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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KIM TOSCH,
Plaintiff/Appellant,

v.

YWCA PIERCE COUNTY
Defendant/Respondents

BRIEF OF RESPONDENT YWCA PIERCE COUNTY

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1. Introduction

The YWCA hired Kim Tosch when she was 57 years old and fired her for performance issues less than a year later. She was hired and fired by the same decisionmaker(s).

The trial court's decision to dismiss Tosch's age discrimination case on summary judgment is consistent with settled law and is supported by the evidence. Tosch was unable to present any evidence of discrimination, much less the extraordinarily strong showing required to overcome the same-actor inference present in the case.

In the end, Tosch was simply unable to answer the applicable query: "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?"

2. Statement of the Issues

Did the trial court appropriately grant summary judgment in this case given that Tosch (1) was hired and fired in less than a year

by the same decisionmaker(s); (2) had a history of poor performance; and (3) was unable to provide even minimal evidence of age discrimination, much less an amount sufficient to overcome the applicable same-actor inference.

3. Statement of the Case

3.1 *YWCA Legal Services Program*

Established in 1906, the YWCA Pierce County has devoted over a century to creating opportunity and safety for women and children in the Pierce County community. A forerunner in the domestic violence service provision field, the YWCA established Washington State's first domestic violence shelter in 1976. The agency provides comprehensive domestic violence services that target prevention and intervention. Services include: free legal services, therapeutic services, support groups, transitional housing, trainings, teen dating violence prevention, and more. The YWCA Pierce County touches the lives of over 12,000 women and children annually. CP 34, ¶ 2.

The YWCA Legal Services Program provides free civil legal counsel, referral, and representation to victims of domestic violence. This combination of services increases victims' chances of permanently and safely ending their domestic violence relationship and establishing lives free of violence. CP 34, ¶ 3.

Legal Services is headed by a director, who is typically the only lawyer on staff. The director since 2005 and at all times relevant to Tosch's employment was Kevin Rundle. CP 82, ¶ 1. Although staffing during this period varied depending on available funding, Legal Services generally employed six individuals in addition to the director. The remaining positions were held by legal advocates, paralegals, or a combination of both. In addition, Legal Services relied on volunteers and/or volunteer interns to help meet client needs. CP 83, ¶ 3.

Hannah McLeod, a paralegal and legal advocate with the Legal Services Program since 2005 and at all times relevant to Tosch's employment, was made Program Manager the same month of Tosch's hire. McLeod assumed some training and supervisory responsibilities with the promotion. Those responsibilities were

assumed under Director Rundle's leadership. CP 48, ¶ 1.

Legal Services is and was, during all times relevant, a high volume/high impact, rather unique type of law office. It represents victims of family violence, including, but not limited to those experiencing physical, emotional, financial, or sexual abuse. It also represents victims of abuse who are facing immigration issues, oftentimes resulting from their being brought to the United States from a foreign land by their abuser who uses immigration status as a means of control over the victim. Legal Services does not charge a fee for any of its services. Despite having an overwhelming volume of clients and prospective clients who are vulnerable and oftentimes totally dependent on the program, it is chronically understaffed. Accordingly, the staff is consistently overworked trying to both assess and address the needs of the clients. CP 83, ¶ 2.

3.2 *Tosch's Employment*

Tosch was 57 years old when she was hired as a

paralegal/legal advocate for the Legal Services Program, an at-will position. CP 74 & 81. She was hired after having spent several months with Legal Services as an unpaid, part-time intern. CP 84, ¶ 6. During Tosch's internship, funding became available to hire someone part time (30 hours per week) to be both paralegal and legal advocate. The job required reporting to the Director of Legal Services. CP 84, ¶ 5; CP 96.

The YWCA's policy is to post positions internally for one week before they are posted publically. It prefers to hire and promote from within whenever possible. CP 70, ¶ 2. When the newly funded part-time paralegal/legal advocate position was posted internally, Tosch applied. CP 84, ¶ 5. Tosch appeared to be a good fit for the new position as she had some background in both required skill sets and had just finished a paralegal certificate program. CP 84, ¶ 6.

As Director of Legal Services, Kevin Rundle had the responsibility to hire and discipline Legal Service employees. That authority was identified in his job description under the heading "Supervisory Responsibilities." CP 84, ¶ 4; CP 93

(“Responsibilities include interviewing, hiring . . . rewarding and disciplining employees . . .”). Rundle’s immediate superior, the Chief Executive Officer for YWCA Pierce County, Miriam Barnett, confirmed that Rundle had that responsibility. CP 33, ¶ 1. While both hiring and firing Legal Service employees could involve seeking the input of others either before or after the decision, Rundle was the main decisionmaker. CP 246-250; CP 212; CP 217-218.

Regardless of whether Rundle also consulted with others before reaching his decision, as Director he held the authority to hire and his opinion carried the most weight – his recommendation on who to hire had never been overruled. CP 84, ¶¶ 4-5; CP 217; CP 212; CP 246. Tosch was aware that Rundle held decision-making authority. Thus, when applying for the job, she directed her application to him: “Dear Kevin: Thank you for considering me for the current paralegal position at the YWCA.” CP 100. Tosch later confirmed that Rundle was the main hiring authority: “Mr. Rundle hired me as a paralegal in September 2011.” CP 39.

Tosch struggled in her new job. Her struggle was noticeable

to Rundle, McLeod and co-workers. In particular, Tosch had problems with multitasking, time management, accepting feedback and communicating with staff and with clients. CP 49, ¶¶ 3-8; CP 54-60; CP 62-69; CP 84, ¶¶ 7-11; CP 241, ¶¶ 1-2; CP 258.

Although she didn't agree with criticism of her performance, Tosch was aware that her performance was not perceived as meeting expectations. CP 241, ¶ 1-2; CP 206.

Rundle and McLeod made significant efforts to help Tosch succeed. They bifurcated her job between advocacy and paralegal work, allowing her to concentrate solely on one part of her job description for a period of one month and then switching, concentrating on the other part of her job description for the next month. The purpose of the bifurcation was to allow Tosch to learn the tasks associated with each. CP 84, ¶ 8; CP 243, ¶ 3. In the last weeks of her employment, Rundle reduced Tosch's advocacy clients from 47 to five in order to help her performance. CP 43; CP 50, ¶ 7; CP 85, ¶ 10; CP 243, ¶ 3; CP 259.

In addition to giving Tosch time to learn each of her two roles unencumbered by having to multitask between them, and in

addition to reducing her work load, Tosch received training and training opportunities as well as on-the-job training. CP 264-271. She received, at minimum, the same training as other Legal Services employees. CP 252, ¶ 1; CP 243; ¶ 4. From McLeod and Rundle's perspective, she received significantly more because she struggled to perform her job. CP 43; CP 49-50, ¶¶ 3-7.

Because the building housing the YWCA was undergoing some remodeling, beginning in April or May 2012 McLeod and Tosch had to share an office. CP 55; CP 85, ¶ 9; CP 243; ¶ 4. As a result, Tosch had access to additional and immediate assistance from McLeod. In addition, she regularly sought and received respectful and timely responses to the questions that she directed to Rundle. CP 275-288.

Despite these efforts, Rundle and McLeod found that even after nearly a year of learning the ropes, Tosch's overall performance still needed significant improvement. Tosch's written performance review, prepared by McLeod with input from Rundle, reflected that assessment. CP 50, ¶ 9; CP 62-65. Tosch was placed on an improvement plan. CP 68-69. Shortly thereafter, Rundle

discovered that a client's responsive pleading was late and, in his interactions with Tosch, concluded that she failed to track the critical deadline and failed to respond effectively to mitigate the error. He decided that despite nearly a year of trying to make Tosch successful, there was nothing left for him to do in order to accomplish that goal. He decided that Tosch was not a good fit for Legal Services and that he needed to terminate her. CP 86-87, ¶¶ 13-17; CP 247-248.

Rundle sought input from McLeod, but it was his decision to make. CP 51, ¶ 10; CP 248 (“... I spoke to Kevin about it and he pretty much told me that was going to happen and asked for my input . . .”). Rundle also advised Robinson and Barnett of his decision and they acquiesced. CP 34, ¶ 4; CP 71, ¶ 4. The termination initiated by Rundle thus became official. CP 249. Rundle and Robinson jointly, and in person, advised Tosch of the decision. CP 71, ¶ 4.

Tosch shared her displeasure with the termination with CEO Barnett that same day. CP 40. Two days after her termination, Tosch wrote a letter to Barnett. In the letter, she identified Rundle

as the man who hired her and was her supervisor. CP 39. She also identified Rundle as the man who fired her. CP 40. In her letter, she accused Rundle of creating stressful working conditions for all his employees. CP 39. As a final note, she wrote that Rundle had, within the last year, fired her as one of “three qualified employees — all woman [*sic*] and all over 50 years of age.” She asked for an investigation, but did not clarify precisely what should be investigated. CP 35, ¶ 5; CP 39-40.

Barnett followed through. She asked Robinson to review the terminations Tosch referred to in her letter. CP 35, ¶ 6. Robinson reviewed them and reported back to Barnett that “the terminations were well documented and that there was no evidence of any discriminatory motive or acts.” CP 71, ¶ 5. Barnett also asked for and received feedback from Rundle and McLeod. CP 35, ¶ 6; CP 42-44. In the end, having received the input requested, Barnett concluded that Tosch was terminated for non-discriminatory reasons, as were the other two Legal Services employees Tosch referred to in her letter. CP 35, ¶ 7.

Among other things, the investigation revealed that Rundle

hired Tosch at age 57 and fired her at age 58. It revealed that Rundle hired the other two employees in question at age 60 and fired them at ages 62 and 61. One was fired for repeatedly breaching client confidentiality and for client complaints. CP 88, ¶ 20; CP 103-115. The other because of client complaints. CP 88, ¶ 21; CP 117-124. At the time of the summary judgment motion, Rundle had fired six employees during his eight-year tenure as Director. Two were under the age of 40. CP 88, ¶ 20.

Of the 19 individuals 50 year-old Rundle hired during this period of time, five were over the age of 50 on their date of hire, and one was aged 49. As of the date of the summary judgment motion, of the six paid Legal Services staff members, two were in their 50's and one was 48. CP 88, ¶ 19.

The YWCA as a whole employs a significant number of individuals over the age of 40. As of January 2013, the YWCA had 42 employees. Of these employees, four were over the age of 60, ten were between 50 and 60, and 20 were between the age of 40 and 50. CP 35, ¶ 10. CEO Barnett was 57. CP 33, ¶ 1.

After her termination, Tosch's duties were assumed by the remaining Legal Services staff, including a newly hired 50 year-old woman and a newly-hired 49 year-old woman. CP 87, ¶ 18.

4. Argument

4.1 Standard of Review

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003).

4.2 Summary Judgment Standard

A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993). If a defendant, as the moving party, chooses the latter alternative, the requirement of setting forth specific facts does not apply. *Guile*, 70

Wn. App. at 23. Rather, it “must identify those portions of the record, together with the affidavits, if any, which . . . demonstrate the absence of a genuine issue of material fact.” *Guile*, 70 Wn. App. at 22. “[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.” *Guile*, 70 Wn. App. at 23 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 817, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

Once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 27, 109 P.3d 805 (2005). If the nonmoving party cannot meet that burden, summary judgment is appropriate. *Vallandigham*, 154 Wn.2d at 26.

4.3. The facts support a strong same-actor inference.

Tosch was 57 when she was hired and 58 when she was involuntarily dismissed. She was both hired and fired by Kevin Rundle, with some input from other YWCA employees. Where the same-actor hires and fires a discrimination plaintiff within a short period of time, a strong inference arises that there was no discrimination. *Coughlan v. American Seafoods Company, LLC*, 413 F.3d 1090, 1096, 1098 (9th Cir. 2005); *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 453-454, 115 P.3d 1065 (2005). The same-actor inference is strengthened when, as here, the period of time between hiring and firing is short. *Griffith*, 128 Wn. App. at 454-55 (noting that a short period of time is not an essential element of the same actor inference, but a shorter time period affects the strength of the inference). The same actor inference is further strengthened when, as here, the actor involved in hiring and firing is a member of the same protected class. *Stout v. Yakima HMA, Inc.*, 2013 WL 587569 at *8 (E.D. Wash.).

An employee under such circumstances cannot rely on simply presenting a prima facie case of discrimination and rebutting the justifications for her termination. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 188-89, 23 P.3d 440 (2001). The employee must also present sufficient evidence to answer the question of why an employer would hire a person in a protected class if that employer had animus against persons in that class? *Hill*, 144 Wn.2d at 189-90. The same-actor inference is strong and can only be defeated by an “extraordinarily strong showing of discrimination.” *Coughlan*, 413 F.3d at 1097 (rarely is a plaintiff’s evidence sufficient to overcome the same-actor inference).

In *Hill*, the Washington Supreme Court explained the rationale behind the same-actor inference:

Unless the strength of this inference is fully recognized, employers could be discouraged from hiring the very persons the Legislature intended the Law Against Discrimination to protect, fearful that doing so would make them more vulnerable, rather than less, to legal claims of unlawful discriminatory animus if legitimate business reasons later required discharging such a person.

Hill, 144 Wn.2d at 189-90.

The same-actor inference does not require a sole actor. The Washington Supreme Court made that clear in *Hill*:

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. *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270–71 (9th Cir.1996) (“[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive.”) (citing *Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 175 (8th Cir.1992) (“It is simply incredible, in light of the weaknesses 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.”)).FN¹² 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.

FN¹². See also *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir.1996); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir.1995); *Tyndall v. Nat’l Educ. Ctr.*, 31 F.3d 209, 214–15 (4th Cir.1994); *Rand v. C.F. Indus., Inc.*, 42 F.3d 1139 (7th Cir.1994); *Proud v. Stone*, 945 F.2d 796 (4th Cir.1991). Hill questions whether the exact person who hired her—i.e., Potter—also made the decision to fire her. The record indicates that Potter and his supervisor Clark participated in that decision. Since the same decisionmakers had authority over both Hill’s hiring and her firing shortly thereafter, a strong “same decisionmaker inference” exists,

even if it was Potter's supervisor Clark rather than Potter himself who ultimately decided to fire her.

Hill, 144 Wn.2d at 189-90.

The evidence before the trial court on summary judgment was unequivocal – Rundle was the key decisionmaker in both hiring and firing Tosch. According to his job description, Rundle had the authority to hire and fire employees. According to the testimony, including Tosch's, Rundle exercised this authority in hiring and firing Tosch. It was Rundle's conclusion that Tosch had failed to track and effectively respond to a briefing deadline. It was Rundle's conclusion that her handling of the matter was, in addition to her other performance problems, final evidence that she was unsuited for the position. While he sought input from McLeod, and could have had his decision questioned by Robinson in Human Resources or overturned by CEO Barnett, the evidence supports the only conclusion a reasonable fact finder could reach – Rundle was the key decisionmaker in both hiring and firing Tosch.

Having others participate in hiring and firing decisions does not remove the same-actor inference. Defendant YWCA is entitled

to the inference and Tosch can overcome it only with “an extraordinarily strong showing of discrimination.” *Coughlan*, 413 F.3d at 1097.

4.4 *Tosch must provide evidence of discriminatory motive or intent in order to avoid summary judgment.*

Discrimination under RCW 49.60, the Washington Law Against Discrimination, may occur because of the disparate treatment of persons or because actions result in a disparate impact upon different people. To prove disparate treatment, a plaintiff must show that an employer treated an individual employee or group of employees differently because of sex, race, age, religion or some other improper differentiation. *International Brd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). While discrimination can be proved either under a disparate treatment or disparate impact analysis, discriminatory motive or intent must be proved under the disparate treatment

theory. *Shannon v. Pay'N Save Corp.*, 104 Wn.2d 722, 727, 709 P.2d 799 (1985).

Tosch is unable to establish a discriminatory motive or intent under the facts of this case.

4.5 *Tosch cannot establish a prima facie case based on direct evidence.*

A prima facie case of discriminatory intent or animus can be established in two ways. *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993). In the first, a plaintiff may establish a prima facie case by producing direct evidence from which a reasonable trier of fact could find that discriminatory intent was a substantial factor leading to an adverse employment action. If the plaintiff does this, the employer may then show by a preponderance of the evidence that the same action would have been taken absent the discriminatory intent. *Kastanis*, 122 Wn.2d at 491.

In discrimination cases, direct evidence has been defined as

“evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption.” *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (internal quotation marks omitted) (alteration in original).

Tosch presents two allegations as direct evidence: (1) Rundle’s alleged shock over learning Tosch’s age and his subsequent treatment of her, and (2) McLeod’s alleged post-termination comment to another employee.

Neither alleged event qualifies as direct evidence because neither, if believed, proves discriminatory animus without the assistance of inference or presumption.

The shock and immediate attitude change that Tosch attributes to Rundle’s learning that she was ten years older than he thought she was has no evidentiary support other than her own subjective perception of the events that followed. The YWCA, on the other hand, has provided the only evidence in the record and it is in direct contradiction to Tosch’s supposition.

Tosch identifies three changes she alleges occurred because

Rundle learned her age was 57 rather than 47: (1) she was moved into the office of her direct supervisor; (2) she resumed handling of her paralegal cases; and (3) Rundle became standoffish and irritable with her. None of these events, even if true, is direct evidence of discriminatory animus. The events are ambiguous and depend on inference or presumption in order to support discrimination.

In addition, the evidence in the record provides other, nondiscriminatory explanations for these changes:

(1) Tosch was moved into McLeod's office in April or May 2012 because of a remodel.

(2) Tosch resumed her paralegal duties in April 2012 after having them temporarily removed because she was having difficulty performing both components of the paralegal/legal advocate job she was hired to perform.

(3) Rundle's emails to Tosch and the testimony of two of Tosch's co-workers establish that Rundle treated her the same as other employees and continued to provide support for her job performance up until the day she was fired.

Tosch argues that McLeod's alleged statement to Ree Wilson that Tosch did not learn quickly and that she was a "nice lady but she was older" is also direct evidence of discrimination.

Whether an apparently discriminatory remark is sufficient to establish direct evidence of unlawful discrimination depends on the context in which the remark was made. In *Mangold*, the court held the remarks, "we want fresh young blood," "we have an excellent staff of young professional people," "older employees, unfortunately don't take advantage of all the opportunities," and "keep as many of our younger, talented staff employed" were relevant to proving age discrimination. *Mangold v. California Pub. Utils. Comm'n*, 67 F.3d 1470, 1466–77 (9th Cir. 1995). These comments expressed a preference for youth and were "regarding assignments, promotions, or policies [.]" *Id.* at 1477. In *Nesbit*, on the other hand, summary judgment in favor of the employer was appropriate because a supervisor's comment that the company does not "necessarily like grey hair" and a comment by the Senior Vice President of Personnel, "[w]e don't want unpromotable fifty-year olds around" were "very general and did not relate in any way,

directly or indirectly, to the terminations of [the plaintiffs].” *Nesbitt v. PepsiCo, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993).

Stray remarks, “when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision-maker in issue.” *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir.1989); see also *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir.1990).

McLeod’s comment, even if true, was general, was made well after Tosch’s termination, to an employee uninvolved in Tosch’s termination, by a woman who was not key in making the decision to terminate her.

Since Tosch lacks direct evidence of discrimination, she is relegated to creating a presumption of discrimination with indirect or circumstantial evidence.

4.6 Tosch cannot establish a prima facie case based on indirect evidence.

Where, as here, the terminated employee lacks direct evidence of a discriminatory motive, the plaintiff may create a presumption of discrimination by establishing a prima facie case based on circumstantial evidence. To do this, a plaintiff must show: (1) she was within the statutorily protected age group of employees 40 years of age or older, (2) she was discharged, (3) she was doing satisfactory work, and (4) she was replaced by a significantly younger person. RCW 49.44.090(1); *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 362, 753 P.2d 517 (1988).

Tosch cannot establish at least one of these key elements – evidence that she was doing satisfactory work. The employee has the burden of establishing specific and material facts to support each element of her prima facie case. *Grimwood*, 110 Wn.2d at 359-61 (conclusory statements and opinions are not sufficient). Here, there is substantial evidence that Tosch was an inadequate performer and no known evidence to the contrary other than her own self-serving testimony. Absent evidence based on specific and

material facts, Tosch cannot establish this key element and her case against the YWCA would be subject to dismissal with prejudice even if Tosch didn't have the additional burden of overcoming the strong same-actor inference.

Tosch's opinion of her own performance is the sole support she presents as evidence that she was doing satisfactory work. While she may have believed that she was being judged unfairly, her performance review indicated an overall "needs improvement," a separate category from "satisfactory." She was also placed on a performance improvement plan. Tosch has to do more than simply claim the assessments were unfair, she has to present evidence that her work was satisfactory.

Tosch cannot rely on speculation, mere allegations, denials, or conclusory statements to establish a genuine issue of material fact. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774, *review denied*, 153 Wn.2d 1016 (2004). A party's own self-serving opinions and conclusions are insufficient to defeat a motion for summary judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-61, 753 P.2d 517

(1988).

In addition to Tosch's inability to show she was doing satisfactory work, the evidence supporting the claim she was replaced by significantly younger employees is weak. In age discrimination cases, Washington courts generally view age differences of ten or more years as significant. *Oliver v. Spokane County Fire Dist. 9*, 2013 WL 3990813 *6 (citing *McKee v. Lehman*, 137 Wn. App. 1017 (2007): "courts generally view age differences of 10 or more years as significant.").

While Tosch's duties were assumed by more than one person after her termination, three of the individuals who assumed her duties were younger by ten years or less. Rundle was no more than ten years younger, and the two individuals who were hired within a 30 day period of Tosch's termination and assumed paralegal and advocacy duties were age 50 and 49. While these two employees and Rundle were all younger than Tosch, none were more than ten years younger.

4.7 *There is no evidence or inference adequate to support pretext.*

Even if Tosch were able to establish a prima facie case based on indirect evidence, her case still would have to survive the three-step, burden-shifting protocol articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 149-150, 94 P.3d 930 (2004).

Under *McDonnell Douglas*, the plaintiff first bears the burden of making a prima facie showing of discrimination. If this burden is met, then a rebuttable presumption of discrimination temporarily takes hold, and the evidentiary burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. *Riehl*, 152 Wn.2d at 150. The employer's burden is one of production, not persuasion. The employee retains the burden of persuasion at all times. *Shannon*, 104 Wn.2d at 727.

If the employer meets this production burden, the presumption established by having the prima facie evidence is rebutted and the presumption is removed. Plaintiff then is “afforded a fair opportunity to show that [defendant's] stated reason for [the adverse action] was in fact pretext.” *McDonnell Douglas*, 411 U.S. at 804. If the employee cannot establish pretext, the employer is entitled to dismissal. *Grimwood v. University of Puget Sound*, 110 Wn.2d at 364.

An employee can demonstrate pretext with evidence showing: (1) the employer’s reasons have no basis in fact, (2) the employer was not actually motivated by the reasons, or (3) the reasons are insufficient to prompt the adverse employment decision. *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 88, 98 P.3d 1222 (2004). A court may grant summary judgment for the employer “when 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 untrue and there was abundant and uncontroverted independent evidence that no discrimination had

occurred.” *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418 (2002) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)).

Pretext can be shown indirectly, by establishing the employer’s explanation is false. *Carle v. McChord Credit Union*, 65 Wn. App. 93, 102, 827 P.2d 716 (1992). However, a plaintiff cannot show pretext without some evidence that the articulated reason for the employment decision is unworthy of belief. “To do this, a plaintiff must show, for example, that the reason has no basis in fact, it was not really a motivating factor for the decision, it lacks a temporal connection to the decision or was not a motivating factor in employment decisions for other employees in the same circumstances.” *Kuyper v. State*, 79 Wn. App. 732, 738-39, 904 P.2d 793 (1995).

Even without the help of the same-actor inference, the YWCA’s evidence of Tosch’s poor performance is sufficient to remove any presumption of discrimination. Both Rundle and McCleod cite specific instances of performance problems and provide ample documentation of ongoing performance problems.

The YWCA has thus met its production burden in support of its employment decision and any presumption in Tosch's favor disappears. The only option remaining to Tosch is to demonstrate extraordinarily strong evidence of pretext. Given the evidence, Tosch cannot meet this burden.

Tosch argues that Rundle's termination of other older employees creates a question of fact regarding pretext. First of all, Washington courts have held that such statistical evidence is insufficient to establish an inference of discrimination. *Shannon*, 104 Wn.2d at 735; *Oda v. State*, 111 Wn. App. 79, 96, 44 P.3d 8 (2002). Further, the employees Tosch claims were similarly situated were terminated for well-documented reasons unrelated to age, and because like Tosch, those employees were both hired and fired within a short period of time by the same actor in the same protected class. As a result, the circumstances of other terminations do not provide Tosch with the necessary evidence that the rationale for her dismissal is unworthy of belief.

4.8 Rundle's shock at Tosch's age does not support an inference of pretext.

Tosch alleges that when Rundle hired her, he must have thought she was 47 instead of 57 because he expressed shock when she voluntarily disclosed her age. She alleges that the ten year difference had significance to Rundle because he began to treat her differently after the disclosure. She believes this creates an inference of animus.

The evidence does not support such an inference. To begin with, it would be outrageous to deny an employer the benefit of the same-actor inference just because he failed to find out the precise age of each individual he hired. It would be equally outrageous to expect an employer to be able to guess an employee's age correctly.

Tosch's belief that Rundle began treating her differently after he learned her true age lacks support. She provides no evidence of a concerted effort to fire her other than her own perceptions. She cannot rely on speculation, mere allegations, denials, or conclusory statements to establish a genuine issue of material fact. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*,

122 Wn. App. 736, 744, 87 P.3d 774, *review denied*, 153 Wn.2d 1016 (2004). A party's own self-serving opinions and conclusions are insufficient to defeat a motion for summary judgment. *Grimwood* 110 Wn.2d at 359–61.

Tosch's perceptions do not create an issue of fact on pretext and they are clearly insufficient to rebut the strong same-actor inference.

4.9 *McLeod's remark made to another employee after Tosch's termination is not evidence of pretext.*

Wilson's undated declaration that McLeod told her that Tosch was a "nice lady but she was older" after complimenting Wilson on her ability to learn quickly was, if true, no more than an isolated, stray comment that does not give rise to an inference of discriminatory intent. The comment was made after Tosch was fired, and was ambiguous. It was made by someone who was consulted, but did not make the decision to fire Tosch. Even if McLeod believed in hindsight that Tosch's performance issues were

due to her age, there is no evidence McLeod thought that at the time of the termination or shared her belief with Rundle.

In *Scrivener*, a recent Division 2 decision, the plaintiff argued that the college president, one of the two individuals who, after receiving recommendations from a screening committee, failed to choose the 42 year-old plaintiff for a job opening, displayed animus when he had four months earlier stated that the college needed “younger talent” and said he did not want experience requirements for the position. *Scrivener v. Clark College*, 2013 WL 4746854 (Wn. App. Div 2).

The court considered the comment in context and determined that the college as a whole hired applicants over 40 at a relatively high rate, and that the president’s general statement did not give rise to an inference of discriminatory intent. The court cited two other Washington cases reflecting similar rationale regarding context. In *Domingo*, the court considered a comment made by the employer three months before she was fired. The employer told the employee she was “no longer a spring chicken.” The court considered that nothing more than an isolated stray remark, and went on to say that,

“[g]enerally, age-related comments by non-decisionmakers are not material in showing an employer’s decision was based on age discrimination.” *Domingo*, 124 Wn. App. at 89-90.

In 2009 and 2011 Rundle hired two employees in their 60s. There is no evidence to suggest those employees fooled Rundle into thinking they were significantly younger. The inference to be drawn is that Rundle didn’t care about age. He cared about performance.

4.10 *There are no discrepancies in the reasons for Tosch’s termination.*

Tosch was fired for performance problems. Whether one describes the problems diplomatically – “not a good fit,” more specifically – “communication difficulties,” or by describing the straw that broke the camel’s back – “failure to get the bench copy to court on time,” they all describe performance.

While pretext can be demonstrated by shifting, conflicting, and retracted justifications for adverse treatment, it is not shown where an employer “simply supplemented its explanation,” where

“there has been no retraction of any of its reasons,” and “nor are any of its reasons inconsistent or conflicting”); *cf. Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir.1997) (holding, in context of retaliation, that the presence of shifting or different justifications for an adverse action is not sufficient to defeat summary judgment when those justifications are not incompatible). *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (2002).

The YWCA made multiple efforts to train, support and encourage Tosch. Rundle and McLeod bifurcated her job for two months so that she could learn each separately, lowered her workload, provided training and generally attempted to make her successful. They also looked into her continued complaints about her computer problems, only to discover that her email problems resulted from user error and not a gremlin.

While Tosch’s evaluation and performance improvement plan focused on her communication difficulties, the cumulative effect of her performance struggles finally ended her employment. Regardless of whether Rundle should have given her one more

chance, or should have documented each of her failures, it was his prerogative to decide when the efforts to make her successful had to come to an end for the good of Legal Services and its clients.

Courts do not typically second guess an employer's exercise of business judgment in making personnel decisions. ". . . an employer's belief that the employee's performance was unsatisfactory, even if mistaken, is not grounds for inferring discrimination." *EEOC v. Republic Services, Inc.*, 640 F.Supp.2d 1267, 1313 (D. Nevada 2009). The *Republic Services* court goes on to cite multiple cases in support of the tenet that an employer may terminate an at-will employee for good, bad or erroneous reasons as long as it is not for discriminatory reasons.

Tosch was an at-will employee. Despite the paralegal certification she received at the University of Washington, there is evidence that she struggled performing her paralegal/legal advocate position. Accommodations were made to her work load several times in an attempt to help her achieve success. The most recent reduction of her workload was in July, the month before she was terminated.

4.11 *The YWCA's post-termination investigation does not support pretext.*

Tosch's first complaint about age discrimination was made after she was terminated. In her letter to Barnett, she spent an entire paragraph describing how Rundle was mean to all his female employees and gave them impossible workloads without sufficient training. She did not report that she was treated differently from the others. On the next page, she mentioned that three women over 50 had been terminated in recent years. The YWCA investigated the allegation regarding the women over 50, and found that there was no support for there being a pattern and practice of terminating individuals based on their age.

Even if the YWCA's investigation was not as comprehensive as Tosch believes it should have been, it does not raise an inference of pretext. The investigation was conducted by the Human Resources Department and CEO Barnett, neither of whom instigated Tosch's termination. The investigation revealed that Legal Services often hired older workers and had hired a 50 year

old and a 49 year old within a month of Tosch's termination. It also revealed that Rundle had hired two 60 year olds within recent history.

5. Conclusion

Tosch's evidence of age discrimination is weak to nonexistent. It does not come close to meeting the extraordinarily strong showing of discrimination necessary to overcome a strong same-actor inference.

The YWCA is mindful that under Washington law, summary judgment in favor of the employer is often inappropriate because evidence often "contain[s] reasonable but competing inferences of both discrimination and nondiscrimination." *Kuyper*, 79 Wn. App. at 739. However, as indicated in detail above, Tosch does not succeed in raising an inference that the YWCA's stated reason for her termination was pretextual and unworthy of belief, particularly when considered as rebuttal to the compelling same-actor inference established by the YWCA. The record is devoid of any evidence or

inference that Tosch's age was a factor in her termination. See *Hill*, 144 Wn.2d at 190 (“[i]ndeed, the only age-related evidence in the record was the age of the persons involved.”). Tosch presents no evidence that anyone took any discriminatory actions toward her or any other worker in the protected class. Even in the light most favorable to Tosch, no reasonable jury could find in her favor on her WLAD age discrimination claim.

The YWCA respectfully suggests that the trial court's ruling on the YWCA's motion for summary judgment should be upheld.

Respectfully submitted this 15th day of May, 2014.

TIERNEY & BLAKNEY, P.C.

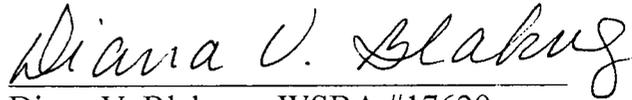
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CERTIFICATE OF SERVICE

I certify that on the / 5th day of May 2014, I caused the original and one copy of the foregoing document to be filed with the Court via ABC Legal Messenger Service, with a copy to be served via U.S. Mail on the following counsel of record:

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