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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA NO. 32252-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

PAT SCHOLZ, a married man,

Appellant

v.

SCAFCO CORPORATION, a Washington corporation,

Respondent

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Plaintiff Patrick Scholz was employed with defendant SCAFCO as the company's comptroller from November 4, 2004 through January 18, 2013. He was discharged in January 2013. The only reason given for his discharge after over eight years of successful employment was that he was "not a good fit." He was 59 years old at the time of his discharge. The evidence supports a finding that he was replaced, i.e., his job duties were assumed by an employee in his mid 30's who was hired nine months prior to his termination.

Mr. Scholz sued SCAFCO alleging age discrimination under RCW 49.60.180. In response to Defendant's Motion for Summary Judgment, he produced evidence establishing a prima facie case of age discrimination. Plaintiff also produced evidence supporting factual findings that SCAFCO's evolving reasons for the termination were pretextual. The record demonstrates that the trial court improperly weighed the evidence in the summary judgment proceedings, ignored clear factual disputes in the record, and granted the defendant's summary judgment motion dismissing plaintiff's claim.

On appeal, defendant SCAFCO offers three essential arguments in support of the trial court's summary judgment order. First, defendant contends plaintiff failed to establish a prima facie case of age discrimination. Specifically, it argues Mr. Scholz failed to demonstrate satisfactory job performance. Second, SCAFCO argues Scholz failed to produce evidence that the company's proffered reasons for discharge were pretextual. Finally, defendant contends plaintiff's age discrimination claim fails under the "same actor defense." See *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 189-190, 23 P.3d 440 (2001).

Defendant's arguments lack merit both factually and legally. First, defendant simply chooses to ignore Mr. Scholz's annual performance evaluations throughout his tenure of employment with the company, all of which were exemplary. Defendant also chooses to ignore the testimony of its own CFO, Jeff White, confirming that SCAFCO employees had a right to rely on their performance evaluations as accurate measures of their job performance with the company. (CP 110-111). Mr. Scholz's exemplary annual performance evaluations support a factual finding that he was doing satisfactory work for purposes of his prima facie case of age discrimination.

Second, SCAFCO fails to recognize the well-established legal standard applied by Washington courts to determine whether the record supports a finding that an employer's proffered reasons for discharge were pretextual. An employee can demonstrate pretext by showing: (1) The employer's reasons had no basis in fact, (2) were not the motivating reasons for the discharge, (3) were not temporally connected to the discharge, or (4) were not motivating factors in employment decisions involving other employees. *Fulton v. Dept. of Social and Health Services*, 169 Wn. App. 137, 161, 279 P.3d 500 (2012). In the instant case, the record supports findings that defendant's criticisms of Mr. Scholz's job performance related to incidents that were temporally removed from the discharge, and, in some instances, had no basis in fact. Therefore, the record demonstrates genuine issues of material fact concerning whether SCAFCO's proffered reasons for Mr. Scholz's discharge were pretextual. The trial court's summary judgment order should be reversed.

Finally, defendant's "same actor" defense is without merit. Washington courts recognize that when "someone is both hired and fired by the same decision makers within a relatively short period of time, there is a strong inference that he or she was not discharged

because of any attribute the decision makers were aware of at the time of hiring.” *Hill*, 144 Wn.2d, at 189. Mr. Scholz was hired by SCAFCO in November 2004 and discharged in January 2013. He was employed for over eight years. No Washington court has applied the “same actor defense” to a plaintiff who had been employed for over eight years. The “same actor” defense simply has no application in this case.

The evidence in the record establishes Mr. Scholz’s prima facie case of age discrimination under RCW 49.60.180. Further, the evidence supports factual findings that defendant’s proffered reasons for discharge were pretextual. A prima facie case plus evidence of pretext is sufficient to preclude summary judgment and require determination of whether the discharge was discriminatory by the trier of fact. *Hill*, 144 Wn.2d, at 185. The trial court erred in granting Defendant’s Motion for Summary Judgment. That order should be reversed.

II. ARGUMENT

1. Plaintiff has produced sufficient evidence to establish a prima facie case of age discrimination.

Again, to make out a prima facie case of wrongful discharge due to age, the plaintiff must show that he (1) was in the statutorily

protected age group (over 40), (2) was discharged, (3) was doing satisfactory work, and (4) was replaced by a significantly younger worker. *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 362, 753 P.2d 517 (1988). There is no dispute about the first two elements. Mr. Scholz was discharged at age 59. Defendant SCAFCO argues he failed to produce sufficient evidence of satisfactory work and that he was replaced by a younger worker.

Defendant simply refuses to acknowledge the evidence in the record demonstrating Scholz's satisfactory work performance. He was employed with SCAFCO for over eight years and received annual performance evaluations. All of his performance evaluations are in the record and all were exemplary. Plaintiff received his last performance evaluation in April 2012, just less than nine months prior to his discharge. He was rated "excellent" in nine categories, "above average" in ten, and "satisfactory" in two (CP 135-142). SCAFCO argues these evaluations were inherently subjective and therefore "they don't count."

This argument fails, both factually and legally. First SCAFCO's CFO, Jeff White, testified that the performance evaluations are "a tool to communicate with the employee about the status of his performance and whether or not he's meeting the

company's expectations." Therefore, Mr. Scholz's consistent exemplary performance evaluations, combined with Mr. White's testimony, support a factual finding that plaintiff was doing satisfactory work. See, *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 858-859, 851 P.2d 716 (1993).

Second, SCAFCO's argument that the performance evaluations don't count because they are subjective is contrary to established, fundamental principles of summary judgment practice. It is axiomatic that in ruling on a Motion for Summary Judgment, the court must construe all of the evidence and reasonable inferences therefrom in the manner most favorable to the non-moving party to ascertain whether there is a genuine issue of material fact. *Sellsted*, 69 Wn. App., at 857. Defendant's suggestion that the performance evaluations "don't count" with respect to the issue of satisfactory work performance lacks merit in light of this most fundamental principle of summary judgment practice. For the same reason the trial court erred in ruling that plaintiff failed to establish a prima facie case, and granting Defendant's Motion for Summary Judgment.

SCAFCO points to a litany of alleged performance deficiencies on Scholz's part between April 16, 2010 and February

27, 2012, the dates of plaintiff's last two performance evaluations.

These alleged deficiencies include:

1. A failure to follow pre-lien notice policies in September or October 2010;
2. An incident of inventory overstatement in October 2010;
3. Additional pre-lien notice issues in October or November 2010; and
4. A \$135,000 B&O tax liability over payment in December 2010.

Each one of these alleged performance deficiencies occurred more than two years prior to plaintiff's discharge. There is no evidence that Scholz was disciplined in any fashion for any of these alleged incidents. They were all followed by Scholz's final exemplary performance evaluation which was prepared on February 27, 2012 and given to him the following April. Plaintiff's exemplary performance evaluations combined with (1) the absence of any discipline for the alleged performance deficiencies, and (2) the temporal remoteness between these alleged deficiencies and plaintiff's discharge demonstrate a genuine issue of material fact concerning whether plaintiff was doing satisfactory work. *Sellsted*, 69 Wn. App., at 857-858. The trial court's Order Granting Summary Judgment was in error and should be reversed.

Finally, defendant argues that an \$800,000 inventory overstatement issue that occurred in March 2012, after the preparation of Scholz's final performance evaluation, establishes as a matter of law that he was not doing satisfactory work. Again, this argument ignores the evidence in the record. SCAFCO's CFO, Jeff White, testified he discussed this inventory overstatement issue with Mr. Scholz in April or May 2012, after giving him his final exemplary performance evaluation in early April. Mr. Scholz testified differently with respect to this inventory overstatement issue:

In paragraphs 4 and 5 of his declaration, Mr. White refers to a conversation we had in 2012 about my "deficient performance." He makes specific reference to an incident in March 2012 involving an overstatement of inventory, "by over \$800,000, a factor of 10X, at one of [SCAFCO's] branches." I recall this conversation. First, it occurred prior to our meeting in April 2012 when Mr. White presented me with my performance evaluation. My performance evaluation was exemplary, and although we discussed the inventory overstatement, I was neither criticized nor disciplined for it. Second, I was the one who identified the inventory overstatement in the financial statements and I brought the error to Mr. White's attention. Third, the error was routinely corrected, resulting in no financial loss to the company. I acknowledge I made the error. However, in carrying out my duties, I identified the error, brought it to Mr. White's attention, and we corrected it. At the time it was not a matter of significant concern. It was only after my discharge that defendant now seems to characterize this as a performance deficiency. This is contrary to the manner

in which the issue was discussed and managed and is plainly pretextual.

(CP 202)

The dispute between Scholz and White in their testimony about this March 2012 inventory overstatement issue demonstrates a factual question concerning whether it was actually a performance failure at all. According to Scholz, he caught the error, brought it to White's attention, and it was routinely corrected. Mr. Scholz's testimony supports a finding that this really was no performance failure at all. Further Scholz's testimony supports a finding that his conversation with White about this inventory overstatement issue occurred prior to Mr. White giving him his final performance evaluation in April 2012, which was, again, exemplary. Whatever the specific facts of this incident, they had no negative impact on plaintiff's final performance evaluation.

Mr. Scholz was never disciplined for deficient performance or anything else during his eight plus year tenure of employment with SCAFCO. He received uniformly positive annual performance evaluations. Mr. White's testimony supports a finding that those performance evaluations were a tool to communicate with the employee about the status of his performance with the company and

whether or not he was meeting the company's expectations. (CP 110). This evidence, construed in the light most favorable to the plaintiff as the non-moving party, was more than sufficient to demonstrate a factual question concerning whether he was doing satisfactory work. The trial court's Order Granting Summary Judgment was in error and should be reversed.

2. The evidence supports a finding that Scholz was replaced, or his job duties were assumed by a younger person.

Defendant SCAFCO argues that plaintiff failed to prove the fourth element of his prima facie case, replacement by a younger worker. Again, defendant ignores substantial evidence in the record on this issue. The evidence supports a finding that Mr. Scholz was replaced, or his job duties were assumed by a younger worker.

In March 2012, SCAFCO hired Patrick Palmer as a "Financial Reporting Manager." Palmer is in his mid 30's (CP 128). Mr. Scholz testified:

It is true that in March 2012, some nine months prior to my discharge, SCAFCO hired Patrick Palmer as a "financial reporting manager." Mr. Palmer is in his mid-30's. I am 59. I did observe that Mr. Palmer was being assigned many of my duties and was being invited to an increasing number of meetings and functions from which I was expressly excluded. This was despite the fact that my performance of my job duties was consistently exemplary, as reflected in

every evaluation I received during my 8 ½ year tenure of employment with SCAFCO.

(CP 203).

On January 8, 2013, CFO White met with Mr. Scholz and told him that SCAFCO President and CEO Lawrence Stone had been discussing terminating his employment for nine months, the period of time dating back to March 2012 when SCAFCO hired Mr. Palmer. (CP 88-89). Plaintiff testified that White told him the discharge was the result of an unspecified “personal conflict” between Scholz and Stone. (CP 89). There was no discussion of performance deficiencies as the reason for discharge. Mr. Scholz’s testimony about the timing and circumstances of the hiring of Palmer in March 2012, and Palmer’s assumption of his job duties, must be construed in the light most favorable to plaintiff as the non-moving party. *Rice v. Offshore Systems, Inc.*, 167 Wn. App. 77, 272 P.3d 865, review denied, 174 Wn.2d 1016 (2012). This testimony supports a finding that Scholz was replaced, or his duties were assumed by a younger worker for purposes of his prima facie case of age discrimination. See *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 363, 753 P.2d 517 (1988) (“... the element of replacement by a younger person or persons outside the protected

age group is not absolute; rather, the proof required is that the employer “sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills”) quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979).

3. The evidence demonstrates a genuine issue of material fact concerning whether defendant’s proffered reasons for discharge were pretextual.

When CFO White met with Mr. Scholz on January 8, 2013 to inform him of his termination, White told him the discharge was the result of an unspecified “personal conflict” between Scholz and CEO Stone. (CP 89). There was no discussion of, or reference to performance deficiencies. SCAFCO’s internal documentation states the reason for discharge as “Not a good fit.” (CP 200). This, despite over eight years of successful employment with uniformly exemplary annual performance evaluations. It was only in the context of this litigation that SCAFCO began to allege a litany of performance deficiencies throughout plaintiff’s tenure of employment as legitimate reasons for his discharge. The evidence is more than sufficient to demonstrate a factual question concerning whether these alleged performance deficiencies were pretextual.

Once the employer produces evidence of a legitimate, non-discriminatory reason for discharge, the employee resisting summary judgment then must produce evidence that raises a genuine issue of material fact on whether the reasons given by the employer for discharging the employee are unworthy of belief or are mere pretext for what is in fact a discriminatory purpose. *Sellsted v. Washington Mutual*, 69 Wn. App., at 859. The employee is not required to produce evidence beyond that offered to establish the prima facie case, nor introduce direct or “smoking gun” evidence. *Sellsted*, 69 Wn. App. At 860. Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff’s burden. *Id.*, at 861. He must meet his burden of production to create an issue of fact but is not required to resolve the issue on summary judgment. “For these reasons, summary judgment in favor of employers is often inappropriate in employment discrimination cases.” *Sellsted*, 69 Wn. App., at 861; *Rice v. Offshore Systems, Inc.*, 167 Wn. App. 77.

An employee can demonstrate that the employer’s proffered reasons for discharge were pretextual in several ways: (1) they had no basis in fact; (2) they were not really motivating factors for the discharge decision; (3) they were not temporally connected to the

discharge decision; or (4) they were not motivating factors in employment decisions for other employees in the same circumstances. *Scrivener v. Clark College*, 176 Wn. App. 405 (2013); *Sellsted*, 69 Wn. App., at 860. In the instant case, the evidence supports findings that defendant's proffered reasons for discharge either had no basis in fact, or were not temporally connected to the discharge, or both.

SCAFCO cites an incident that occurred in 2006 or 2007 when Scholz was relieved of his duties of interfacing with the company's outside attorney. This was six or seven years prior to the discharge. Defendant cites the "Kristofferson" pre-lien notice issue which occurred in the fall of 2010, over two years prior to the discharge. It then cites an incident involving overstatement of financial reports in October 2010, again over two years prior to the discharge. SCAFCO refers to additional pre-lien notice issues in October/November 2010, again over two years prior to the discharge. (The evidence on this issue is extremely vague. See, CP 221-222). Then the company refers to a \$135,000 B & O tax liability issue that occurred in December 2010, two years prior to the discharge. All of these alleged performance deficiencies were temporally remote by several years from the discharge decision.

Notably, there were no disciplinary actions taken against Mr. Scholz as a result of any of them. None of them were mentioned either in the January 8, 2013 meeting with Mr. White when plaintiff was informed of his discharge, or in the company's internal documents regarding the reasons for discharge. The record clearly demonstrates factual questions concerning whether these proffered reasons were pretextual. *Sellsted*, 69 Wn. App. at 862.

SCAFCO's final complaint about Scholz's job performance relates to an incident in March 2012 when inventory at the company's Montana location was overvalued by \$800,000.00. Again, this occurred nine months prior to the discharge and was therefore temporally remote, supporting a finding of pretext. Further, the evidence supports a finding that this simply was not a performance deficiency. Mr. Scholz testified he caught the error in the company's financial statements, brought it to CFO White's attention, and it was routinely corrected. Mr. Scholz further testified this issue arose sometime prior to April 2012 when he received his final performance evaluation from Mr. White which was, once again, exemplary. White testified that the performance evaluation was a tool by which the company communicates with the employee about the status of his employment and whether or not he

was meeting the company's expectations. Scholz's receipt of an exemplary performance evaluation in April 2012, after the March 2012 inventory overstatement issue, demonstrates a factual question concerning (1) whether the inventory overstatement issue represented a performance failure at all, and (2) whether defendant's reliance on this to support the discharge was pretextual.

Contrary to defendant's argument, the record is replete with evidence demonstrating whether the company's proffered reasons for discharge were pretextual. When the employee produces a prima facie case of discrimination plus evidence of pretext, a trier of fact must determine the true reason for the discharge because the record contains reasonable but competing inferences of both discrimination and non-discrimination. *Rice v. Offshore Systems, Inc.*, 167 Wn. App. 77; See also *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 150, 94 P.3d 930 (2004). The trial court's Order Granting SCAFCO's Motion for Summary Judgment was in error and should be reversed.

4. The "same actor" defense does not defeat plaintiff's claim.

In *Hill v. BCTI Income Fund*, 144 Wn.2d 172, 189-190, 23 P.3d 440 (2001), the Washington court held that when someone is

both hired and fired by the same decision maker within a relatively short period of time, there is a strong inference that he was not discharged because of any attribute the decision maker was aware of at the time of the hiring. This is known as the “same actor” defense. Defendant SCAFCO contends summary judgment was appropriate on this theory. The trial court apparently agreed.¹ This was error.

Defendant’s “same actor” defense lacks merit for two reasons. First, plaintiff has produced direct evidence of discriminatory animus. When SCAFCO hired Patrick Palmer, a younger man in his 30’s, in March 2012, Mr. Scholz discussed this with CFO White. During these discussions, White told Scholz that the two of them (White and Scholz) “were not getting any younger; we need to find some new talent out there.” (CP 92). At the discharge meeting on January 8, 2013, White told Scholz that SCAFCO’s president, Lawrence Stone, had been considering firing Scholz for nine months, the period dating back to March 2012 when

¹ Defendant raised the “same actor” defense for the first time in its reply materials submitted in the Motion for Summary Judgment before the trial court. Allowing the moving party to raise new issues in its reply materials is improper because the non-moving party has no opportunity to respond. *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 168-169, 810 P.2d 4 (1991). Therefore, the same actor issue was not properly before the trial court and should not be considered by this court on appeal.

Palmer was hired. This was the context of White's comment that he and Scholz "were not getting any younger," and this was the reason for hiring Palmer.

SCAFCO cites *Domingo v. Boeing Employee's Credit Union*, 124 Wn. App. 71 (2004) to argue that White's reference to Scholz getting older and the company's need for younger talent was a "stray remark," and insufficient to create a factual question regarding age bias. The *Domingo* court recognized that the context of an isolated discriminatory statement may well reflect discriminatory animus. In the instant case, Mr. White's comment that Scholz was not getting any younger, and the company needed younger talent, was made in the context of hiring the much younger Patrick Palmer, who began to assume an increasing amount of Mr. Scholz's duties. The evidence, construed in the light most favorable to Scholz as the non-moving party, supports a finding that White's comment demonstrates age bias. Therefore, unlike the case in *Hill*, 144 Wn.2d 172, the record in this case contains direct evidence of discriminatory animus. The same actor defense does not apply.

More importantly, the same actor defense applies only when the same decision maker both hires and fires an employee "within a

relatively short period of time.” *Hill*, 144 Wn.2d at 189. Mr. Scholz was hired in November 2004 and discharged over eight years later in January 2013. No Washington court has applied the same actor defense in a case involving an employee with an eight year tenure of employment.

Finally, the Washington court has recognized the “same actor” defense in only two cases, *Hill v. BCTI Income Fund*, 144 Wn.2d 172, and *Griffith v. Schnitzer Steel*, 128 Wn. App. 438, 115 P.3d 1065 (2005). In both cases, the court invoked the “same actor” inference only in considering post trial motions to set aside jury verdicts. No Washington case has applied the “same actor” defense at the summary judgment stage. See *Creekmore v. U.S. Bank*, 2010 WL 3211 925 (W.D. Wash. 2010). The same actor defense does not apply in this case. The trial court’s Order Granting Defendant’s Motion for Summary Judgment should be reversed.

III. CONCLUSION

At the end of the day, defendant SCAFCO is arguing that plaintiff’s employment discrimination claim under RCW 49.60.180 fails because the record contains little or no direct evidence of age bias. That is simply not the law. It is well established that courts

do not require plaintiffs, in age discrimination cases, to produce direct evidence of discriminatory intent. *Hill*, 144 Wn.2d, at 179. Circumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden. *Sellsted*, 69 Wn. App., at 860. "Indeed, in discrimination cases, it will seldom be otherwise." *deLisle v. FMC Corporation*, 57 Wn. App. 79, 83, 786 P.2d 839 (1990).

In *Hill*, 144 Wn.2d 172, the Supreme Court clarified the evidentiary standard a plaintiff must meet to survive a motion for summary judgment as a matter of law in an employment discrimination case under RCW 49.60. The court expressly rejected the "pretext plus" standard previously applied by a number of Washington appellate and federal circuit court decisions. The *Hill* court held that generally, evidence of a prima facie case plus evidence of pretext will suffice to require determination of the true reason for the adverse employment action by a fact finder in the context of a full trial. 144 Wn.2d at 185. In the instant case, the trial court erred fundamentally by failing to follow *Hill*, and improperly applying a "pretext plus" evidentiary standard in analyzing the summary judgment record.

The evidence in the record is sufficient to establish all four elements of plaintiff's prima facie case of age discrimination. The evidence supports findings that he was (1) over 40, (2) doing satisfactory work, (3) discharged, and (4) replaced by a younger worker. The evidence further demonstrates genuine issues of material fact concerning whether defendant's proffered reasons for discharge, i.e., alleged performance deficiencies, were pretextual. On this record the trial court erred in granting Defendant SCAFCO's Motion for Summary Judgment. Plaintiff respectfully requests that the court reverse that decision and remand this case to Spokane County Superior Court for trial on the merits.²

RESPECTFULLY SUBMITTED this 7 day of
September, 2014.

PAUL J. BURNS, P.S.

By: 
PAUL J. BURNS
WSBA #13320
Attorney for Appellant

² SCAFCO requests attorney fees on appeal under RAP 18.9, which permits the court to award fees when an appeal is frivolous. For the reasons stated above, this court should reverse the decision of the trial court. It certainly cannot be said that Mr. Scholz has raised no debatable issues upon which reasonable minds could differ. Therefore, SCAFCO's request for attorney fees should be denied.

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 2 day of September, 2014, at Spokane, Washington, the forgoing was caused to be served on the following person(s) in the manner indicated:

Robert A. Dunn Dunn & Black 111 N. Post Street, Suite 300 Spokane, WA 99201	<input type="checkbox"/> Regular Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail
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PAUL J. BURNS