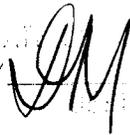


COURT OF APPEALS  
DIVISION TWO

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BY 

No. 41499-6-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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JO-ANN FULTON

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

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BRIEF OF APPELLANT

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Frederick H. Gautschi, III  
WSBA No. 20489  
Connell, Cordova, Hunter &  
Gautschi, PLLC  
1325 Fourth Avenue, Suite 1500  
Seattle, WA 98101  
(206)583-0050  
Attorneys for Appellants

Larry J. King  
WSBA No. 1325  
P.O. Box 796  
Olympia, WA 98507  
(360)352-1591  
Attorney for Appellants

**ORIGINAL**

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## ASSIGNMENT OF ERROR

The trial court erred in dismissing on summary judgment Jo-Ann Fulton's (Ms. Fulton's) sex discrimination claim against the Department of Social and Health Services (DSHS).

### ISSUES ARISING FROM ASSIGNMENT OF ERROR

1. Does the Washington Law Against Discrimination (Ch. RCW 49.60) (WLAD) permit a state agency to hire a male to fill a permanent Washington Management Service (WMS) position when a female who has expressed an interest in the position has had no opportunity to apply for the position?
2. May a state agency's decision to fill a WMS position with an applicant from the pool of applicants for another WMS position qualify as a legitimate non-discriminatory reason for failing to consider a female who had no opportunity to apply for the first WMS position?

## INTRODUCTION

This case reduces to a simple question: does the WLAD permit a state agency to employ an informal job selection process that has the effect of precluding a woman from competing for a WMS position that goes to a man? Ms. Fulton was interested in serving as the permanent Operations Manager in DSHS's Office of Claims Processing. Yet, because the position was never posted, she did not have the opportunity to apply and compete to fill it. Instead, the informal selection process that DSHS used to fill the position resulted in the appointment of a male who, prior to the appointment, reported to Ms. Fulton.

## STATEMENT OF THE CASE

The salient facts at the heart of Ms. Fulton's appeal are undisputed. In 1984, Ms. Fulton commenced employment with the Department of Social and Health Services (DSHS). Over the next 20 plus years she held a number of positions of increasing responsibility in that agency. In December 2004, she attained a supervisor position as a Medical Assistance Specialist 5 (MAS 5) in the Division of Program Support – Claims Processing in the Health and Recovery Services Administration (HRSA) in DSHS. Her supervisor at the time was Debbie Coverdell, the Operations Manager for the Office of Claims Processing (OCP). In October 2005, Debbie Coverdell left state service.

Kathy Eberle (Ms. Eberle), the then-Office Chief for OCP, appointed Ms. Fulton to a temporary position as the Operations Manager, a WMS position. She held that position from October 17, 2005 until the end of March 2006. During that period no one at DSHS indicated to her that her job performance in the position was other than satisfactory. CP 74, 123, 124..

In March 2006, Ms. Eberle left DSHS for a position with the Department of Licensing. Before she left, Ms. Eberle asked Ms. Fulton if she would be willing to hold the position of Office Chief in OCP until Mary Anne Lindeblad (Ms. Lindeblad), the Director of the Division of Program Support, was able to recruit applicants for the position and fill it. Ms. Fulton expressed a reluctance to do so and indicated to Ms. Eberle that she liked serving as the Operations Manager and wanted to return to that position after her appointment as Office Chief ended. Effective March 27, 2006, Ms. Lindeblad appointed Ms. Fulton to the position of Office Chief in OCP in an “acting” capacity. CP 75, 124.

On August 1, 2006, Ms. Lindeblad informed Ms. Fulton that Robert Covington (Mr. Covington) had become the reporting authority for the Office Chief and the Operations Manager positions in OCP. A reorganization of DSHS led to the change in supervisors for OCP. As of August 1, 2006, Ms. Fulton had only a passing acquaintance with Mr.

Covington. The two of them had never met on a one-on-one basis prior to that date. Their interactions were limited to the period during which she had held the Office Chief position and involved their mutual attendance at meetings of managers at DSHS. Ms. Fulton recalls that the meetings dealt largely with “routine” matters and were not stress inducing for her. CP 124, 125.

Sometime after August 1, 2006, Mr. Covington initiated efforts to fill the position of Office Chief on a permanent appointment basis. The position was posted and a number of candidates applied. Consistent with her representation to Ms. Eberle in March 2006, Ms. Fulton did not apply: She had no interest in a permanent appointment as Office Chief. As she made clear to Ms. Eberle in March 2006, Ms. Fulton was interested in an appointment as Operations Manager for OCP. Despite her interest in the Operations Manager position, once Mr. Covington assumed operational control over OCP, Ms. Fulton had no chance of attaining an appointment as to that position. DSHS did not post the position. Mr. Covington did not indicate to her that he intended to fill the Operations Manager position on a permanent basis. Nor did he solicit applications to fill the position. CP 20, 124, 125.

A three-person panel, which included Mr. Covington and Ms. Lindeblad, evaluated the applicants for the Office Chief position. The

panel ranked Karen DeLeon first and Milton Haire second. In his capacity as the appointing authority Mr. Covington selected Karen DeLeon for the permanent Office Chief position. In mid-August of 2006, Mr. Covington called Ms. Fulton into his office to inform her that he had decided to appoint Milton Haire, who at the time reported to Ms. Fulton, to the position of permanent Operations Manager for OCP. Prior to that time, Mr. Haire had never held a WMS position on either an acting or a permanent basis at DSHS. Regardless, Mr. Covington's decision derived from the fact that Mr. Haire had applied for the permanent Office Chief position and that the three-person panel had ranked him second among the pool of applicants for that position. Yet, the posting for the Office Chief position did not indicate that applying for that position was a prerequisite to being considered for the Operations Manager position. CP 20, 21, 125.

Because Ms. Fulton was not among the applicants for the permanent Office Chief position, neither Mr. Covington nor the other two members of the panel compared her qualifications for the position with those of Mr. Haire. Nor in the brief period in which Mr. Covington functioned as Ms. Fulton's supervisor did he ever observe her job performance. Further, when she went into her first one-on-one meeting with Mr. Covington in mid-August 2006, Ms. Fulton had no idea that he

had already decided to fill the Operations Manager position on a permanent appointment basis by appointing Mr. Haire. CP 125.

On July 16, 2009, Ms. Fulton filed a complaint against DSHS in Thurston County Superior Court which she alleged that in failing to consider her for the permanent Operations Manager position, the agency had discriminated against her on the basis of sex in violation of the WLAD. On September 30, 2010, DSHS moved for summary judgment dismissal of Ms. Fulton's claim. On October 29, 2010, the Thurston County Superior Court, Hon. Carol Murphy presiding, heard oral argument and granted DSHS's motion with prejudice. This appeal followed. CP 5, 13, 141-142, 143-145.

## ARGUMENT

### **Standard of Review**

On review of a summary judgment order, [the appellate court] engages in the same inquiry as the trial court. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001). Summary judgment is appropriate only when there are no disputed issues of material fact and the prevailing party is entitled to judgment as a matter of law. CR 56(c).

*Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber*, 165 Wn.2d 679, 686, 202 P.3d 924 (2009).

Ms. Fulton claims DSHS subjected her to sex discrimination in violation of the WLAD by promoting Mr. Haire to a position that she could not know was open. An understanding of why DSHS's conduct constitutes proscribed discrimination benefits from reference to judicial and legislative efforts to eliminate this country's lengthy tradition of discriminating against members of minority groups and women.

**Simply stating through a judicial ruling or a legislative act that discrimination on the basis of, for example, race or sex, is not permissible does not eliminate discrimination.**

Eliminating this country's lengthy history of discrimination has taken decades to effect. In 1954, the U.S. Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), also known as *Brown I*. The following year the Court decided *Brown v. Board of Education*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), also known as *Brown II*. Together, those cases meant that separate was no longer equal, at least in our public schools, and that the Fourteenth Amendment's guarantee of equal protection meant that no longer could public officials deny "colored" children the educational opportunities that White children enjoyed.

Despite the clarity of the mandate of *Brown I* and *Brown II*, racial segregation persisted in numerous school systems for years after

1955. Clearly intending to find a way around *Brown I* and *Brown II*, public officials devised a variety of facially legal mechanisms for maintaining the racially segregated status quo. For example, at the time of *Brown I*, New Kent County, Virginia had two single race K-12 public schools. By law the county's white children attended New Kent school, which was located on the East side of the county. Negro children attended George W. Watkins school on the West side of the county. In contrast to other counties in Virginia, White and Negro children were similarly distributed throughout the county. As a result, White children from the West side of the county traveled to the East side of the county to attend public school. At the same time, Negro children who lived on the East side of the county traveled to the George W. Watkins school on the West side of the county. In a clear effort to maintain racially segregated schools in the aftermath of *Brown I* and *Brown II*, public officials effected "freedom of choice" plans which allowed the county's children to attend the school of their choice. Unremarkably, for more than a decade after *Brown I* and *Brown II*, New Kent County's two public schools remained nearly all-White or all-Negro. Only a U.S. Supreme Court decision declaring that New Kent County's freedom-of-choice plan violated the 14<sup>th</sup> Amendment's guarantee of equal protection brought about a change in the status quo. *Green v. Sch. Bd.*

*of New Kent County*, 391 U.S. 430, 431-435, 440-441, 88 S. Ct. 1689, 20 L. Ed.2d 716 (1968).

The demographics in housing in other school districts often matched the demographics in the public schools in those districts. That is, White schools were populated with children who lived in White sections of the school district. Children who attended all-Negro schools lived in Negro sections of the school district. At the time of *Brown I* and *Brown II*, Charlotte-Mecklenburg County, North Carolina exemplified that reality. In response to *Brown I* and *Brown II*, public officials drew pie-shaped attendance zones, based on where children lived, to determine where the district's children would attend school. As in *Green*, the public officials did not require children to attend single-race schools. Yet, the facially neutral attendance policy perpetuated racially segregated schools in the county. Sixteen years after *Brown II*, the U.S. Supreme Court declared that *Brown II* required remedial action to effect a change to a unitary public school system that adherence to an attendance-zone policy had prevented from occurring in Charlotte-Mecklenburg County. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6-10, 15-18, 91 S. Ct. 1267, 28 L. Ed.2d 554 (1971).

The insidious mechanisms that public officials employed to maintain racial segregation in public schools, illustrated by *Green* and *Swann*, insinuated themselves into other facets of American life, including the workplace. One decade after the U.S. Supreme Court decided *Brown I*, Congress passed sweeping legislation that, among other things, focused on eliminating racial discrimination in employment. Yet, Title VII of the Civil Rights Act of 1964 (Title VII), codified at 42 U.S.C. §2000e, *et seq.*, encountered considerable efforts, on the part of Senators from states that made up the old Confederacy, to defeat the legislation. In perusing the portion of then-Justice Rehnquist's dissenting opinion in *United Steelworkers v. Weber*, 443 U.S. 193, 220-255, 99 S. Ct. 2721, 61 L. Ed.2d 480 (1979), that focused on the Senate debates regarding Title VII, one cannot miss the names and remarks of some of the Senate's steadfast defenders of racial segregation, including, for example, Stennis of Mississippi, Sparkman of Alabama, Russell and Talmadge of Georgia, Smathers of Florida, Ervin of North Carolina, and Long of Louisiana. Their remarks included representations that the proposed legislation would force employers to hire "Negroes" who were not qualified to fill the jobs that the employers sought to fill. When it became apparent that the legislation would pass, in a last-ditch effort to effect defeat, one

legislator inserted an amendment that would bar discrimination in employment on the basis of sex. *Id.* at 236-249; *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-64, 106 S. Ct. 2399, 91 L. Ed.2d 49 (1986).<sup>1</sup>

In analyzing employment discrimination cases brought, as here, pursuant to the WLAD, Washington courts look to their federal counterparts for their analyses of similar cases brought under the federal statutes that proscribe employment discrimination. Washington courts are not bound by those cases where they do not serve the purposes of the WLAD. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988).

One manifestation of employment discrimination cases pursuant to Title VII and/or the WLAD is what courts refer to as failure-to-promote, or failure-to-hire, cases. Further, U.S. Supreme Court case law teaches that a Title VII discrimination claim based on the failure of an employer to promote a complaining employee can qualify as an instance of proscribed “disparate impact” or “disparate treatment” discrimination. The former type of discrimination occurs as the result of a facially neutral policy or practice the application of which results in very few or no persons in a protected category being promoted into

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<sup>1</sup> The on-line New World Encyclopedia entry titled Civil Rights Act of 1964, accessible at [www.newworldencyclopedia.org](http://www.newworldencyclopedia.org), explains that the Chair of the House Rules Committee, Howard W. Smith, “jokingly” inserted sex into the bill as a protected category at the last minute.

particular positions within the employer's organization. That is, disparate impact sex discrimination, for example, affects the class of women of which a plaintiff is a part. In a disparate impact case of sex discrimination the plaintiff(s) need not demonstrate that the employer intended to discriminate against women. Instead, the plaintiff's burden is to satisfy a statistical test that demonstrates the disparate impact of the employer's practice or policy on women as a class. If women and men are equally "impacted" by the policy or practice, the plaintiff has not proved disparate impact sex discrimination. *Lowe v. City of Monrovia*, 775 F.2d 998, 1004-1005 (9<sup>th</sup> Cir. 1985).

The U.S. Supreme Court has made clear that a plaintiff in a disparate treatment discrimination lawsuit can follow one of two avenues to prove the existence of discrimination. She may introduce direct evidence of the discrimination in the form of, for example, remarks by a supervisor that the employer prefers a male to fill the position in question. Alternatively, she may rely on circumstantial evidence to prove the existence of discrimination. *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714, n. 3, 75 L. Ed.2d 403, 103 S. Ct. 1478 (1983).

As to the second avenue, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), a case involving

an employer's failure to re-hire a previously laid off employee, the U.S. Supreme Court recognized that proscribed employment discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.* (Title VII), can exist even if a plaintiff cannot introduce direct evidence of it. In the absence of direct evidence a Title VII plaintiff must first establish a *prima facie* case of discrimination by satisfying a four-part test: (1) she is part of a protected class; (2) she is qualified for a position that she seeks or holds; (3) she suffered an adverse employment action, e.g. was not promoted or hired; and (4) the position that she sought went to a person not part of the plaintiff's protected class. In failure-to-promote cases under the WLAD the "*McDonnell Douglas*" four-part *prima facie* test requires the plaintiff to show "that (1) she is a woman; (2) she applied and was qualified for a position; (3) she was not offered the position; and (4) the promotion went to a man. *Kuyper v. Dep't of Wildlife*, 79 Wn. App. 732, 735, 904 P.2d 793 (1995)." *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 623-624, 128 P.3d 633 (2006).

In *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978), the U.S. Supreme Court explained that the *McDonnell Douglas* formulation "was never intended to be rigid, mechanized, or ritualistic." Otherwise, a rigid application of the four-

prong test would allow employers to devise insidious methods of preserving the practice of discrimination in the workplace in ways analogous to what public officials accomplished through, for example, freedom-of-choice plans for determining which schools children would attend.

Failure-to-hire and failure-to-promote cases highlight the need for flexibility in that formulation. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365, 366, 97 S. Ct. 1843, 1870, 52 L. Ed. 2d 396 (1977), involved an employer and a union that together systematically discouraged Hispanic employees from applying for promotions. Writing for the Court, Justice Stewart explained that

the company's assertion that a person who has not actually applied for a job can never be awarded seniority relief cannot prevail. The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.

If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices - by his consistent discriminatory treatment of actual applicants, by the

manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.<sup>51</sup> When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

*Id.* at 365-366.

*Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9<sup>th</sup> Cir. 1980), involved similar systematic discrimination against women in the context of promotions. According to Margaret Reed, she had occupied the same position at Lockheed for 25 years with no opportunity for promotion. She alleged further that no male at the company had spent more than ten years in the same position. While determining that questions of fact existed as to those allegations, the Court noted that

under the Lockheed system, she had no notice of an opening. Further, her responses on deposition indicated that women at Lockheed had the legitimate belief that because of a pervasive discriminatory policy, an application would be futile.

*Id.* at 761-762. Citing to *International Brotherhood of Teamsters, supra*, the Court refused to accept Lockheed's argument that it could not have discriminated against Ms. Reed because it never rejected her for promotion when she had never applied for one. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d at 762.

Systematic mechanisms that bar a member of a minority group or a woman from a job come in a variety of forms beyond those presented in *International Brotherhood of Teamsters* and *Reed*. Those two cases describe circumstances in which an aggrieved employee did not apply for a position because doing so was futile. In *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11<sup>th</sup> Cir. 1984), futility was not the issue. There, a Black man whom Birmingham Saw Works employed as a janitor, sought a position in sales with his employer. The employer systematically told Black job applicants that the only jobs available were as janitors. Contrary to that representation, at the same time Birmingham Saw Works had open positions in sales, which it filled by hiring White applicants. Under a rigid application of the *McDonnell Douglas* formulation Mr. Carmichael and other Black persons who wished to obtain employment in sales with Birmingham Saw Works could not establish a *prima facie* case of race discrimination because they could not demonstrate that they had applied and were qualified for sales positions. Clearly, Birmingham Saw Works utilized the original articulation of the *McDonnell Douglas* formulation to maintain an all-White sales force. Any other explanation for the Birmingham Saw Works' failure to advertise open sales positions is impossible to imagine. In explaining how the practice violated the law

against discrimination in employment, the Court stated, among other things,

*McDonnell Douglas* "align[s] closely the prima facie case with proof of elements within the plaintiff's own objective knowledge." . . . By showing that he applied, the plaintiff shows that the employer knew he was interested in the job. But when there is not formal notice of the job's availability, the plaintiff may have no means, within his own knowledge, of showing whether the employer considered him or not. Furthermore, when an employer uses such informal methods it has a duty to consider all those who might reasonably be interested, as well as those who have learned of the job opening and expressed an interest.

Accordingly, a plaintiff makes out a prima facie case -- that is, he creates a presumption of discrimination and forces the employer to articulate legitimate reasons for his rejection -- as long as he establishes that the company had some reason or duty to consider him for the post. The employer cannot avoid a Title VII violation by showing that it incorrectly assumed that the plaintiff was uninterested in the job. When the plaintiff had no notice of or opportunity to apply for the job, such a reason for rejection is "legally insufficient and illegitimate". [citation omitted].

*Carmichael v. Birmingham Saw Works*, 738 F.2d at 1133-1134.

Two aspects of the quoted remarks above deserve attention.

First, if an employer fails to post a position in which a person in a protected class has expressed an interest and if that person does not secure the position, the aggrieved employee does not have to show that he or she applied for the position in order to satisfy the *McDonnell Douglas* four-part test. Second, if the employer offers as the reason for not hiring the aggrieved employee the failure of the employee to apply

for the un-posted position, that reason is legally insufficient and illegitimate.

While *Carmichael* originated in a part of the country that practiced legally protected racial discrimination in hiring and promotions, the practice was not confined to states of the old Confederacy. For example, as late as 1986, Metal Service Company (MSC), a small corporation that was located in Apollo, Pennsylvania, maintained an all-White work force. One of the methods of doing so involved two elements. First, MSC “advertised” open positions through word-of-mouth. At the same time, MSC had a contractual agreement with a state agency, Pennsylvania Job Service (PJS), that functioned as an employment matching service. MSC posted notices at its headquarters that instructed potential employees to apply for positions with the PJS. During 1984 and 1985 Willie Brown, a Black male, attempted on several occasions to apply directly to MSC for a position. He never received an interview. During the same period MSC hired White males through the word-of-mouth system. When the EEOC pursued a Title VII race discrimination lawsuit against MSC on Mr. Brown’s behalf, the company argued that he could not establish a *prima facie* case because he had not applied for a position. That is, he had not applied for an open position because he did not apply through PSC.

*EEOC v. Metal Service Company*, 892 F.2d 341, 343-344 (3<sup>rd</sup> Cir.

1990).

The 3<sup>rd</sup> Circuit rejected MSC's argument after noting that

[c]ourts have generally held that the failure to formally apply for a job opening will not bar a Title VII plaintiff from establishing a prima facie claim of discriminatory hiring, as long as the plaintiff made every reasonable attempt to convey his interest in the job to the employer. This is true both in failure to promote cases, (citations omitted) and failure to hire cases (citations omitted).

*Id.* at 349-351. Consistent with the Court's ruling in *Carmichael*, the 3<sup>rd</sup>

Circuit reasoned that

A relaxation of the application element of the prima facie case is especially appropriate when the hiring process itself, rather than just the decision-making behind the process, is implicated in the discrimination claim or is otherwise suspect. In *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793 (11th Cir. 1988), a black hospital employee brought a Title VII disparate treatment action against his employer for denying him fair promotional opportunities on the basis of his race. The claim stemmed from the fact that a white man had been hired for a supervisor position through an informal and secretive hiring process through which the plaintiff did not have the opportunity to apply. *Id.* at 797. Although the plaintiff was qualified for the position, the white worker landed the job primarily, it seems, because of his attendance at the hospital administrator's barbecues and his becoming the administrator's "drinking buddy." *Id.*

The court noted that informal, secretive and subjective hiring practices are suspect because they tend to facilitate the consideration of impermissible criteria:

[The Administrator's] informal methods necessarily and intentionally favored those who moved within his social circles--i.e., white people. . . . [A] black man

stood little chance of getting this promotion. This "method" of promotion patently failed to afford a black man the equal treatment which Title VII demands.

*Id.* at 798-99. Thus, the court held that "when the failure to promote arises out of an informal, secretive selection process . . . a plaintiff may raise an inference of intentional, racially-disparate treatment without proving that he technically applied for . . . the promotion." *Id.* at 797. (citation omitted).

*Id.* at 349-350.

In a lengthy footnote the court in *Carmichael* discussed *Lowe v. City of Monrovia*, 775 F.2d 998 (9<sup>th</sup> Cir. 1985), and noted as "particularly instructive" the 9<sup>th</sup> Circuit's reasoning as to the need, in some circumstances, for relaxing the requirement that a plaintiff applied for a position that she did not obtain. *Id.* In *Lowe*, a police department had a complex system for determining whom to hire into entry level positions as police officers. Under that system, Ms. Lowe, a Black female, who had completed a police officer training program, applied for an entry level police officer position in Monrovia's all-White, all-male police department. The hiring system that the department utilized had two features that effectively blocked Ms. Lowe from "applying" for an entry level position. First, sometime after she applied she became part of the department's eligibility list for entry level hires. Second, the eligibility list automatically expired six months later. At the time Ms. Lowe applied, the

department had open entry level positions. Under the hiring system, however, she was not an applicant for an entry level position until her name appeared on the eligibility list. During the six-month period that she was on the eligibility list, there were no open entry-level positions.

Subsequent to the automatic expiration of the eligibility list, the department had open entry level positions that it filled. According to the department, at that time Ms. Lowe was no longer an applicant for any of those positions. *Id.* at 1002-1003.

In seeking dismissal of Ms. Lowe's discrimination claims arising out of its failure to hire her, Monrovia argued that she could not satisfy the second prong of the *McDonnell Douglas* formulation for establishing a *prima facie* case. Specifically, according to Monrovia, Ms. Lowe never applied for an open entry level position in the department and was never rejected as an applicant. Reasoning that because the department advertised and filled open positions after Ms. Lowe applied but before her name appeared on the eligibility list, she, in fact, had applied for an open position and was rejected. That is, she had expressed an interest in an open entry level position but never had an opportunity to compete for such a position because of the hiring system that the department used to select entry level police officers. *Id.* at 1005-1006.

As explained above, in *Carmichael, EEOC v. Metal Service Company*, and *Lowe* employers did not advertise that they maintained Whites only workforces. Similarly, in *Green* and *Swann* public officials did not represent that the public schools within their jurisdiction would be single-race. Regardless, just as the U.S. Supreme Court did in *Green* and *Swann*, the courts in *Carmichael, EEOC v. Metal Service Company*, and *Lowe* recognized as insidious the practices that effectively barred non-Whites from specific categories of positions that the employers filled. Clearly, without a flexible application of the *McDonnell Douglas* formulation, by utilizing an informal, or even secret hiring process, an employer, who wished to exclude a person of a racial minority or a woman from having the opportunity to compete for a position, could do so without fear of violating Title VII.

**Under an appropriate application of *Carmichael, et al.*, in order to establish a *prima facie* case of sex discrimination Ms. Fulton did not have to show that she applied for the Operations Manager position.**

As explained above, *Carmichael, et al.* teach that an employee who is interested in a promotion to a specific position with her employer need not necessarily have to show that she applied for the position in order to establish a *prima facie* case of sex discrimination. Instead, she must

show first that she expressed an interest in the position that she did not attain.

In its motion for summary judgment, DSHS argued that Ms. Fulton did not satisfy the second prong of the *McDonnell Douglas* test because she did not apply for the Office Chief position. She did, however, express an interest in the Operations Manager position. For approximately six months Ms. Fulton held that position on a temporary basis. In March 2006, Ms. Eberle asked her to fill the Office Chief position until Ms. Lindeblad could advertise and fill that position. Ms. Fulton expressed her reluctance to leave the Operations Manager position because she liked it. She explained to Ms. Eberle that she wanted to return to the Operations Manager position after her tenure as the temporary Office Chief had ended, if she were to agree to fill the latter position. CP 124. Thus, Ms. Fulton satisfied the first of *Carmichael, et al.*'s two showings for not requiring a plaintiff to demonstrate that she applied for a position that she did not attain.

In addition, *Carmichael, et al.* teach that Ms. Fulton must show that DSHS utilized an informal system for filling the Operations Manager position and that as the result of the system she was precluded from applying for the position. There is no dispute that DSHS did not post the Operations Manager position, that DSHS selected a male from

the pool of applicants for the Office Chief position to fill the Operations Manager position, and that DSHS did not give notice to anyone interested in the Operations Manager position that she had to apply for the Office Chief position in order to be considered for the Operations Manager position. Accordingly, in order to satisfy the test for a *prima facie* case of sex discrimination Ms. Fulton did not have to show that she applied for the Operations Manager position.

**The record contains evidence that Ms. Fulton was qualified for the Operations Manager position.**

DSHS has claimed that Ms. Fulton has not “explained” her qualifications for the Operations Manager position. This assertion derives from two circumstances. First, Ms. Fulton held the Operations Manager position on an “acting basis only.” Second, as the result of observing her while he was her supervisor, Mr. Covington formed a negative opinion of her qualifications. CP 129. DSHS failed to present, however, any evidence to support a conclusion that the qualifications for holding the Operations Manger position on a permanent basis differed from those required for an acting appointment. Further, DSHS ignored altogether the fact that Ms. Fulton held the Office Chief position, a position superior to that of Operations Manager, at the time when Mr. Covington decided to appoint Mr. Haire to the

Operations Manager position. Again, DSHS offered no evidence that the qualifications for holding the Office Chief position on a permanent basis differed from those for holding the position on an acting basis. Nor has DSHS argued that it appointed Ms. Fulton to two WMS positions for which the agency decided she was not qualified. Further, there is no evidence in the record that during the period in which Ms. Fulton held those two positions anyone at DSHS judged her job performance to be unsatisfactory.

Regarding Mr. Covington's opinion regarding Ms. Fulton's managerial qualifications, as we explained above, Ms. Fulton is clear that as of the meeting in which he informed her of his decision to appoint Mr. Haire to the Operations Manager position, Mr. Covington had never observed her. Accordingly, Mr. Covington formed his opinion after he made the appointment decision. Finally, as DSHS explained in its motion for summary judgment, a three-person panel ranked the applicants in the Office Chief pool. Mr. Covington was only one member of that panel. Where Ms. Fulton would have ranked had she been part of the pool is impossible for anyone to say. Thus, Mr. Covington's *post hoc* opinion of Ms. Fulton's managerial qualifications is irrelevant to the question whether she was qualified for the Operations

Manager position. The only meaningful evidence in the record on the matter indicates that she was qualified.

**Ms. Fulton satisfied the fourth prong of the *McDonnell Douglas* test; DSHS filled the Operations Manager position with a male.**

As to the fourth prong of the *McDonnell Douglas* test, DSHS asserted as follows:

Although Ms. Fulton focuses solely on the Operations Manager position, the candidates were selected from the same candidate pool for permanent promotion. A female candidate (Karen DeLeon) was chosen to fill the higher-level position of Office Chief. The Operations Manager position went to the second highest ranking candidate, a male (Milton Haire).

CP 28.

Ms. Fulton does not dispute the accuracy of the above-recitation of the results of the selection process. Implicit in that recitation is an argument that seems to go as follows: Ms. DeLeon ranked first among the applicants for the Office Chief position. In order to be considered for the Operations Manager position, one had to have applied for the Office Chief position. Because the panel that evaluated the applicant pool for the Office Chief position ranked a woman, Ms. DeLeon, first, DSHS could not have discriminated against Ms. Fulton in failing to consider her for promotion to the Operations Manager position. As we explained above, however, that Ms. Fulton did not apply for the Office

Chief position is irrelevant to her claim that DSHS discriminated against her as to the Operations Manager position. Even if it were relevant, U.S. Supreme Court case law is clear that Mr. Covington's appointment of a woman to that position is of no consequence. In the context of an age discrimination case the U.S. Supreme Court explained that selection of someone from a protected class for a position that a plaintiff from the protected class sought does not defeat the plaintiff's claim of employment discrimination:

The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*.

*O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S. Ct. 1307, 134 L. Ed.2d 433 (1996).

In summary, the evidence is clear: Ms. Fulton is a woman; she expressed an interest in filling the Operations manager position that she had held without any indication that she performed unsatisfactorily ; DSHS never advertised the position but instead filled it through an informal, secret process; DSHS did not promote Ms. Fulton to fill the Operations Manager position; and DSHS filled the Operations Manager with someone outside Ms. Fulton's protected class. Accordingly, she carried her burden of production as to a *prima facie* case of sex discrimination.

**Ms. Fulton met her burden of producing evidence that DSHS's reason for not promoting her to the Operations Manager position is a pretext for sex discrimination.**

Under the familiar *McDonnell Douglas* formulation, once a plaintiff has established a *prima facie* case of discrimination, the burden shifts to the employer to come forward with a legitimate, non-discriminatory reason for the adverse employment action. *Hill v. BCTI Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001). Here the adverse action consisted of DSHS's failing to consider Ms. Fulton for the Operations Manager position and, as a result, rejecting her. DSHS's allegedly legitimate, non-discriminatory reason for rejecting Ms. Fulton is that she was not among the pool of applicants for the Office Chief position:

Even assuming that Ms. Fulton can satisfy the *facie* elements of a gender discrimination claim, [DSHS] has advanced legitimate non-discriminatory reasons for the selection of other qualified candidates for the Office Chief and Operations Manager positions. A panel of three managers, including a woman who previously served as the appointing authority over [OCP] interviewed candidates for the Office Chief position. A female candidate with excellent qualifications was ranked first by the panel, and was selected by [Mr.] Covington. The committee's second choice, a male, was chosen for the subordinate position of Operations Manager, again by [Mr.] Covington.

Because Ms. Fulton did not apply for the Office Chief position, she was not included in the candidate pool and,

thus, not considered for either position. Even had Ms. Fulton applied for the permanent Office Chief position, the appointing authority [, i.e., Mr. Covington,] lacked confidence in her managerial abilities and would not have hired her for either position.

CP 27, 28.

Thus, DSHS advanced two allegedly legitimate, non-discriminatory reasons for failing to promote Ms. Fulton to the Operations Manager position. The first is the same as that which the agency advanced in arguing that Ms. Fulton did not satisfy the second and fourth prongs of the *McDonnell Douglas* test for establishing a *prima facie* case of sex discrimination: She did not apply for the Office Chief position and a qualified woman was selected to fill that position. Second, DSHS claims that because he lacked confidence in Ms. Fulton's managerial abilities, even if she had been in the applicant pool for the Office Chief position, Mr. Covington would not have promoted her to the Operations Manager position.

The *McDonnell Douglas* formulation requires that once an employer has advanced a legitimate, non-discriminatory reason for its failure to promote the plaintiff, she must produce evidence to show the reason to be a pretext for discrimination. *Hill v. BCTI Fund-I*, 144 Wn.2d at 182. At a minimum, evidence of pretext must show that the employer's reason for the action it took is not believable. *Id.* Ms.

Fulton does not dispute the first of the two reasons that DSHS offered as justification for not promoting her to the Operations Manager position. The infirmity in the reason derives from its obvious illegitimacy. As the court in *Carmichael* explained:

When the plaintiff had no notice of or opportunity to apply for the job, such a reason for rejection is "legally insufficient and illegitimate".

*Carmichael v. Birmingham Saw Works*, 738 F.2d at 1134. Much like Birmingham Saw Works attempted, DSHS argues that the same informal, secret process that precluded her from applying and being considered for the Operations Manager position accounts for the reason that she was not promoted into that position. Thus, as in *Carmichael*, the process that prevented her from applying for the Operations Manager position cannot form the basis for a legitimate, non-discriminatory reason that DSHS rejected her.

As to the second allegedly legitimate, non-discriminatory reason, the evidence is clear that Mr. Covington had no opportunity to assess Ms. Fulton's "managerial abilities" until after he called her in to inform her that he had selected Mr. Haire for the Operations Manager position. After all, he did not, as the result of a reorganization at DSHS, assume appointing authority over positions in OCP until the beginning of August 2006. Approximately two weeks later he informed Ms. Fulton

of his decision to appoint Mr. Haire. At that time Mr. Covington had never observed Ms. Fulton's "managerial abilities." He and Ms. Fulton had never met face-to-face. Nothing in Mr. Covington's declarations, CP 58-72; CP 137-140, suggests otherwise. What Mr. Covington seems to be saying in those declarations is that, at the time he was deliberating on whom to appoint to the Operations Manager position, had he known what he came to know later as to Ms. Fulton's "managerial abilities," he would not have appointed her to the Operations Manager position. The issue as to pretext focuses, however, on what Mr. Covington's views as to Ms. Fulton's managerial abilities were at the time that he was considering whom to appoint to that position. Thus, his assertion that he would not have appointed Ms. Fulton because of his observations of her "managerial abilities" is not credible.

For the reasons set forth above, Ms. Fulton carried her burden as to a showing of pretext. DSHS advanced two reasons for rejecting Ms. Fulton. The first, is, by definition, neither legitimate nor non-discriminatory. The second is not believable. In *International Brotherhood of Teamsters* the U. S. Supreme Court noted the significance of such a circumstance:

Although the McDonnell Douglas formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection

did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

*International Brotherhood of Teamsters v. United States*, 431 U.S. at 358, n. 44.

As a follow on to the sentiment expressed above, Washington follows the U. S. Supreme Court as to whether simply producing evidence of pretext is sufficient to send a discrimination case to a jury:

we hold that while a *McDonnell Douglas* prima facie case, plus evidence sufficient to disbelieve the employer's explanation, will *ordinarily* suffice to require determination of the true reason for the adverse employment action by a fact finder in the context of a full trial, \* that will not always be the case.

*Hill v. BCTI Fund-I*, 144 Wn.2d at 185. Thus, if the employer had other legitimate, non-discriminatory reasons for taking the adverse employment action at issue, the plaintiff's discrimination claim fails. Again, here DSHS has advanced two reasons for rejecting Ms. Fulton. Nothing in the record suggests another legitimate, non-discriminatory reason for doing so.

## CONCLUSION

There is no dispute that DSHS utilized an informal, secret process for selecting someone to fill a WMS position which Ms. Fulton had filled on a temporary basis for approximately six months and in which she had communicated to her superior an interest in filling again. DSHS would have the Court place its stamp of approval on the use of that process. Yet, for reasons set forth in this brief, throughout this nation's history, until courts ruled against them, employers have used similar processes in an attempt to evade the requirement that they not discriminate in decisions as to whom to hire or promote. Remarks from *EEOC v. Metal Service Company* quoted earlier in this brief bear repeating:

In *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793 (11th Cir. 1988), a black hospital employee brought a Title VII disparate treatment action against his employer for denying him fair promotional opportunities on the basis of his race. The claim stemmed from the fact that a white man had been hired for a supervisor position through an informal and secretive hiring process through which the plaintiff did not have the opportunity to apply. *Id.* at 797. Although the plaintiff was qualified for the position, the white worker landed the job primarily, it seems, because of his attendance at the hospital administrator's barbecues and his becoming the administrator's "drinking buddy." *Id.*

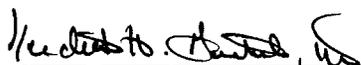
***The court noted that informal, secretive and subjective hiring practices are suspect because they tend to facilitate the consideration of impermissible criteria:*** (emphasis supplied).

*EEOC v. Metal Service Company*, 892 F.2d at 349, 350. As in *Roberts*, *supra*, the process that Mr. Covington used to appoint Mr. Haire was “informal and secretive,” and in the words of the *Roberts* court, “suspect because [it] tend[ed] to facilitate the consideration of impermissible criteria.”

Evidence in the record is clear that Ms. Fulton established a *prima facie* case of sex discrimination and satisfied her burden to produce evidence that DSHS’s allegedly legitimate, non-discriminatory reasons for rejecting her are a pretext for sex discrimination. Accordingly, she asks this Court to reverse the trial court’s granting of summary judgment dismissal of her claim against DSHS.

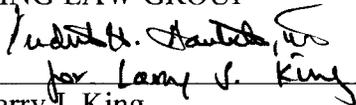
Respectfully submitted this 14<sup>th</sup> day of February, 2011.

CONNELL, CORDOVA, HUNTER & GAUTSCHI, PLLC



Frederick H. Gautschi, III  
WSBA No. 20489  
Attorneys for Jo-Ann Fulton

KING LAW GROUP



Larry J. King  
WSBA No. 01325  
Attorney for Jo-Ann Fulton

**COURT OF APPEALS, DIVISION TWO OF THE STATE OF WASHINGTON**

JO-ANN Fulton

**Plaintiff,**

NO: 41499-6-II

**Vs**

**Certificate of Service**

**STATE DSHS,**

**Defendant .**

CLERK OF COURT:

ALL OTHER INVOLVED PARTIES:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party in this action. My Business address is 110 11<sup>th</sup> Ave Olympia Wa. 98501.

On February 16, 2011, I served a true and correct copy of the following documents on the parties listed below:

1. Brief of Appellant

Marie Clarke

Office of Attorney General

P.O Box 40117

Olympia Wa 98504-0117

Street Address:

7141 Cleanwater Drive SW

Olympia Wa. 98501-6503

I, Imad Ahmad, declare under the penalty of perjury that the foregoing is true and correct. Executed on this 16th day of February 2011 at Olympia Washington.

By: \_\_\_\_\_

Imad Ahmad

11 FEB 23 4:11:56 PM  
 STATE OF WASHINGTON  
 COURT OF APPEALS  
 DIVISION II  
 BY: [Signature]

Washington State  
Office of the Attorney General  
Acknowledged Receipt, this 16<sup>th</sup> day  
of February, 20 11, Time: 1:42 pm  
in Tumwater, Washington.  
No. 41499-6-11 Signature: [Signature]  
Print Name: Christopher Lanese  
Assistant Attorney General

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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JO-ANN FULTON

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

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BRIEF OF APPELLANT

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Frederick H. Gautschi, III  
WSBA No. 20489  
Connell, Cordova, Hunter &  
Gautschi, PLLC  
1325 Fourth Avenue, Suite 1500  
Seattle, WA 98101  
(206)583-0050  
Attorneys for Appellants

Larry J. King  
WSBA No. 1325  
P.O. Box 796  
Olympia, WA 98507  
(360)352-1591  
Attorney for Appellants