, which was untimely and improperly attempted to offer evidence contrary to Plaintiff's unequivocal testimony about facts that he did not have any emotional distress complaints related to his termination – facts clearly within his particular knowledge.

## II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly granted Defendants' Motion for Summary Judgment where Plaintiff cannot prove that Defendants' stated reason for Plaintiff's lay off was, in fact, pretext for intentional discrimination against Plaintiff because of his age?

2. Whether the trial court properly denied Plaintiff's Motion to Allow an Additional Witness to testify at trial as to his alleged emotional distress damages where (a) Plaintiff failed to timely disclose the proposed witness, and (b) Plaintiff unequivocally testified he did not suffer emotional distress?

## III. COUNTERSTATEMENT OF THE CASE

### A. Plaintiff's Employment with MCFP.

Long Bell Ventures, LLC, d/b/a Lewis County Forest Products, LLC ("LCFP"), is MCFP's parent company and owns 100% of MCFP.<sup>2</sup> CP 120. LCFP and MCFP are both Washington Limited Liability companies that specialize in the manufacture, production and sale of forest products. CP 120-21. MCFP owns and operates a large log mill and a stud (lumber) mill in Shelton, Washington. CP 120. LCFP owns a stud (lumber) mill in Winlock, Washington. CP 121. Mr. Johnson is the

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<sup>2</sup> In order to avoid confusion, and because one of the named Defendants in this action is MCFP, any reference to MCFP herein may encompass LCFP.

President, Chief Operating Officer and an owner of both LCFP and MCFP. CP 120-21.

1. Plaintiff is Hired at Age 56 by Mr. Johnson, Who is Also 56, and Jim Woodfin, Who is 51; Plaintiff Never Complains About Ageism. Mr. Johnson and LCFP employee, Richard “Jim” Woodfin (“Mr. Woodfin”) hired Plaintiff in January 2005 to work at the Winlock lumber mill as a Swing Shift Supervisor. CP 138-39 (Groh. Dep. at 39), 155 (Johnson Dep. at 11). At that time, both Plaintiff and Mr. Johnson were 56 years old, and Mr. Woodfin was 51 years old. CP 136 (Groh. Dep. at 6), 154 (Johnson Dep. at 6), 161 (Woodfin Dep. at 4).

During his employment with MCFP, Mr. Groh never reported or complained about any discrimination or harassment because he “didn’t feel harassed.” CP 148 (Groh. Dep. at 80). Indeed, he never complained to anyone at MCFP that he felt discriminated against because of his age and admits that there were no ageist comments made to him while he was employed at MCFP. CP 148-49 (Groh. Dep. at 81, 83-84).

2. The Declining Lumber Market Forces MCFP to Shutdown the Winlock Lumber Mill, Lay Off Nearly 60 Employees, Shift From Domestic to International Metric Lumber and Restructure Its Remaining Workforce. Beginning in 2006, the domestic lumber market began to

decline. CP 121, 163-64. As this decline continued and worsened, MCFP was forced to restructure and downsize in order to survive. CP 121.

In August 2006, MCFP shut down the Winlock lumber mill where Plaintiff was working. CP 121, 141 (Groh. Dep. at 50). Believing the shutdown to be temporary, MCFP transferred some employees – including Plaintiff – from the Winlock lumber mill to the Shelton lumber mill. CP 121. MCFP was forced to lay off the remaining 60 employees from the Winlock lumber mill. CP 124.

In response to the declining domestic lumber market, MCFP shifted its domestic focus to the international lumber market. CP 121. This market shift required versatility from employees as it demanded an entirely new approach to mill work. *Id.*

3. To Keep Plaintiff Employed During What MCFP Hoped Would Be a Temporary Shutdown of the Winlock Lumber Mill, MCFP Offers Plaintiff a Transfer, Lodging, a Promotion and a Raise. In August 2006, Mr. Johnson asked Plaintiff to transfer to the Shelton lumber mill, where Plaintiff took the position of Swing Shift Planer Supervisor. CP 140. The lumber market continued to slow, and MCFP was forced to stop running all swing shifts shortly after Plaintiff's transfer. CP 143 (Groh. Dep. at 61). MCFP laid off the Day Shift Planer Supervisor, and Plaintiff took on that position. CP 142-43 (Groh. Dep. at 57-58).

For a period of six months, Mr. Johnson also arranged, and MCFP paid, for Plaintiff's lodging at the Little Creek Casino in Shelton. CP 144 (Groh. Dep. at 63-64). MCFP also provided Plaintiff a per diem for meals and incidentals. CP 144 (Groh. Dep. at 64-65).

In November 2006, Mr. Johnson promoted Plaintiff to Stud Mill Supervisor and provided him a raise. CP 143 (Groh. Dep. at 61); *see also* Appellant's Brief, p. 4. Plaintiff was in this position when he was subsequently laid off from MCFP. CP 121.

In January 2007, MCFP transferred Plaintiff to the Shelton lumber mill. CP 144 (Groh. Dep. at 65). To assist in relocation, Mr. Johnson provided Plaintiff and his roommate with first month's rent and a deposit on an apartment in Shelton. CP 145-46 (Groh. Dep. at 69-70).

4. MCFP Diversifies Its Market, But the Poor Economy Necessitate Additional Lay Offs, Including Plaintiff. Following on the heels of the declining domestic lumber market, the general economy then took a dramatic turn, entering a recession. CP 121, 163-64. Thus, despite its efforts to diversify into the international lumber market and streamline its workforce, MCFP continued to suffer the effects of the poor economy, and lay offs were ongoing through November 2009. CP 121. The Winlock and Shelton mills went from 391 employees in November 2005 to approximately 133 employees as of December 31, 2009. CP 124.

Around July 2008, Mr. Johnson had to make the difficult decision to lay off another 28 workers. CP 124, 157 (Johnson Dep. at 29). Mr. Johnson included Plaintiff in the lay offs. CP 157-58 (Johnson Dep. at 29-30). Mr. Johnson explained that he made the decision to include Plaintiff in the lay offs based on his perception of Plaintiff's struggles with the international lumber market. CP 114-15, 121, 157-58 (Johnson Dep. at 27, 29-30). Of the 28 lay offs, only seven employees (or 25%) were over 40 years of age. CP 124-25. By contrast, nearly 40% of the Shelton lumber mill's employees as of January 21, 2010 were over 40 years of age. *Id.* At the time, Plant Manager Greggery Duncan ("Mr. Duncan") was on vacation; he did not take part in the decision to include Plaintiff in the lay offs. CP 103-04.

No new employee was hired to take Plaintiff's place; rather, as often happens in downsizing and restructuring, Plaintiff's duties were subsumed by other employees, including Mr. Poppe. CP 106-08. Mr. Poppe is not only performing many of the duties performed by Plaintiff, but is also performing a number of Lead functions for the mill – duties not performed by Plaintiff. CP 121-22.

Plaintiff admitted shortly after his lay off that the real reason for his lay off was the economic downturn and not his age. After being laid off, Mr. Groh filed a claim for unemployment benefits. CP 137 (Groh.

Dep. at 27). As part of the application process for unemployment benefits, he informed the Employment Security Department that the reason he left his former employment was “lack of work.” *Id.*

Since Plaintiff’s lay off, the Winlock lumber mill has not reopened, and additional lay offs have occurred at the Shelton mill. CP 122.

B. Plaintiff’s Unequivocal Testimony That He Has No Emotional Distress Damages and Failure to Identify Any Witnesses or Documents in Support of His Alleged Emotional Distress Claim.

At the outset of this case, the trial court ordered Plaintiff to disclose all witnesses no later than May 15, 2009, and ordered that discovery be completed by September 30, 2009.<sup>3</sup> CP 258.

In Plaintiff’s Complaint for Wrongful Discharge, he seeks damages for emotional distress. CP 249. However, he failed to identify any damages, witnesses or documents in support of an emotional distress claim in his discovery responses. CP 175-76. Plaintiff also failed to disclose any witnesses in support of this claim – or any other claim – on or before May 15, 2009, and, in fact, failed to disclose any witnesses at all before the close of discovery. CP 221-22.

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<sup>3</sup> The parties stipulated to a limited extension of discovery to October 30, 2009, for the sole purpose of reviewing company financial records. CP 221, 255-56. The stipulation did not relate to or contemplate the identification of additional witnesses by either party – particularly not as to Plaintiff’s emotional distress claim. *Id.*

Plaintiff was deposed on August 13, 2009. CP 135. During his deposition he was specifically asked and unequivocally denied that he is alleging any emotional distress as a result of being laid off from MCFP:

Q. Okay. Are you alleging that you have any emotional complaints, emotional distress due to the termination?

A. No.

Q. And you haven't seen any therapists, is that correct?

A. No.

Q. Haven't seen any counselors?

A. No.

CP 151 (Groh. Dep. at 118).

C. The Trial Court Properly Denies Plaintiff's Motion to Allow an Additional Witness to Testify As to Plaintiff's Alleged Emotional Distress Damages.

In a belated effort to get around his own unequivocal denial of any emotional distress, Plaintiff filed a Motion to Allow an Additional Witness ("Motion to Allow") on October 23, 2009 – well after the close of discovery – moving the trial court for an order allowing his wife, Ms. Groh, to testify as to his alleged emotional distress. CP 247. In an accompanying declaration, Ms. Groh admitted Plaintiff told her that he testified "that he did not suffer mentally from his termination from Mason

County Forest Products.” CP 245. Nonetheless, Ms. Groh wants to testify to the contrary – that Plaintiff did suffer emotional distress. CP 245. Plaintiff also admitted that Ms. Groh’s proffered testimony would be limited to the issue of Plaintiff’s alleged emotional distress. CP 245-47. Plaintiff did not offer any explanation for his failure to timely disclose any witnesses – much less his failure to timely disclose Ms. Groh as a potential witness as to his alleged emotional distress. *See* CP 207-11, 219-220, 247.

Defendants opposed Plaintiff’s Motion to Allow (*see* CP 199-206, 235-42), and on January 6, 2010, the trial court denied Plaintiff’s Motion to Allow. CP 192-93.

D. The Trial Court Properly Grants MCFP’s Motion For Summary Judgment.

On January 25, 2010, Defendants filed a Motion for Summary Judgment requesting dismissal of Plaintiff’s Complaint alleging age discrimination in violation of the WLAD.<sup>4</sup> CP 177-93. Plaintiff opposed the Motion for Summary Judgment (*see* CP 78-96), and, on March 15, 2010, the trial court granted Defendants’ Motion for Summary Judgment, dismissing Plaintiff’s Complaint in its entirety. CP 13-14.

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<sup>4</sup> Plaintiff stipulated to dismissal of his Age Discrimination in Employment Act and punitive damages claims; accordingly, the only cause of action left in Plaintiff’s Complaint was his discrimination claim under the WLAD. CP 194-96, 248-50.

#### IV. STANDARD OF REVIEW

##### A. Summary Judgment Standard.

In reviewing an order for summary judgment, the Court applies the same standard as the trial court. *Wirtz v. Gillogly*, 152 Wn. App. 1, 7, 216 P.3d 416 (2009); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 463, 98 P.3d 827 (2004). The Court reviews an order for summary judgment de novo, viewing all evidence in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Wirtz*, 152 Wn. App. at 7-8; *Kirby*, 124 Wn. App. at 463. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value. *Kirby*, 124 Wn. App. at 463.

##### B. Standard For Review Of Trial Court's Discovery Sanctions.

The Court reviews a trial court's discovery sanctions for abuse of discretion. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009); *Blair v. TA-Seattle East #176*, 150 Wn. App. 904, 908, 210 P.3d 326 (2009). A trial court exercises broad discretion in imposing discovery sanctions, and its determination should not be disturbed absent a clear abuse of discretion. *Magana*, 167 Wn.2d at 582; *Blair*, 150 Wn. App. at 908-09. To find an abuse of discretion, the Court must find

either that the trial court's order is (a) based on untenable grounds (as where the trial court relies on unsupported facts or applies the wrong legal standard), or (b) manifestly unreasonable (as where the trial court adopts a view that no reasonable person would take). *Magana*, 167 Wn.2d at 582-83.

## V. ARGUMENT

### A. The Trial Court Correctly Granted Summary Judgment for Defendants, Because Plaintiff Cannot Prove That His Lay Off Was, in Fact, Pretext for Intentional Discrimination.

Plaintiff's sole claim is a claim of age discrimination in violation of the WLAD. CP 194, 248-50. Specifically, Plaintiff claims that he was terminated because of his age. CP 248-50. Plaintiff all but admits that he does not have any direct evidence of intentional discrimination and must, therefore, proceed with his claim under the *McDonell Douglas* evidentiary burden-shifting protocol. *See Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179-80, 188, 23 P.3d 440 (2001)<sup>5</sup> (citing *McDonell Douglas Corp. v. Green*, 411 U.S. 72, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973)); *see also* Appellant's Brief, pp. 19-22.

Under the burden-shifting scheme for an age discrimination claim, the plaintiff bears the immediate burden of setting forth a prima facie case

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<sup>5</sup> *Overruled in part on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006).

that he was terminated because of his age by showing that he (1) is within the statutorily protected age group; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by a significantly younger<sup>6</sup> person. *Hill*, 144 Wn.2d at 181, 188; *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 446-47, 115 P.3d 1065 (2005). For purposes of this appeal, Defendants do not dispute that Plaintiff has met his initial burden of setting forth a prima facie case in that he was 60 years old at the time of his lay off, Plaintiff may be able to raise a genuine issue of material fact as to whether he was doing satisfactory work and Plaintiff's job duties were subsumed by a number of employees, including Mr. Poppe, who was under 40 years of age.<sup>7</sup>

If the plaintiff sets forth a prima facie case, the burden of production (and not the burden of proof)<sup>8</sup> shifts to the defendant to set

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<sup>6</sup> Plaintiff misstates the test by citing to *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 858, 851 P.2d 716 (1993), which was decided before the Washington Supreme Court clarified in *Hill* that the plaintiff must prove that he was replaced by a "significantly younger" person. See *Hill*, 144 Wn.2d at 188 n.10 (explaining the prima facie case) and Appellant's Brief, p. 22 (citing the incorrect *Sellsted* standard).

<sup>7</sup> Defendants reserve the right to dispute Plaintiff's allegations as to satisfactory performance in the event this case is remanded to the trial court. And, although Defendants dispute that Plaintiff was replaced solely by Mr. Poppe, Defendants recognize that the undisputed fact that Mr. Poppe took over some of Plaintiff's duties is sufficient under current Washington case law pertaining to the prima facie case. See *Cluff v. CMX Corp., Inc.*, 84 Wn. App. 634, 638-39, 929 P.2d 1136 (1997).

<sup>8</sup> Plaintiff appears to suggest – incorrectly – that defendants have  
(continued . . .)

forth admissible evidence of a legitimate nondiscriminatory explanation for the termination sufficient to raise a genuine issue of material fact. *Hill*, 144 Wn.2d at 181; *Griffith*, 128 Wn. App. at 447.

Once the defendant meets its burden of production, the burden of proof shifts back to the plaintiff to show that the defendant's stated reasons were "in fact pretext" for intentional discrimination. *Hill*, 144 Wn.2d at 182 (quoting *McDonnell Douglas*, 411 U.S. at 804). To prove pretext, the plaintiff must show that the defendant's stated reasons "have no basis in fact, are unreasonable grounds upon which to base the termination, or were not motivating factors in employment decisions for other similarly-situated employees." *Griffith*, 128 Wn. App. at 447; *Kirby*, 124 Wn. App. at 467. If the plaintiff fails to prove pretext, the defendant is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 446-47.

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( . . . continued)

the burden of *proof* on one or more elements of Plaintiff's claim under the *McDonnell Douglas* burden-shifting scheme. *See, e.g.*, Appellant's Brief, p. i (identifying the assignments of error to be whether defendants carried their "burden of establishing" the prima facie case and pretext *and* Appellant's Brief p. 22 (arguing that defendants "failed to establish that there is no issue of fact relating to whether there was a nondiscriminatory reason for the plaintiff's discharge...." Case law is clear that, to the contrary, the burden of *proof* lies at all times with the plaintiff. *See Hill*, 144 Wn.2d at 180-81.

Under the “hybrid-pretext” model adopted in *Hill*,<sup>9</sup> even where the plaintiff produces evidence demonstrating that the defendant’s reasons for termination were pretextual, the defendant is still entitled to judgment as a matter of law if no rational trier of fact could conclude that discrimination was a “substantial factor” in the defendant’s actions. *Hill*, 144 Wn.2d at 183-84 (citing, *inter alia*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)); *Griffith*, 128 Wn. App. at 448. *Hill* further explained:

Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record *conclusively* revealed some other, nondiscriminatory reason for the employer’s decision, or if the plaintiff created only a weak issue of fact as to whether the employer’s reason was

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<sup>9</sup> Plaintiff again incorrectly cites the pretext-only model espoused in *Sellsted*, which was overruled in *Hill*. See *Hill*, 144 Wn.2d at 183-84 (adopting the hybrid-pretext model) & 195-96 (J. Talmadge’s dissent, recognizing the majority’s adoption of the hybrid-pretext standard overruling *Sellsted*’s pretext-only standard); and see Appellant’s Brief, p. 23 (citing the pretext-only model espoused in *Sellsted*).

untrue *and* there was *abundant and uncontroverted* independent evidence that no discrimination had occurred.

*Hill*, 144 Wn.2d at 184-85; *accord*, *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418 (2002). In sum, to defeat summary judgment, the plaintiff cannot rely solely on his prima facie case and must carry the ultimate burden of proving that the defendant intentionally discriminated against the plaintiff. *Hill*, 144 Wn.2d at 180-81, 186-87.

The trial court's order granting summary judgment for defendants should be affirmed, because Plaintiff failed to prove pretext and failed to meet his ultimate burden of proving intentional discrimination as a matter of law.

1. Defendants Have Met Their Burden of Producing a Legitimate, Nondiscriminatory Explanation for Plaintiff's Termination. It is undisputed that, beginning in 2006, the domestic lumber market began to decline, subsequently followed by a decline in the general economy and recession. *See* Appellant's Brief, p. 3 & CP 121. The decline caused MCFP to experience financial hardships, shift its focus to the international lumber market, shut down the Winlock mill entirely, run the Shelton large log mill and the Shelton lumber mill less and less frequently, and engage in a series of systematic lay offs continuing through at least November

2009. *Id.* Plaintiff also admits that he was laid off during this period of decline on July 25, 2008. *See* Appellant's Brief, pp. 4-5 and CP 121.

It is also undisputed that MCFP's President, Mr. Johnson, was the sole decision-maker in Plaintiff's lay off. CP 104-05, 110, 150 (Groh Dep. at 101), 157-58 (Johnson Dep. at 29-30). Mr. Johnson made the decision to lay off Plaintiff as part of the company's ongoing restructuring and downsizing process. CP 104-05, 124, 157 (Johnson Dep. at 29). In making the decision to include Mr. Groh in the lay offs, Mr. Johnson relied on his perception that Plaintiff was struggling with the international lumber market. CP 115-16, 157-58 (Johnson Dep. at 29-30). No *one* person took over the position; instead, Plaintiff's duties were absorbed by a number of individuals, including Mr. Poppe (who was also simultaneously performing a number of other duties). CP 105, 118, 121-22, 157 (Johnson Dep. at 26-27).

This evidence is more than sufficient to meet Defendant's burden of production. *See, e.g., Hill*, 144 Wn.2d at 181; *Griffith*, 128 Wn. App. at 447; *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 623, 60 P.3d 106 (2002) (discussing the employer's burden of production, not persuasion, in providing a non-discriminatory reason for the termination); *Cluff*, 84 Wn. App. at 639 (discussing that evidence of the plaintiff's termination as

part of company's restructuring sufficient was to meet the defendant's burden of production).

2. Plaintiff Cannot Establish Pretext as a Matter of Law. The burden of proof thus shifts back to Plaintiff to prove that Defendants' proffered reason is pretext for intentional discrimination. *Hill*, 144 Wn.2d at 182 (quoting *McDonnell Douglas*, 411 U.S. at 804); *Griffith*, 128 Wn. App. at 447; *Kirby*, 124 Wn. App. at 467. Plaintiff failed to meet his burden.

a. Plaintiff Admits Defendants' Proffered Reason for His Lay Off Has a Basis in Fact. Plaintiff has not and cannot show that Defendants' proffered reason has no basis in fact. *Griffith*, 128 Wn. App. at 447; *Kirby*, 124 Wn. App. at 467. First, Plaintiff admits that he was laid off. *See* Appellant's Brief, p. 5 ("Mr. Groh, who was 60 years old at the time, was laid off on July 25, 2008.") & CP 137 (Groh Dep. at 27). Second, Plaintiff admits, as he must, that Defendants' proffered reason for his lay off has at least some basis in fact – e.g., that the declining lumber market and economy caused financial hardships for MCFP and forced MCFP to engage in a series of systematic lay offs and that Plaintiff was laid off during this period. *See* Appellant's Brief, pp. 3-5 & CP 121, 141-43 (Groh Dep. at 52-61).

b. Plaintiff Fails to Identify Any Similarly-Situated Employees Who Were Treated More Favorably. Plaintiff has not and cannot identify any similarly-situated employees who were treated more favorably than he during MCFP's financial hardships.<sup>10</sup> *Griffith*, 128 Wn. App. at 447; *Kirby*, 124 Wn. App. at 467. On the contrary, the Winlock and Shelton mills have gone from 391 employees in November 2005 to approximately 133 employees as of January 21, 2010. In addition, of the twenty-eight lay offs that occurred at the Shelton stud mill at the time of Plaintiff's lay off, only seven employees (or 25%) were over 40 years of age. CP 124-25. Comparatively, nearly 40% of the Shelton stud mill's employees as of December 31, 2009, were over 40 years of age. CP 125. This evidence strongly suggests that Defendants were not motivated by Plaintiff's or any other employee's age in making lay off decisions. *See McDonnell Douglas*, 411 U.S. at 805 (statistics as to the defendant's employment policy and practice may be helpful to a determination of whether the defendant's decision was discriminatory).

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<sup>10</sup> It is axiomatic to say that the plaintiff cannot simply point to his or her replacement as a comparator who was treated differently to meet his or her burden of showing pretext; otherwise, every plaintiff who makes out a prima facie case in a termination matter would automatically be able to prove pretext. In any event, Mr. Poppe was not similarly-situated to Plaintiff. *See* CP 170-73 (Poppe Dep. at 5-17) (describing Mr. Poppe's work history with MCFP).

c. Plaintiff Fails to Prove Defendant's Proffered Reason Was Unreasonable. Finally, Plaintiff has not and cannot show that Defendants' proffered reason was an unreasonable ground upon which to base his lay off. *Griffith*, 128 Wn. App. at 447. Where, as here, the same person is responsible for both the hiring (or other positive employment decisions) and the firing of the plaintiff, and both actions occurred within a short period of time, a strong inference arises that there was *no* discriminatory motive. *See Hill*, 144 Wn.2d at 189-90 (plaintiff failed to prove pretext); *Griffith*, 128 Wn. App. at 453-54 (plaintiff failed to prove pretext); *Bradley v. Harcourt, Brace & Company*, 104 F.3d 267 (9<sup>th</sup> Cir. 1996)<sup>11</sup> (collecting cases and holding that the plaintiff failed to prove pretext because the same person who terminated the plaintiff was the same person who hired the plaintiff less than a year earlier); *see also Lowe v. J. B. Hunt Transport, Inc.*, 963 F.2d 173, 175 (8th Cir. 1992) ("It is simply incredible, in light of the weakness of plaintiff's evidence otherwise, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later.").

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<sup>11</sup> Washington courts look to federal cases construing the Age Discrimination in Employment Act and Title VII in construing the WLAD. *See Hill*, 144 Wn.2d at 180 (looking to Title VII); *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 361, 753 P.2d 517 (1988) (looking to ADEA).

In *Hill*, similar to the facts here, defendant BCTI's employee, Randy Potter, hired the plaintiff when she was 53 years old and participated in the decision to terminate the plaintiff less than a year later. *Hill*, 144 Wn.2d at 176-78. The decision makers testified that they terminated the plaintiff after concluding that she had violated a company policy against discussing compensation issues with other employees. The plaintiff testified that she had not, in fact, violated the policy. *Id.* at 190 & n.14. *Hill* nonetheless held that the plaintiff's testimony – while raising a question of fact regarding the company's explanation for firing her – provided only minimal probative value on the plaintiff's claim of age discrimination and did not defeat summary judgment. *Id.* Specifically, the Supreme Court held:

When someone is both hired and fired by the same decisionmakers within a relatively short period of time, there is a strong inference that he or she was *not* discharged because of any attribute the decisionmakers were aware of at the time of hiring. [Citations to *Bradley* and *Lowe*, *supra*, omitted.] For a plaintiff to prevail under such circumstances, the evidence must answer an obvious question: if the employer is opposed to employing persons with a certain attribute, why would the employer have hired

such a person in the first place? The record here fails even to suggest an answer.

Indeed, the only age-related evidence in the record was the ages of the persons involved. Potter himself was over 40 years old when Hill was fired, and there was no evidence or testimony that he or anyone else at BCTI had made derogatory ageist comments or otherwise discriminated against older workers, or that Hill's age had proved problematic in any way. And while Hill's testimony raised a question of fact regarding BCTI's explanation for firing her, its probative value in establishing Hill's ultimate claim of age discrimination proved minimal.

We find as a matter of law that no trier of fact could, after considering such evidence in light of the fact that the same decision makers had authority over both Hill's hiring as well as her firing less than a year later, reasonably conclude that her age was more likely than not a substantial factor in BCTI's decision to terminate her.

*Hill*, 144 Wn.2d at 189-190 (footnotes omitted).

Similarly, in *Griffith*, defendant Schnitzer Steel knew Griffith's age (52) when it promoted him to general manager just five years before Schnitzer Steel and individual defendant Jay Robinovitz terminated Griffith's employment. Significantly, the Court of Appeals held:

An employee under such circumstances cannot rely on simply presenting a prima facie case of discrimination and rebutting the justifications proffered for his termination. *Hill*, 144 Wn.2d at 188-89, 23 P.3d 440. To prevail, the employee must also present sufficient evidence "answer[ing] an obvious question: if the employer is opposed to employing persons with a certain attribute, why would the employer have [promoted] such a person in the first place?" *Hill*, 144 Wn.2d at 189-90, 23 P.3d 440.

*Griffith*, 128 Wn. App. at 454. Plaintiff fails to answer this important question.

(1) Plaintiff Fails to Provide Any Evidence to Suggest Mr. Johnson Would Suddenly Switch from Favoring Him as an Older Worker to Terminating Him Because of His Age. As explained in *Hill* and *Griffith*, Mr. Johnson's and MCFP's favorable treatment of Plaintiff leading up to his lay off creates a strong inference that Mr. Johnson was not motivated by any discriminatory animus. MCFP and

Mr. Johnson hired Plaintiff when Plaintiff was 56 years old. In November 2006, when Plaintiff was 58 years old, Mr. Johnson, who was also 58 at the time, asked Plaintiff to transfer to the Shelton lumber mill, promoted him to Stud Mill Supervisor, arranged for his paid lodging for six months, and gave him a raise. *See* Appellant's Brief, pp. 3-4 & CP 143-46 (Groh Dep. at 60-71), 155-57 (Johnson Dep. at 13-26).<sup>12</sup> Plaintiff fails to explain why, after hiring him, promoting him, paying for his lodging, and giving him a raise, Mr. Johnson suddenly decided to terminate him because of his age. Plaintiff's failure to answer this question is fatal to his age discrimination claim. *Hill*, 144 Wn.2d at 189-90; *Griffith*, 128 Wn. App. at 454.

(a) Plaintiff Fails to Identify Any Ageist Comments or Evidence of Discriminatory Animus. Plaintiff fails to identify any ageist or derogatory comments by decisionmaker Mr. Johnson. Plaintiff also fails to provide any other evidence to even suggest that Mr. Johnson had a discriminatory animus toward older

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<sup>12</sup> Indeed, Plaintiff's only issue with his treatment prior to his termination is that Plaintiff was not offered the opportunity to take computer training courses applicable to the Shelton mill's computer programs. *See* Appellant's Brief, p. 17. Mr. Poppe was sent to classes in 2007 when he was a Lead (a position Plaintiff never held). CP 173. Notably, Plaintiff does not allege that he ever asked for any computer training. CP 49. At most, this creates only a weak issue of fact on pretext and is insufficient to defeat summary judgment. *Hill*, 144 Wn.2d at 184-85.

workers beyond the mere fact that Plaintiff was over 40 and his job duties were subsumed, at least in part, by a substantially younger employee.<sup>13</sup> Proof that a plaintiff was replaced by a substantially younger employee is not enough to defeat judgment as a matter of law. *See Griffith*, 128 Wn. App. at 455-56 (the plaintiff failed to prove pretext even though he was replaced by a significantly younger worker).

(b) The Only Direct Evidence Shows Older Workers Fared Better During the Lay Offs. Here, the only direct evidence – statistical evidence of MCFP’s lay offs – shows that older workers fared better in the lay offs than younger workers. CP 124-25. Again, particularly where, as here, the same decision maker who included Plaintiff in the lay offs also treated Plaintiff favorably in a number of respects in the years leading up to his lay off, Plaintiff’s failure to identify

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<sup>13</sup> The only proffered remark is Mr. Duncan’s alleged comment to Plaintiff after Plaintiff’s termination that Mr. Poppe is “a good kid, and [Mr. Johnson] needs a place for him.” First, Mr. Duncan was not a decision maker. CP 104-05, 110, 150, 157-58. Second, the remark has nothing to do with Plaintiff’s age. At most, it is a stray remark that has no bearing on whether or not Defendants’ decision was based on age discrimination. *See Griffith*, 128 Wn. App. at 457 (“Statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, cannot satisfy the employee’s burden of demonstrating animus.”) (citations omitted); *Kirby*, 124 Wn. App. at 467 (ageist comments by non-decision makers are insufficient to establish discriminatory intent); *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 89-90, 98 P.3d 1222 (2004) (“Generally, age-related comments by non-decision makers are not material in showing an employer’s decision was based on age discrimination”).

any evidence to show that Mr. Johnson had a discriminatory animus toward older workers is fatal to his age discrimination claim. *Hill*, 144 Wn.2d at 189-90; *Griffith*, 128 Wn. App. at 454.

(2) An Abundance of Evidence Shows That No Discrimination Occurred. In addition to the lack of evidence of any discriminatory animus, there is also an abundance of evidence supporting Mr. Johnson's decision to include Plaintiff in the lay offs as part of MCFP's systematic downsizing and restructuring. It is undisputed that MCFP was experiencing serious financial hardships that forced it to engage in a series of lay offs. CP 121-22. Plaintiff himself admits that the Winlock mill was shut down because of the economy (CP 141) (Groh Dep. at 50), the Shelton mill thereafter reduced its hours because of the economy (CP 143), that he was "laid off" (see Appellant's Brief, p. 4) and that, shortly after his lay off, he admitted to the Employment Security Department that he was separated for "lack of work" (CP 137) (Groh Dep. at 27).

Plaintiff has provided no evidence to dispute the fact that no new employee was hired to take Plaintiff's place; rather, as often happens in downsizing and restructuring, Plaintiff's duties were subsumed by other employees, including but not limited to Mr. Poppe. CP 106-08. And Plaintiff has provided no evidence to dispute the fact that Mr. Poppe is not

only performing most of the duties performed by Plaintiff, but is also performing a number of Lead functions for the mill – functions never performed by Plaintiff. CP 121-22. In sum, the evidence shows that Plaintiff's position was effectively eliminated as a stand-alone job and that his duties were either spread out among other employees or – as Plaintiff suggests – given wholly to Mr. Poppe in addition to his other duties as Lead as part of MCFP's restructuring. As in *Griffith*, Plaintiff has not met his burden of proving pretext, and the trial court's grant of summary judgment for Defendants should be affirmed. *See Griffith*, 128 Wn. App. at 453-54.

(3) Plaintiff's Attempts to Create a Weak Issue of Fact Are Not Sufficient to Defeat Summary Judgment. Plaintiff attempts to create an issue of fact by pointing to (1) Mr. Duncan's testimony that Plaintiff was a good performer and (2) Mr. Duncan's testimony that he did not believe Plaintiff's performance played a part in Mr. Johnson's decision to include Plaintiff in the lay offs. Mr. Duncan's testimony creates, at best, only a "weak issue" of fact and is not sufficient to defeat summary judgment. *Hill*, 144 Wn.2d at 184-85.

(a) Mr. Duncan's Assessment of Plaintiff's Performance is Irrelevant. Plaintiff points to testimony from Mr. Duncan, who was admittedly *not* a decision maker, that he believed –

contrary to Mr. Johnson – that Plaintiff was doing a good job and did not have any problems with the international lumber market. *Compare* CP 103-06 (Mr. Duncan’s testimony) *with* CP 114 (Mr. Johnson’s testimony). Mr. Johnson testified that he did not recall discussing Plaintiff’s performance with Mr. Duncan and that, based on his perception of Plaintiff’s struggles with the international lumber market, Mr. Johnson decided to include Plaintiff in lay offs as part of the company’s continual downsizing.<sup>14</sup> CP 114-15, 121, 157-58. As Mr. Duncan was not a decision maker, his subjective opinion about Plaintiff’s performance is irrelevant. *Hill*, 144 Wn.2d at 190 n.14.

As explained in *Hill*, the truth as to whether or not Plaintiff was performing satisfactorily is irrelevant; rather, it is the *decision maker’s* actual perception of Plaintiff’s performance that matters:

It is not unlawful for an at-will employee to be discharged because he or she is *perceived* to have misbehaved, . . . and courts must not be used as a forum for appealing *lawful* employment decisions simply because employees disagree with them.

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<sup>14</sup> Similarly, there is no evidence in the record of Mr. Duncan testifying that he discussed Plaintiff’s performance with Mr. Johnson.

*Hill*, 144 Wn.2d at 190 n.14 (emphasis in original). As later explained by the *Domingo* court:

Courts generally do not second guess the wisdom of personnel decisions because “arguing about the accuracy of the employer’s assessment is a distraction because the question is not whether the employer’s reasons for a decision are ‘right but whether the employer’s description of its reasons is *honest*.’”

*Domingo*, 124 Wn. App. at 84 n.26 (citations omitted) (emphasis in original). To that end, Plaintiff’s own subjective assessment and opinions, or that of other coworkers who were not decision-makers, is irrelevant on the issue of pretext. *Hill*, 144 Wn.2d at 190 & n.14.

In *Hill*, the decision makers testified that they terminated the plaintiff after concluding that she had violated a company policy against discussing compensation issues with other employees. The plaintiff testified that she had not, in fact, violated the policy. *Hill*, 144 Wn.2d at 190 & n.14. *Hill* nonetheless found that the plaintiff’s testimony – while raising a question of fact regarding the company’s explanation for firing her – provided only minimal probative value on the plaintiff’s claim of age discrimination and did not defeat judgment as a matter of law. *Id.* The same is true here, and Mr. Duncan’s subjective opinions about Plaintiff’s

performance – even if it raises a question of fact regarding Mr. Johnson’s explanation for including Plaintiff in the lay offs – does not defeat summary judgment – particularly where there is no evidence in the record that Mr. Duncan ever discussed Plaintiff’s performance with Mr. Johnson.

Plaintiff’s reliance on *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 60 P.3d 106 (2002) is misplaced in a number of respects. First, in *Renz*, the plaintiff alleged that her employer and her manager, Kenneth Sweatt, terminated her in retaliation for complaining about Mr. Sweatt’s sexual harassment of her. As *Renz* is a retaliation claim and not a discrimination claim, it has only limited applicability to the facts of this case.

Second, *Renz* is factually distinguishable. In finding sufficient evidence of pretext to defeat summary judgment, the Court relied on the “cumulative evidence to support a reasonable inference of pretext” including: (1) direct evidence of Mr. Sweatt’s sexually harassing comments, such as a comment about “eating his banana,” advising the plaintiff to “be sure to use protection” on her date with her boyfriend, and asking the plaintiff (who was kneeling to get something from a cabinet) “on your knees again? Didn’t you spend most of your weekend there?”; (2) evidence that Mr. Sweatt decided to extend the plaintiff’s probationary period (which had already ended without any performance issues being

documented) *after* Mr. Sweatt overheard the plaintiff making her first complaint; (3) the close proximity in time between the plaintiff's complaint to Human Resources (which was reported to Mr. Sweatt) and Mr. Sweatt's decisions to transfer her and then terminate her; and (4) evidence that the Clinic's claim that the plaintiff had customer service problems was rebutted by the testimony of a coworker who observed and praised her customer service skills. *Id.* at 615-16, 623-25. Unlike *Renz*, there is no such "cumulative evidence" here. Plaintiff has not provided any direct evidence of discriminatory animus, there is no evidence of "ageist" comments or complaints of discrimination by Plaintiff, and there is no temporal proximity. Thus, evidence that one coworker may have disagreed with Mr. Johnson's reasons for terminating Plaintiff is not, by itself, enough to overcome the strong inference of nondiscriminatory animus under the same actor rule espoused in *Hill* and *Griffith*.

(b) Mr. Duncan's Belief That Performance Was Not a Factor in Mr. Johnson's Decision to Include Plaintiff in the Lay Offs Is Irrelevant. Mr. Johnson did not give inconsistent reasons for *his* decision to include Plaintiff in the lay offs. Mr. Johnson explained that he made the decision to include Plaintiff in the lay offs based on his perception of Plaintiff's struggles with the international lumber market. CP 114-15, 121, 157-58.

In an attempt to fashion “inconsistent reasons” for Plaintiff’s termination, Plaintiff points to testimony from Mr. Duncan – who was *not* a decision maker and was on vacation when Mr. Johnson made the decision to include Plaintiff in the lay offs. CP 104. Specifically, Plaintiff points to testimony that Mr. Johnson told Mr. Duncan that he let Plaintiff go because the company was “cutting that position out” and “downsizing.” *Id.* Notably, Mr. Duncan never testified that Mr. Johnson told him that Mr. Johnson’s assessment of Plaintiff’s performance played *no* part in his decision to include Plaintiff. On the contrary, Mr. Duncan admitted that it was his “belief” that performance was not an issue, but that he “never really got an answer” as to why Plaintiff was chosen other than that the company was “cutting costs.” CP 110-11. Mr. Duncan’s testimony does not provide “inconsistent reasons” for Mr. Johnson’s decision.

Plaintiff relies primarily on *Sellsted v. Washington Mutual Savings Bank*. *Sellsted*’s holding relied on the pretext-only model, which was overruled in *Hill*. *See Hill*, 144 Wn.2d at 183-84 (adopting the hybrid-pretext model) & 195-96 (J. Talmadge’s dissent, recognizing the majority’s adoption of the hybrid-pretext standard overruling *Sellsted*’s pretext-only standard). *Sellsted*’s discussion of pretext is, therefore, of only limited applicability to the facts of this case. And, contrary to *Sellsted*’s holding, *Hill*’s hybrid-pretext model *does* potentially require a

plaintiff to produce evidence beyond the prima facie case at the pretext stage in that the plaintiff is required to provide sufficient evidence to raise a genuine issue of material fact as to whether the defendant had an actual discriminatory motive that was a “substantial factor” in the defendant’s actions. *Compare Sellsted*, 69 Wn. App. at 860 *with Hill*, 144 Wn. 2d at 184-85.

In any event, *Sellsted* is factually distinguishable from this case. In *Sellsted*, the plaintiff was able to establish evidence of pretext: (1) by demonstrating through statistical evidence that only older workers were targeted for layoffs; (2) through direct evidence that others in the plaintiff’s department perceived that age was a reason for the plaintiff’s termination and feared the same fate for themselves or others; and (3) by showing that, although he was alleged to be part of a “reduction in force,” the termination notice listed “redefinition of job responsibilities requires greater knowledge and experience,” and the employer almost immediately hired someone younger from outside the company to take his place. *Sellsted*, 69 Wn. App. at 856-57, 861, 864. Here, the statistical evidence shows, if anything, that older workers fared better in the lay offs than younger workers. CP 124-25. And there is no direct evidence of discriminatory animus based on age; on the contrary, Mr. Johnson treated Plaintiff favorably up until the lay off. *See Appellant’s Brief*, pp. 3-4 &

CP 143-46, 155-56. Finally, the evidence shows that, consistent with a lay off, Plaintiff's job duties were subsumed by others employees. CP 106-08.

As to the inconsistent reasons for the plaintiff's termination, the *Sellsted* court explained:

The speed with which Sellsted was replaced by a newly-hired individual supports the inference that the work force reduction rationale was both unworthy of credence and pretextual. Similarly, the identity of job responsibilities and [a decision maker's] admission that Sellsted's performance after March 31 was satisfactory logically support the inference that the "redefinition of job responsibilities" and competence rationales were also a pretext and unworthy of belief. The focus of probation and increased scrutiny on employees within the protected group raises the inference that age played a part in the decision.

*Id.* at 861. Unlike *Sellsted*, there is no evidence here that MCFP hired anyone to take over Plaintiff's duties – on the contrary, the evidence shows that his duties were subsumed by other employees. CP 106-08. And Mr. Johnson did not make any admissions contrary to his testimony that his perception of Plaintiff's struggles with the international lumber

market played a part in his decision to include Plaintiff in the lay offs.<sup>15</sup> Mr. Duncan's assessment of Plaintiff's performance to the contrary is irrelevant, as he was not a decision maker.

Plaintiff's reliance on *Godwin v. Hunt Wesson, Inc.* is also misplaced. First, in *Godwin*, the plaintiff produced evidence of direct discrimination – including a sexist comment from an alleged decision maker directly related to the positions the plaintiff was seeking in promotion, as well as pervasive sexist comments and actions by managers. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9<sup>th</sup> Cir. 1998). The Ninth Circuit held that this evidence *alone* was sufficient to satisfy the plaintiff's showing of pretext. *Id.* at 1221. Plaintiff has presented no such direct evidence here.

Second, in dicta, the Ninth Circuit went on to state that the plaintiff had also presented sufficient circumstantial evidence of pretext. Specifically, the Ninth Circuit pointed to declarations from the decision makers explaining that they selected a male candidate for one position

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<sup>15</sup> To support his claim that Mr. Johnson's testimony that his perception of Plaintiff's struggles with the international lumber market played a part in his decision to terminate Plaintiff are unworthy of belief, Plaintiff cites only to one alleged conversation he had with Mr. Johnson two weeks before his termination. Plaintiff alleges Mr. Johnson told him that he was "happy" with the production in the stud mill. CP 98-99. This vague statement, even if true, creates no more than a "weak" issue of fact on pretext and is insufficient to defeat summary judgment. *Hill*, 144 Wn.2d at 184-85.

because they believed he would work well with other personnel and did not select the plaintiff because of concerns about her ability to get along with other personnel. *Id.* at 1222. Similarly, the decision makers declared that they selected a male candidate for the second position because of his experience and his easygoing personality. *Id.* However, these reasons were inconsistent, in material ways, with the contemporaneous memoranda prepared at the time of the selection. *Id.* Moreover, the plaintiff's performance reviews repeatedly described her as getting along well with others, while one of the male candidates had received poor evaluations on his personality. *Id.* Here, Plaintiff has not provided any such blatant evidence.

Finally, the Ninth Circuit relied not only on the circumstantial evidence, but also on the *direct evidence of discriminatory animus*, in stating that the plaintiff had raised a genuine issue of material fact as to whether the defendant's nondiscriminatory explanations "masked discriminatory motives." *Id.* Again, there is no such direct evidence here to buttress Plaintiff's, at most, weak evidence of alleged inconsistent reasons.

Plaintiff's citation to *Cluff v. CMX Corp.* as support for his argument on pretext is also misplaced. *Cluff* involved a claim of disability discrimination. While the plaintiff was on medical leave, CMX began

restructuring in order to improve efficiency and ultimately terminated the plaintiff's position; the plaintiff's duties were subsumed by a number of other employees. *Cluff*, 84 Wn. App. at 636. The trial court granted summary judgment for CMX, because the plaintiff failed to establish a prima facie case in that he did not prove he was replaced. *Id.* at 636-37. On appeal, the Court of Appeals held that, where there is a reduction in force, the plaintiff does not have to prove that he was replaced to make out a prima facie case; thus, the plaintiff was able to make out a prima facie case. *Id.* at 637-39.

In sum, *Cluff* only addresses a plaintiff's ability to meet his prima facie case by introducing evidence that other employees subsumed his duties after a reduction in force; it does not state or even suggest that a plaintiff can meet his burden of showing pretext by showing that his duties were subsumed by other employees. On the contrary, *Cluff* ultimately held that the plaintiff failed to establish that the restructuring was a pretext for discrimination; thus, summary judgment for CMX was appropriate. *Id.* at 639-40.

Plaintiff can only meet the pretext stage by producing direct or circumstantial evidence of an *actual discriminatory purpose* for Defendants' actions. *Hill*, 144 Wn.2d at 185-186. If Plaintiff fails to prove pretext, Defendants are "entitled to judgment as a matter of law."

*Hill*, 144 Wn.2d at 182; *Milligan*, 110 Wn. App. at 637. Plaintiff has not met his burden, and the trial court's grant of summary judgment should be affirmed.

B. The Trial Court Properly Excluded Carolyn Groh as a Witness.

At the outset, Plaintiff does not and cannot allege that Ms. Groh's proffered testimony would go to the issue of liability; Ms. Groh's proposed testimony is admittedly limited to Plaintiff's claim for emotional distress damages on his WLAD discrimination claim. CP 245-47. Plaintiff also admits that he sought to call Ms. Groh as a witness for trial (and not to defeat summary judgment). CP 247; *see also* Appellant's Brief, p. 18. Therefore, if the Court affirms summary judgment for MCFP, the issue of whether or not the trial court properly excluded Ms. Groh's proffered trial testimony is moot. *See Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 808, 123 P.3d 88 (2005) (affirmance of trial court's grant of summary judgment for the defendants rendered the plaintiff's CR 23 motion for class certification moot).

1. The Trial Court Did Not Abuse its Discretion in Excluding Ms. Groh Where Plaintiff Failed to Timely Disclose Her as a Witness. At the outset of this case, the trial court ordered Plaintiff to disclose all witnesses no later than May 15, 2009, and ordered that discovery be

completed by September 30, 2009. CP 258. Plaintiff failed to disclose any witnesses on or before May 15, 2009, and, in fact, failed to disclose any witnesses before the close of discovery.<sup>16</sup> CP 221-22. Plaintiff has not offered any explanation for his failure to timely disclose any witnesses – much less his failure to timely disclose Ms. Groh as a potential witness as to his emotional distress claim. *See* CP 207-11, 219-220, 247.

The trial court has authority to strike a witness as a sanction upon a showing of “intentional or tactical nondisclosure, willful violation of a court order, or unconscionable conduct.” *Blair*, 150 Wn. App. at 909. “A party’s failure to meet specific court ordered discovery deadlines is a presumptively willful violation of the court’s orders.” *Id.* at 906; *accord*, *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 327, 54 P.3d 665 (2002) (citation omitted). In *Blair*, as here, the plaintiff failed to disclose any witnesses by the court-ordered deadline; thereafter, the trial court struck seven of the fourteen witnesses and two additional expert witnesses the plaintiff identified after the deadline. *Blair*, 150 Wn. App. at 907-08. In affirming the trial court’s decision under the abuse of discretion standard, the Court of Appeals confirmed that, as the plaintiff was unable to provide any legitimate reason for her failure to timely disclose witnesses, the

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<sup>16</sup> The parties’ limited extension of discovery to October 30, 2009, did not relate to or contemplate the identification of witnesses by either party as to Plaintiff’s emotional distress claim. CP 221, 255-56.

plaintiff's violation of the trial court's discovery orders was deemed to be willful. *Id.* at 909.

Plaintiff cites only to Division III's decision in *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 155 P.3d 978 (2007). In *Peluso*, the Court of Appeals held that the trial court abused its discretion in failing to consider lesser sanctions on the record. *Id.* at 69-70 (citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)). However, *Peluso* is distinguishable because it dealt with the trial court's exclusion of an expert witness on the issue of liability – not the exclusion of a lay witness as to damages. *Peluso*, 128 Wn. App. at 67-69.

In addition, Division I declined to follow *Peluso* and its interpretation of the *Burnet* decision. *Blair*, 150 Wn. App. at 909-10 & n.9. In *Blair*, Division I affirmed the trial court's exclusion of witnesses for the plaintiff's failure to timely disclose them even though the trial court failed to make specific *Burnet* findings. *Blair*, 150 Wn. App. at 909. In support of its decision, Division I quoted the following language from the Supreme Court addressing *Burnet*: “nothing in *Burnet* suggests that trial courts must go through the *Burnet* factors every time they impose

sanctions for discovery abuses.” *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006).<sup>17</sup>

As in *Blair*, the record here provides adequate grounds to evaluate the trial court’s decision. Plaintiff violated the trial court’s discovery order and failed to disclose any witnesses – much less Ms. Groh – by either the deadline for disclosing witnesses or even the discovery deadline. Plaintiff also failed to explain his untimely disclosure. Plaintiff’s violation is therefore presumptively willful. *Behr Process Corp.*, 113 Wn. App. at 327 (citation omitted).

In sum, Plaintiff has failed to show that the trial court’s order is based on untenable grounds – there is no evidence that the trial court relied on unsupported facts or applied the wrong legal standard. *Magana*, 167 Wn.2d at 582-83. Plaintiff has also failed to show that the trial court’s order is manifestly unreasonable – the trial court here issued the same discovery sanction that was affirmed in *Blair*. *Id.* Accordingly, the trial court’s order should be affirmed.

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<sup>17</sup> Division II has not yet issued a reported decision that directly speaks to this issue. In *Behr*, Division II reviewed the trial court’s order issuing a default judgment against Behr as a sanction for Behr’s deliberate failure to disclose evidence. *Id.* at 316, 329. The sanction of a default judgment is “the most severe sanction” and, therefore, unquestionably one of the “harsher remedies” that requires the trial court to make *Burnet* findings. *See Mayer*, 156 Wn.2d at 688 (citations omitted).

2. The Trial Court Did Not Abuse its Discretion in Excluding Ms. Groh from Flatly Contradicting Plaintiff's Prior Unequivocal Statement. In his deposition, Plaintiff unequivocally testified – consistent with his discovery responses – that he is not alleging emotional distress. CP 221-22, 225-29, 232. Ms. Groh admits that Plaintiff told her that he testified “that he did not suffer mentally from his termination from Mason County Forest Products.” CP 245. Nonetheless, Ms. Groh wants to testify to the contrary – that Plaintiff did suffer emotional distress. CP 245. Plaintiff admits that Ms. Groh’s proffered testimony would be limited to the issue of Plaintiff’s alleged emotional distress. CP 245-47. The trial court did not abuse its discretion in excluding Ms. Groh’s testimony to the contrary.

The seminal case on this issue is *Dahlgren v. Blomeen*, 49 Wn.2d 47, 298 P.2d 479 (1956). In *Dahlgren*, the matter concerned contradictory testimony on the issue of whether or not the decedent had executed an unsigned carbon copy of a written agreement. *Id.* at 49. The attorney who drew up the written agreement testified that he was reasonably certain that the decedent had signed the agreement. *Id.* The respondent testified that, although he remembered the decedent signing an agreement at the attorney’s office, he did not think that the unsigned carbon copy offered

was the same agreement. *Id.* at 51. The Supreme Court allowed the contradictory testimony finding:

This is not a case where a party has testified to facts *not open to observation and peculiarly within his own knowledge*, which facts if true would defeat his cause of action or his defense.

*Id.* at 53 (emphasis added); accord *Whitney v. State*, 24 Wn. App. 836, 840, 604 P.2d 990 (1979). In other words, as there were multiple parties (including the respondent and the attorney) who could have observed the physical act of the decedent signing the written agreement, the contradictory testimony on that fact was allowed.

In *Whitney*, the plaintiff testified about the placement of a sweeper which she struck with her vehicle on a roadway. *Id.* at 837. The plaintiff's recollection of the sweeper's location contradicted photographs of the sweeper's location. *Id.* at 838. As in *Dahlgren*, the court permitted the plaintiff to offer the contradictory evidence, because it related to a fact (the sweeper's location) that was open to observation by multiple witnesses and was not peculiarly within the plaintiff's own knowledge. *Id.* at 840-42.

Here, the facts are inapposite to those set forth in *Dahlgren* and *Whitney*. Plaintiff is not seeking to introduce evidence from another

witness to contradict his own physical observations about a fact in dispute (e.g., the execution of an agreement or the placement of a sweeper). Rather, Plaintiff is seeking to introduce evidence from another witness to contradict his own testimony regarding his alleged, internal emotional distress, which is a fact particularly within his own knowledge. Plaintiff has unequivocally testified that he did not suffer emotional distress, a fact that even Ms. Groh acknowledges. CP 221-22, 225-29, 232. Ms. Groh's proffered testimony is therefore precluded by Plaintiff's prior inconsistent statements. *Dahlgren*, 49 Wn.2d at 53; *Whitney*, 24 Wn. App. at 840.

#### VI. CONCLUSION

For these reasons, the trial court's Order Granting Defendants' Motion for Summary Judgment should be affirmed, and the trial court's Order Denying Plaintiff's Motion to Allow an Additional Witness should be declared moot, or, in the alternative, affirmed.

RESPECTFULLY SUBMITTED this 30th day of June, 2010.

LANE POWELL PC

By 

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STATE OF WASHINGTON

**CERTIFICATE OF SERVICE**

I, Lorrie A. Salinas, certify under penalty of perjury and the laws Ca  
of the State of Washington:  
BY \_\_\_\_\_  
CITY

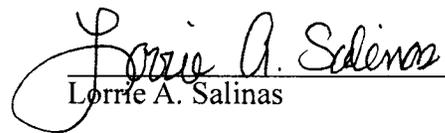
I am a citizen of the United States and a resident of King County, Washington. I am over the age of 18 years and am not a party to the within cause. My business mailing address is 1420 Fifth Avenue, Suite 4100, Seattle, Washington 98101-2338.

On the date identified below, I caused the foregoing to be served on the following parties in the manner as indicated below:

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- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**

EXECUTED this 30th day of June, 2010, at Seattle, Washington.

  
Lorrie A. Salinas