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Court of Appeals No. 45298-7-II STATE OF WASHINGTON

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

IRENE NGUGI,
Appellant, Cross-Respondent,

v.

STATE INSTITUTE FOR PUBLIC POLICY, et al,
Respondents. Cross-Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik Price

BRIEF OF CROSS-RESPONDENT
and REPLY BRIEF OF APPELLANT

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1. Respondent's Bad Facts (PART I)

At the time she started work for the Respondent in January 2008, Irene Ngugi already held a master's degree in Economics and a Ph.D. in Public Policy from the University of Texas. CP. 481. Irene Ngugi also taught college economics and made presentations in graduate school (CP. 253). The only reliable "evidence" written by the Respondents concerning the Appellant is from before Irene Ngugi filed a discrimination complaint on October 29, 2009. Thereafter, the Respondents engaged in wholesale manufacture of retaliatory documentation. See for example, pre-complaint CP. 60 (to Irene Ngugi and a co-worker from Anne Penucci on August 28, 2008): "Thank you both for all **your excellent work** and for sticking with it even when I'm not the easiest person to work with."(emphasis added); CP 76-99 (zero criticism of Appellant's work by Marna Miller); CP 131-143 (Lieb makes no mention to other state agencies of **any** deficiencies in Appellant's work); 127 (outside job opportunity sent to all WSIPP staff, not just Ngugi). Thereafter, the Defendants obviously had the motive, opportunity, and as shown from the Brief of Appellant, the need to contrive facts in their post-complaint "memo to file" documents and declarations-that-don't-match-deposition-testimony. Apparently in

desperation, the Respondent's summary judgment and set of facts before this court comes from the unreliable post-complaint opinions contained in the 113-page declaration of Roxanne Lieb (at CP. 104-217) and the manufactured-post-complaint "memo to file" documents to bias any investigation of Appellant's comparative skills. Evidence of retaliation after an employee engages in protected activity includes new memos challenging the worker's competency. Herring v. DSHS, 81 Wn.App. 1, 914 P.2d 67 (1996)(DSHS' newfound findings of incompetency, not shared with Welling, are evidence of retaliation).

There is no dispute that on October 28, 2009, OSPI agreed to contract for Ngugi's services through "6-30-10 with reconsideration at that time." CP. 207. On October 29, 2009, Ngugi (through an attorney) first contacted the president of The Evergreen State College to discuss workplace discrimination, and immediately upon learning about this, Roxanne Lieb put "all pending personnel actions" on hold while waiting to learn more about the allegations (CP. 114, 211) and then terminated the Appellant's employment, offering numerous conflicting, unsubstantiated until after-the-fact reasons. In sum, the Respondent's "timeline" and

counter-statement is built on after-the-complaint documents and omits all facts introduced by the Appellant and is therefore unreliable.

2. Respondent's Bad Facts (PART II) -Multiple Excuses:

The Respondent's brief (at page 14-15) focuses on late November 2009, when Lieb claims she supposedly was told by a lawyer that an OSPI contract "would likely not comply with immigration laws" and OSPI could not hire her directly under those laws, either. Respondent's Brief at 14, *citing the declarations of Roxanne Lieb and OSPI's Jennifer Priddy, CP. 115, 42.* Although Lieb and Priddy filed declarations, they were clearly not the source or qualified to advance those legal claims. According to Respondent's brief, "[a]s a result [of those legal complications] the Institute decided to end Ms. Ngugi's employment with the institute." Br. Resp. at 15, citing CP. 115. In addition to that poorly-documented, national origin-related excuse for terminating the Appellant's employment, the Respondent offers additional excuses: a financial one because "the one last education-related study" that "Ms. Ngugi had intended to work on" had "fallen through" and was "denied." Br. Respondents, at 11, and at Timeline of Key Events. Unlike the brief's claim, however, the record says Lieb felt it "was uncertain that it was going to be funded" (CP. 472)

and if Ngugi went to work at OSPI, she “would not be able to work on the Goldhaber study.” CP. 113. In rebuttal, Roxanne Lieb offered yet a third excuse for terminating Irene Ngugi’s employment: that Irene Ngugi was the “weakest” employee. CP. 472. As noted in the Brief of Appellant, this is contradicted by Jennifer Priddy, who observed Ngugi’s work at OSPI. See, for example, CP. 439, at p8, ln 19-23 (“And in those interactions, did you find Irene to be a competent employee? ANS: Yes”). Lieb had also sent the Appellant an October 7, 2009 memo in which Lieb thanked Ngugi for working on the housing project “and being so responsible about meeting the timelines, etc.” CP. 205. The Respondent’s brief attempts to bolster the third excuse by referencing three “memo to file” documents excoriating the Appellant’s competence, obviously prepared on or about November 18, 2009, right after the written discrimination complaint was received. CP. 231 (complaint); CP. 223 (memo to file).

3. Respondent’s Bad Facts (PART III) - Caucasian Comparators

The Respondents repeatedly cite CP. 107-108 for the proposition that two Caucasian employees were supposedly treated the same as the Plaintiff, in being notified of the risk of losing their jobs, whereupon one allegedly “opted to retire in early 2009” and the other one was “ultimately”

let go. In the record provided by the Respondents, at CP.238-239, Ms. Lieb identified the two Caucasians who were supposedly at risk of losing their jobs as Corey Nunlist, a Research Assistant, and Tali Klima, a Research Associate. CP. 238-239. There is no announcement of any retirement in the record, and there is no notice of termination of the employment of either employee. Those two Caucasians may have been “at risk” and may have subsequently announced a future retirement or “ultimately” lost their employment before Leib’s declaration was signed in 2013, but the evidence clearly shows that neither one left employment in “early 2009” or on any other date in 2009 or thereafter. Instead, CP. 477-478 (authenticated by Roxanne Lieb at CP. 470, p.48, line 13-25, P49, line 1), shows undisputably that both Caucasian employees were still working for the Respondents, and participating in ongoing meetings to discuss the technical aspects of a “big model” *aka* “kahuna” in late August, 2009. Not only did those two Caucasians continue their employment and participate in the big “kahuna,” Roxanne Lieb announced the hiring of an additional Caucasian “senior associate” in July 2009, who would start in October 2009, but who was also allowed to attend the meetings beforehand. CP. 479. Although Ms. Ngugi was still an employee and on the invite list with

her Caucasian co-workers, and she expressed interest in attending the meetings, Roxanne Lieb expressly disinvited Ms. Ngugi from participation with all her existing and future Caucasian co-workers, and instead offered to tell Ngugi later what she missed (which never happened).. CP. 477-478, CP. 489.

What is undisputed is that Irene Ngugi was the one and only black person ever hired by Lieb (eventually Lieb stepped down and her replacement as Director hired one in 2013, see CP. 417, p.20, ln. 17-25), she had a Ph.D., and she was hired under the unique H1-B laws because no similarly-qualified white candidates were available (see below). The Respondent argues, incorrectly, that there is a single instance of discriminatory behavior in this case. Viewing the evidence in the light most favorable to the Appellant, there are many. Lieb called Ngugi a racist for trying to talk about countries of origin with another black person, on another occasion Lieb tried unsuccessfully more than once to match Ngugi with a black person Ngugi barely knew, which offended Ngugi and the other black person. Lieb used stereotypical, offensive personal language about Ngugi (big-eyed, lazy, speaker of English with an “edge”), and when Ngugi reacted, Lieb referred *Ngugi* to counseling (see CP. 176). Moreover, another key variable, and “strong evidence” of bias existed when Lieb personally encouraged a white

person who was not even employed at the agency to attend meetings about agency projects, while at the same time denying that opportunity to Ngugi. Eventually that white person was placed on the payroll in October 2009 (CP. 479) at the same time Lieb believed she had a deal with OSPI to get Ngugi out of there. The act of removing Ngugi from lead status on a publication she wrote is additional evidence of discriminatory behavior. There is no evidence that Lieb ever allowed that to happen to any white person. Lieb also secretly put “all employment-related action” concerning Ngugi “on hold” (CP. 602), shredding the evidence and never talking to Ngugi about it, either. Meanwhile, three of Lieb’s subordinates prepared self-serving “memo to file” employment records, again without input from or notice to the Appellant, excoriating her work from over a year earlier. Lieb (and whatever the unnamed lawyers were advising Lieb) kept the emerging immigration issues a secret from Ngugi until after Lieb terminated Ngugi’s

ARGUMENT

Summary judgment involves considering all material evidence that was before the trial court, and all reasonable inferences therefrom are considered in the light most favorable to the non-moving party. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.3d 1030 (1982). *See also* CR 56(c). Appellate courts also consider the verbatim report of proceedings. RAP

9.2. In this case, the trial court detailed on the record and in its order the information it considered. RP. 54.

RAP 9.12

The Respondent first argues that under RAP 9.12 and RAP 2.5(a), this court should restrict itself to a 6-page section of the Appellant’s trial brief on the two legal issues before the trial court: RCW 49.60.180 (discrimination) and RCW 49.60.210 (retaliation). In compliance with RAP 9.12, the Appellant’s opening brief in the Court of Appeals addresses the same two legal issues that were before the trial court, and cites the same facts that were brought to the attention of the trial court and included in the order granting the motion for summary judgment. The Washington Supreme Court has explained that restricting the appellate courts’ review cases pursuant to RAP 9.12 is “misguided” because the rule simply reflects CR 56, concerning the documents and other evidence called to the attention of the trial court. Ellis v. Seattle, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2001). “There is no requirement to list every statute, code, or case brought to the attention of the trial court. Nor should there be, as any court is entitled to consult the law in its review of an issue, whether or not a party has cited that law.” Id. Similarly, RAP 2.5(a) involves the

“discretionary” authority of the appellate court to decline review of a legal issue that was not brought before the trial court, but “[n]othing in RAP 2.5(a) prohibits an appellate court from *accepting* review of an issue” even if it was not raised in the trial court. (emphasis in original) State v. Russell, 171 Wn.2d 118, 122, 219 P.3d 604 (2011). In any event, the Appellant’s assignments of error and issues presented in the present case were clearly ones that were squarely before the trial court.

Prima Facie Case

The Respondent argues that this court should ignore the evidence that the trial court considered, and instead this court should reverse the trial court’s finding that the Appellant met her burden of establishing her prima facie case for discrimination and retaliation. RP. 47, 51-52. The Respondent erroneously argues, contrary to the trial court’s summary and the law and facts in this case, that the “sole” basis for liability under RCW 49.60 is the Appellant’s job termination; 2) no other “nearly identical” Caucasian employees kept their jobs; and 3) two supposedly “identical” Caucasian employees supposedly opted to retire or were let go. Br. Resp., Citing CP. 107-08. As noted above, in making this argument, the Respondents offer conflicting facts. Respondent argues that Director

(Lieb) alone handled the supervisory hiring, firing and evaluation decisions for this “small staff” of “12 researchers.” Br. Resp. at 4,5,9. See also CP. 416 at p14, ln. 1-9. As such, the Appellant properly testified upon personal experience that all the similarly situated researchers (who were all Caucasian) received favorable treatment in terms of “major assignments” while hers were “ad hoc” and Caucasians were allowed to attend meetings, including a new employee who was hired after the Appellant, when the Appellant was not. CP. 484-485. The Appellant’s job title and description does not differentiate her work from the Caucasian comparators (CP. 517), and the Respondent offers no factual or credible explanation why her co-worker Caucasian researchers who kept their jobs and attended meetings were “not identical” including Annie Penucci (CP. 51, 643) who was also sent out on a “secondment” just like the Appellant, and Marna Miller (CP. 69), who worked on the same project as the Appellant, as well as the newly hired research associate. Notably, the Respondent claims a research “assistant” (Corey Nunlist) who was not terminated and instead allegedly retired, who did not even work on the same projects as the Appellant, was not sent on a “secondment” assignment, and did not even have the same job title would supposedly be

“nearly identical” while the others would not. The Respondent’s argument is nonsense and is belied by the evidence.

The prima facie disparate treatment case involves a determination of whether (1) Ngugi belongs to a protected class, (2) she was treated less favorably in the terms or conditions of her employment (3) than a similarly situated, nonprotected employee, and (4) she and the nonprotected "comparator" were doing substantially the same work;. Johnson v. DSHS, 80 Wn.App. 212, 226-227, 907 P.2d 1223 (1996). To show a prima facie case of retaliation under RCW 49.60, an employee must show that: (1) she opposed an activity forbidden by chapter 49.60 RCW; (2)the employer took adverse employment action against her; and (3) retaliation was a substantial factor behind the adverse employment action. See, e.g., Allison v. Housing Authority of City of Seattle, 118 Wn.2d 79, 85, 821 P.2d 34 (1991). Prima facie cases of discrimination can be established with direct or circumstantial evidence. Fulton v. DSHS, 169 Wn. App. 137, 279 P.3d 500 (2012), at n.17 (citing Hill v. BCTI Income Fund, 144 Wn.2d 172, 23 P.3d 440 (2001) and other authorities). Once the prima facie case is established, a "legally mandatory, rebuttable presumption" of discrimination temporarily takes hold.” Hill v. BCTI, at 181.

In Johnson, the court noted that the comparator received more favorable assignments, and was allowed secretarial support. Here, the trial court correctly summarized the terms of a prima facie case, noted the disparities in the terms and conditions of the Appellant's employment, and found that the conflicting facts and competing inferences at summary judgment would mean the court accepted the Appellant's position, and concluded the prima facie case had been met. Utilizing the same facts that were before the trial court, this court should not "turn[] summary judgment on such narrow questions as the distinction between the behavior of the comparator" because that "defeats the fundamental concept of allowing discrimination claims to be decided on the merits." Johnson, at 230. The Appellant alone was singled out with hostile comments by the Director because of her race (commenting upon her "wide eyes" and calling her a "racist" for asking about another person's country of origin), and the Director tried to hook the Plaintiff up with another black person the two had just met. The Appellant asked for and received no "major projects" that would have preserved her employment in the same manner as the Caucasian employees. With respect to the Appellant's termination from employment, the Respondents claimed that the Respondents did not have

enough funded work to go around, while the Appellant demonstrated that there were projects that would have kept her employed, and in addition the OSPI job was agreed upon, had she been allowed either option, but the other major projects went to the Caucasian employees, including a new one who was hired after the Appellant. The Respondents claim that another driving force in terminating the Appellant included the “legal complications” associated the Appellant’s non-immigrant status (aka different national origin), but the Appellant pointed out that her existing visa to work with the Respondents was still valid for several months after she was terminated. Here, the only reason offered by the Respondent in the trial court for immediately stopping the Appellant from assuming her new position at OSPI in October 2009 was the fact that she had lodged a discrimination complaint. While the employer seems to argue that this was a good thing, as noted in the Appellant’s memorandum opposing summary judgment in the trial court and the Brief of Appellant, that is inconsistent with the fact that the employer hid that information from the Appellant and subsequently kept the Appellant in the dark for several weeks, until the employer issued a notice of termination once it believed it was in the clear of the discrimination complaint. Again, there is circumstantial

evidence and clear support for the inference of discrimination. The trial court's refusal to consider circumstantial evidence and, in particular, competing "inferences" due to a Ninth Circuit's minority view that has not been adopted in Washington violates the rule set out in Johnson, as well as the well-settled rule in Washington that all reasonable inferences are considered in the light most favorable to the responding party at the summary judgment stage, particularly when it comes to circumstantial evidence in discrimination cases under RCW 49.60, where an employer rarely admits its discriminatory motives.

More on Pretext and Evidence of Discrimination

The Respondent argues that the Appellant failed to introduce any evidence in the trial court or on appeal that the employer's excuses for its actions were pretextual, and that a substantial factor was the Appellant's race and/or her discrimination complaint. Again, as repeatedly explained by the Appellant, an employee need only create a genuine issue of material fact that the excuses for termination were pretextual in order to survive an employer's summary judgment motion because the court is supposed to consider all facts and inferences in the light most favorable to the employee. Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 619, 60

P.3d 106 (2002). The question of pretext is generally a question for the finder of fact when there are competing inferences of discrimination in a case. Fell v. Spokane Transit Authority, 128 Wn.2d 618, 642 (1996). Moreover, an employee may show pretext by the same evidence used to make her prima facie case. Milligan v. Thompson, 110 Wn. App. 628, 637, 42 P.3d 418 (2002). If an employer gives multiple, inconsistent reasons for terminating an employee, there is an inference that none of the reasons given is the real reason. Renz, 114 Wn. App. at 624. Close temporal proximity to a discrimination complaint may be sufficient to satisfy the causation element. See Burchfiel v. Boeing Corp., 149 Wn. App. 468, 205 P.3d 145 (2009); Passantino v. Johnson & Johnson Consumer Prod., Inc., 212 F.3d 493, 507 (9th Cir. 2000); Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (3 weeks deemed sufficient); Miller v. Fairchild, Industries, Inc., 885 F.2d 498, 505 (9th Cir. 1989) (2 months deemed sufficient). As noted in the Brief of Appellant, the trial court rejected the “inference” or circumstantial based evidentiary manner of deciding the pretext issue in discrimination cases, and instead the trial court erroneously adopted a minority view of the Ninth Circuit, by requiring more specific and substantial evidence.

Here, the Appellant introduced sufficient facts in the trial court and in her opening brief to this court to support an inference of pretext. The temporal proximity to the first retaliatory action was one day, for putting the kibosh on the OSPI assignment, and five weeks for terminating the Appellant. The employer offered different excuses for the termination. Finally, as noted in the Brief of Appellant, the employer engaged in disparate treatment before the discrimination complaint was lodged. The Appellant met her burden and the competing reasonable inferences remain for the finder of fact

The Respondent claims that exclusion of Ms. Ngugi from meetings, including one in which the employees were invited to “share kickball stories” (CP. 478) was not discriminatory because the Appellant was working at OSPI and there is “no evidence that any other employee who was working at a different agency was invited to these meetings” and there was no evidence supporting a need for Ngugi to attend the meetings. Resp. Br. at 35. The “no evidence” arguments are both wrong. The Director allowed a future employee to attend the meetings, (CP. 479), while the Director told Ngugi, “we can catch you up later.” CP. 477, 489.

The Respondent simply argues that the Director’s “big eyes” comment was just a “deer in the headlights” sort of comment, and “there is no black stereotype that black individuals have big eyes” except on the Internet.. Resp. Br. at 36. Portrayal of black people as a deer in the headlights with big eyes is extremely offensive and stereotypical, and has been around since long before the Internet. See Persons, Contours of African American Politics: Volume III, Transactions Publishers, 2013, p105. (“One [political] ad in particular drew widespread attention, depicting a black man in oversized white t-shirt and baggy jeans with bulging eyes, suggesting he was frightened beyond extreme. The bulging eyes coupled with the size of his head and hands, which were disproportionately larger than the small body harkened to images of a black Sambo.”).¹

¹ See African American Registry: www.aaregistry.org/historic_events/view/nigger-word-brief-history: “The negative portrayals of Blacks were both reflected in and shaped by everyday material objects: toys, postcards, ashtrays, detergent boxes, fishing lures, and children’s books. These items, and countless others, portrayed Blacks with bulging, darting eyes, fire-red oversized lips, jet-Black skin, and either naked or poorly clothed... When frightened, the Coon's eyes bulged and darted.” See also the New York Times, August 14, 1988, “Black Musicians in Art: Stereotypes and Beyond” (“The 1896 sheet music cover for the song, “All Coons Look Alike to Me,” is filled with black men with big eyes, big hats and thick red lips.”); <http://www.authentichistory.com/diversity/african/3-coon/2-pickaninny/>: “The picaninny is an anti-Black caricature of children. They are “child coons,”(see coon caricature history) with the same physical characteristics. Pickaninnies have bulging eyes, big red lips, and they speak in a primitive, stereotypical dialect.”

In addition, the Appellant introduced evidence of multiple unwarranted comments with racial overtones from the employer, involving Appellant's English having an "edge" to it, calling the Appellant a racist for discussing national origins with another black person, suggesting the appellant should hook up on a date with a black person the Plaintiff had just met, an observation that the Appellant was not "lazy," and of course, the "wide eyes" or "big eyes" comment. See Johnson v. Riverside Healthcare, 534 F.3d 1116 (9th Cir. 2008)(in addition to one instance of a racial epithet, the inference of racial motivation can be drawn from other comments, such as asking the black physician to take out the trash in the operating room).

The Respondent argues that the only issue in this case that the Appellant presented to the trial court was her termination from employment on December 4th, under a burden-shifting analysis, and there was no evidence or argument below that the December 4th termination was motivated by the Appellant's discrimination complaint. First, the Respondent misrepresents the Appellant's argument, which focused on two adverse employment actions, the first occurring "immediately" after

her discrimination complaint in October, with the termination of the agreed-upon position at OSPI, followed by weeks of keeping the Appellant “in the dark” until her termination from employment on December 4th when it was too late for the Appellant to successfully complete the agreed crossover to OSPI, since she was terminated from employment. CP 535-536. The argument and evidence clearly established the Appellant’s position that the adverse action in October was directly connected to the discrimination complaint. The Appellant also argued, with correct citation to the law, that she did not have to prove that the sole motivation was the discrimination complaint to prevail at summary judgment. CP. 536-537. By only claiming an adverse event occurred on December 4, 2009, the Respondent is the party that is not accurately representing the facts and legal issues associated with retaliation that were before the trial court. The Respondent also argues, without basis, that the “resentment” against the Appellant was only related to an airline ticket issue that arose after the Appellant’s termination. That is clearly a misrepresentation of the record, presented by the Appellant, that the resentment was motivated by Ngugi’s conduct both before and after she

was terminated from employment, by, according to Lieb, “pulling every possible employment-related string that exists.” CP. 635, p37, ln 7-8.

Motion To Strike

The trial court’s decision to admit or refuse evidence proffered at summary judgment is reviewed for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Rebuttal testimony is admissible under CR 56, and under the well-established doctrine of “opening the door” the trial court has the discretion to admit otherwise inadmissible evidence when the opposing party raises a material issue. State v. Berg, 147 Wn.App. 923, 939, 198 P.3d 529 (2008). While filing entire depositions may be burdensome and contrary to procedural rules, that does not preclude their consideration by the trial court or on appeal. Mithoug v. Apollo Radio of Spokane, 128 Wn.2d 460, 462, 909 P.2d 291 (1996) (allowing review of entire depositions filed in the case and brought to the attention of the trial court, even if not expressly considered by the trial court). See also McClarty v. Totem Electric, 119 Wn.App. 453, 81 P.3d 901 (2003)(citing Mithoug above), *reversed on other grounds*, 157 Wn.2d 214, 137 P.3d. 844 (2006), *supreme court basis for reversal abrogated sub judice*, Substitute Senate Bill 5340 (SSB 5340)(2007).

The Respondent here argues that the trial court erred and should have stricken the expert witness declaration of Bart Stroupe. The Respondent clearly and repeatedly opened the door to rebuttal testimony concerning the visa waiver process at summary judgment, through otherwise inadmissible hearsay testimony offered by Lieb, who supposedly spent \$20,000 on lawyers' advice, admittedly had no experience with those laws on her own, had no clue how to interpret them, and repeatedly referred to various laws and the out-of-court oral interpretations of them attributed to unnamed and perhaps lesser-experienced lawyers than Mr. Stroupe. See, for example, CP. 106 paragraph 6, CP. 114 paragraph 34, CP. 115 paragraph 36; CP 116 paragraph 39.

A review of Mr. Stroupe's declaration clearly establishes its reliability based on his 20 years' work in the immigration field, and his detailed explanation of the H1-B procedures and the I-129 Petition for Non-Immigrant workers and its procedural aspects. Although the Appellant's witness did not recite all the federal immigration laws verbatim in his declaration, neither did the Respondent in its own

declarations from lay witnesses who claimed that those laws are to blame for the Respondent's termination of the Appellant's employment.

The trial court addressed the Respondent's complaints about the depositions that were filed by indicating that it was burdensome in the way they were filed, but he did in fact read them all (RP. 54), and, in any event, the Respondent offers no legal authority from any Washington court to reverse Mithoug and McClarty on that point, or to exclude their consideration here or in the trial court.

Finally, the Respondent complains about statements in the Appellant's own declaration about how she was treated in comparison to other employees. Those statements are based upon personal knowledge. As for conversations she had with OSPI's Jennifer Priddy about her competence and termination from employment by Roxanne Lieb. Priddy's testimony concerning her side of the conversation was included as well, which was properly before the trial court. See, for example, CP. 439, at p8, ln 19-23 (And in those interactions, did you find Irene to be a competent employee? ANS: "Yes"); CP 444, p.27 ln. 1-25, p.28, ln 1-23 (recalling conversations with Ngugi and Lieb about the termination of Ngugi's employment; "it might have been Irene first."). Again, the

Respondents opened the door through Lieb's declaration, which also similarly recounts hearsay conversations with Priddy and other unnamed OSPI employees about the Appellant. See CP. 116, paragraph 39, CP. 112, paragraph 26. Notably, the Respondent complains about an email from Janie Maki, the office manager of the Respondent, that says, "I just spoke to Roxanne, and before the arrangement was confirmed with OSPI, she had talked to Brenda at the attorney's office about the visa." CP. 498. In addition to the Appellant's sworn statement as to how the Appellant received the record in response to a public records request pursuant to RCW 42.56, the Respondent Evergreen State College included a certification of it as a public record on the face of the document when it provided it to Ms. Ngugi. It is clearly an official record, and the availability in court of the declarant concerning it is immaterial. ER 803(a)(8)/RCW 5.44.040, State v. Monson, 113 Wn.2d 833, 784 P.2d 485 (1989).

The Respondent does not challenge the admissibility of the Plaintiff's evidence concerning Roxanne Lieb's multiple discriminatory comments and pattern of favoritism in the terms and conditions of employment. Warren v. City of Carlsbad, 58 F.3d 439, 443 (9th Cir.

1995)(a plaintiff raises a genuine issue of material fact regarding pretext by presenting single derogatory comment by supervisor in conjunction with other circumstantial evidence).

Same Actor Inference and the Heightened Burden of Proof

As noted in the Brief of Appellant, the trial court erred when it applied the Coghlan more-onerous burden of proof to the Appellant's retaliation claim. Washington courts have never adopted the Coghlan burden of proof, and its adoption by this court would create havoc on summary judgment as it presently exists in this state.

As for the Coghlan "same actor" rule with regard to Appellant's disparate treatment claim, as noted in the Brief of Appellant, Irene Ngugi was not hired in competition with any white candidates. In Coghlan v. American Seafoods. Co., 413 F.3d 1090 (9 Cir. 2005), which Respondent and the trial judge relied upon exclusively, the Ninth Circuit explained that the "same actor" inference was only "relevant here because [Norwegian] Inge Andreassen, the man who made all of the challenged employment decisions, was the same man who appointed Coghlan as master of the Katie Ann in 1998 (over at least one viable candidate of Norwegian descent, according to Andreassen's declaration)."

The Respondent argues that “there is no evidence in the record regarding whether other candidates were considered for Ms. Ngugi’s position.” Br. Resp. at 32. . Exactly, that’s the point. The Defendant omitted evidence that made this case similar to the Coghlan case. Nevertheless, the Respondent attempts to justify the application of the “same actor” inference in this case solely upon “how illogical it is to hire a person you harbor a discriminatory animus against.” Br. Resp. at 33

The Respondents ask this court to apply a “logical” inference, without any evidence to support it. That is not only irrational, the application of the “inference” would constitute illegal conduct under the facts of this case. The Respondents’ brief implores the court to look at the H1-B waiver law (and someplace called “mintz.com”?), but leaves out the most important part. The Appellant was hired under a “waiver.” What does that mean? It means that the application of the “same actor” inference cannot apply, unless the Respondents engaged in illegal activity, because the, contrary to the Respondent’s reference to the law in its brief, the Appellant was hired under the H-1B program, which is part of the Immigration and Nationality Act (INA) as amended by the Immigration Act of 1990, 8 USC 1101(a)(15)(1)(b), 1182(n), 1184(c); 20 CFR 665

subparts (H) and (I). Under that law, the employer must swear it would have offered the job to any U.S. worker who applied and was equally or better qualified than the H-1B worker, unless the H-1B worker was designated a "priority worker" within the meaning of Section 203(b)(1)(A), (B), or (C) of the INA. It is not only be illogical to argue that an employer demonstrated lack of bias by choosing to hire the black H1-B applicant over a qualified white applicant, that sort of inference or actual conduct would be illegal under the undisputed facts of this case. The H1-B applicant only gets the job if there was no other choice. The Respondent's resort to pure "logic" to defeat the Appellant's opening brief is factually and legally untenable.

Moreover, under CR 56 and Washington cases that explain summary judgment, focus on the law and the evidence, not flawed logic and erroneous assumptions in favor of the Respondents. Why was the trial court so ready to rely upon an inference with no evidence to support it? The Respondent's version of the rule is this: Merely hiring a black person creates a strong inference that the people involved lacked a discriminatory animus, which requires strong evidence to overcome, if the black person is terminated from his or her job over two years later. Normally, such a rule

would only be logical if the corollary is true: that merely not hiring a black person creates a strong inference that the people involved had a discriminatory animus. Obviously, Washington Courts have rejected the corollary. Instead, a black person who is not hired, has to prove that a similarly or lesser-qualified white candidate was hired just to establish a prima facie case, at which point any non-discriminatory excuse offered by the employer will prevail unless the black person also introduces evidence that that excuse is unworthy of credence. Similarly, a mere allegation that a black person got fired creates zero inference of anything in Washington, without proof that a similarly situated white person did not get fired. Ironically, while Respondent is asking for a “infer-without-evidence rule” favoring the employer, the Respondent wants this court to adopt an even a harsher evidentiary hurdle when it comes to firing, absolutely dismissing any claim of discriminatory animus when firing a black person absent evidence that a virtually “identical” white person did not get fired. Applying an inference without any evidence to support it is not sound.

The Appellant realizes that the appellate courts’ time is precious, but a critical analysis of the application of the “same actor” rule here is definitely in order when a Respondent’s sole argument is that an inference

involving social behavior is “logically” sound, regardless of the evidentiary circumstances. The rule on summary judgment should be to look at the evidence first, instead of starting with such a powerful inference of non-discriminatory bias with no empirical evidence to support it. To the average person (not just Rosa Parks), placing “logic” ahead of evidence at the summary judgment stage in a court case explicitly based upon a social justice statute, seems problematic at best, and calls out for this court to devote a more realistic analysis of the evidence that is missing from the Respondent’s case. Even if there was such evidence, which there is not in this case, it doesn’t seem to justify the inference in the first place, especially under the H1-B waiver facts that were presented here.

Sometimes social justice prevails, and sometimes it doesn’t. Compare RCW 49.60.010 (discrimination not only threatens the victims, it “menaces the institutions and foundation of a free democratic state”) with Plessy v. Ferguson, 163 U.S. 537 (1896)(repudiated in 1954)(“Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences.”) The learned judges at the U.S. Supreme Court relied entirely upon logical inferences instead of real evidence in

Plessy – which inferences might sound like good things for everyone, when, in reality, they are not a good thing for anyone.

Legal experts in psycho-social behavior have rejected the courts' blind reliance on the "logic" behind the "same actor" inference. See Kreigher and Fiske, Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment, 94 California Law Review 997, 1052 (2006) ("the same actor inference is based on an intuitive psychosocial model that has been disconfirmed by advances in cognitive social psychology.") In reaching that conclusion, the article contains an in-depth analysis of the Respondent's outdated "logical" theory, including a critical analysis of the case law identified in the Appellant's opening brief (see p. 1039-1052). As long as Respondents (and trial courts) apply logic over evidence, as in Plessy and in the present case, there is little hope that the laudable goals the legislature envisioned in RCW 42.60 will ever prevail over "strong" presumptions that lack an underlying evidentiary basis and are, themselves dubiously based on flawed logic.

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Conclusion

The Respondent/Cross-Appellant's facts and arguments are not supported by the record or the law. This court should reverse the trial court's order granting summary judgment and reinstate Ms. Ngugi's claims.

Respectfully submitted May 27, 2014.



Christopher W. Bawn, #13417, Attorney for Appellant

CERTIFICATE OF SERVICE

On this date, I delivered the Brief of Appellant to the Court of Appeals and I personally submitted the Reply Brief of Appellant/Cross Respondent to the Respondent's counsel.
Signed at Olympia, Washington this 27 of May, 2014.



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RESUBMITTAL: As a result of a missing table of contents and pagination error, this brief was ordered resubmitted on June 16, 2014. Thus, the table of contents was added and pagination was corrected for resubmittal on June 16, 2014.

Respectfully resubmitted and reserved on the Respondent on June 16, 2014,

