

**FILED**

JUL 28 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 32252-1-III

COURT OF APPEALS OF THE STATE  
OF WASHINGTON, DIVISION III

---

PAT SCHOLZ, a married man,

Plaintiff/Appellant,

v.

SCAFCO CORPORATION, a Washington Corporation,

Defendant/Respondent.

---

APPEALED FROM SPOKANE COUNTY  
SUPERIOR COURT CAUSE NO. 12-2-01378-3

---

**RESPONDENT SCAFCO CORPORATION'S  
RESPONSE BRIEF**

---

ROBERT A. DUNN, WSBA # 12089  
ALEXANDRIA T. JOHN, WSBA # 45188  
DUNN BLACK & ROBERTS, P.S.  
111 North Post, Suite 300  
Spokane, WA 99201  
(509) 455-8711  
Attorneys for Respondent SCAFCO  
Corporation

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE.....	2
A. Background.....	2
B. Timeline Of Events.....	5
III. ARGUMENT.....	9
A. Standard of Review.....	10
B. Plaintiff Failed To Establish a Prima Facie Case of Age Discrimination.....	11
1. Plaintiff Failed To Demonstrate He Was Doing Satisfactory Work.....	13
2. Plaintiff Was Not Replaced By Someone Significantly Younger.....	18
C. SCAFCO Legitimately Terminated Plaintiff's Employment Solely Due To Poor Work Performance.....	19
D. Plaintiff Failed To Present Evidence That SCAFCO's Reasons for Termination Were Untrue or Mere Pretext.....	21
1. Plaintiff's subjective and self-serving response to the events cited by SCAFCO is not evidence of pretext.....	22
a. Kristofferson Matter and B&O Tax Liability Issue.....	25
b. Inventory Overstatements, Additional Pre-lien Notice Issues, and Subordinates' Concerns About Plaintiff's Leadership.....	27

2.	Plaintiff’s subjective performance evaluations are irrelevant and insufficient evidence of pretext. ....	29
E.	No Reasonable Trier Of Fact Could Or Would Conclude Plaintiff Was Fired Due To His Age.....	31
1.	Hiring a Subsequent Employee Is Irrelevant and Unrelated To Plaintiff’s Termination or His Discrimination Claim.....	34
2.	The Uncorroborated Statement Plaintiff Relies On Is At Most A Stray Comment Insufficient To Support Plaintiff’s Discrimination Claim. ....	36
3.	Plaintiff’s age at the time of his hiring confirms his age was immaterial to his termination. ....	40
IV.	RAP 18.9 MOTION FOR ATTORNEY FEES AND COSTS.....	43
V.	CONCLUSION .....	43

## TABLE OF AUTHORITIES

	<u>Page</u>
 <b><u>Cases</u></b>	
<u>Barker v. Advanced Silicon Materials, LLC, (ASIMI)</u> , 131 Wn. App. 616, 625 (2006) .....	41, 42
<u>Baumgartner v. State Dep't of Corr.</u> , 124 Wn. App. 738, 743 (2004). .....	11
<u>Bradley v. Harcourt, Brace &amp; Co.</u> , 104 F.3d 267, 270–71 (9th Cir. 1996)) .....	33
<u>Brownfield v. City of Yakima</u> , 178 Wn. App. 850, 875 (2014).....	10
<u>Buhrmaster v. Overnite Transp. Co.</u> , 61 F.3d 461, 464 (6th Cir. 1995) .....	40
<u>Domingo v. Boeing Employees' Credit Union</u> , 124 Wn. App. 71, 77-78, (2004).....	passim
<u>Donatelli v. D.R. Strong Consulting Engineers, Inc.</u> , 179 Wn.2d 84, 111 (2013) .....	14
<u>Fulton v. State Dep't of Soc. &amp; Health Servs.</u> , 169 Wn. App. 137, 162 (2012) .....	23, 26
<u>Greenhalgh v. Dep't of Corrections</u> , 160 Wn. App. 706, 714 (2011). .....	11
<u>Griffith v. Schnitzer Steel Indus., Inc.</u> , 128 Wn. App. 438, 446 (2005) .....	passim
<u>Grimwood v. Univ. of Puget Sound, Inc.</u> , 110 Wn.2d 355, 365 (1988) .....	23, 24, 25, 28
<u>Hill v. BCTI Income Fund-I</u> , 144 Wn.2d 172, 189 (2001) .....	33, 40, 41, 42
<u>Kirby v. City of Tacoma</u> , 124 Wn. App. 454 (2004) .....	38, 39
<u>Kumar v. Gate Gourmet, Inc.</u> , 325 P.3d 193 (May 22, 2014).....	13
<u>McClarty v. Totem Elec.</u> , 157 Wn.2d 214 (2006).....	33
<u>McDonnell Douglas Corp. v. Green</u> , 411 U.S. 792 (1973).....	12

<u>Overton v. Consol. Ins. Co.</u> , 145 Wn.2d 417, 430 (2002).....	21
<u>Quedado v. Boeing Co.</u> , 168 Wn. App. 363, 367 (2012).....	11
<u>Scrivener v. Clark College</u> , 176 Wn. App. 405, 411 (2013)....	passim
<u>Short v. Battle Ground Sch. Dist.</u> , 169 Wn. App. 188, 196 (2012) .....	13, 19
<u>State v. Hicks</u> , 163 Wn. 2d 477, 495 (2008). .....	1
<u>Thompson v. St. Regis Paper Co.</u> , 102 Wn.2d 219, 226 (1984) .....	12
<u>Youker v. Douglas Cnty.</u> , 178 Wn. App. 793 (2014) <u>review</u> <u>denied</u> , 180 Wn.2d 1011 (2014).....	17
<u>Young v. Key Pharmaceuticals, Inc.</u> , 112 Wn.2d 216, 225 (1989) .....	10

*“It is an old adage among trial lawyers that when the law is on your side you argue the law, when it is not you argue the facts, and when you have neither you pound the table.”<sup>1</sup>*

## **I. INTRODUCTION**

Plaintiff’s appeal presents neither facts nor law to demonstrate any genuine material issues in support of his claims of discrimination. Thus, the Trial Court’s summary judgment dismissal of Plaintiff’s case should be affirmed.

Plaintiff Scholz, an at-will employee, does not deny the occurrence of each and every performance deficiency that was noted by Defendant SCAFCO Corporation (“SCAFCO”) as the basis for terminating his employment. Furthermore, Plaintiff admits that each such deficiency was caused either by him personally or by someone for whom he was ultimately responsible as SCAFCO’s Financial Controller.

Plaintiff has not only failed to present a prima facie case of age discrimination, but has also failed to produce any evidence demonstrating that Defendant’s reasons for terminating him were pretextual. There is no evidence to allow a rational trier of fact to

---

<sup>1</sup> State v. Hicks, 163 Wn. 2d 477, 495 (2008)(J. Chambers, concurring).

conclude that discrimination of any kind has occurred. Thus, the Trial Court properly dismissed Mr. Scholz's baseless age discrimination claim as a matter of law.

## II. STATEMENT OF THE CASE

### A. Background.

SCAFCO hired Patrick Scholz in November 2004, as an at-will employee to fill the position of Financial Controller with the corporation. At the time, Mr. Scholz was 50 years old. CP 271. It quickly became apparent to SCAFCO's President, Larry Stone, that Mr. Scholz lacked the attention to detail and the administrative and managerial skills needed to perform the tasks for which he had been hired. CP 271.

Mr. Scholz had originally been hired with the expectation that he would one day transition to become SCAFCO's Chief Financial Officer (CFO), replacing Art Mell, then 67 who had expressed a desire to prepare for retirement. CP 271. Mr. Stone quickly realized

this was not feasible based on Mr. Scholz's inadequate job performance.<sup>2</sup> CP 271. Nonetheless, Mr. Scholz was allowed to remain in his position with SCAFCO despite Mr. Stone's misgivings and better judgment. CP 272. Eventually, Jeff White was hired at age 55 in 2011 to do the job for which Mr. Scholz had originally been intended. CP 272; CP 48. Mr. White currently serves as SCAFCO's CFO. CP 272; CP 48.

Mr. Stone's frustration with Mr. Scholz's subpar work as Financial Controller continued. CP 272. An example of Mr. Scholz's unsatisfactory job performance was his failure to follow company pre-lien procedures mandated by Mr. Stone. As a result, in 2010 SCAFCO was exposed to nearly \$200,000 in lost revenue, embroiling SCAFCO in prolonged litigation in an attempt to recoup its losses (referred to as the "Kristofferson matter"). CP 272. This situation underscored Mr. Stone's belief that Mr. Scholz did not have the ability to manage SCAFCO's finances on a large scale. CP

---

<sup>2</sup> When it became apparent that Mr. Scholz was an inadequate replacement, Mr. Mell agreed to stay on as SCAFCO's CFO until a more suitable replacement could be found. CP 271. Mr. Mell ultimately resigned at age 72 in 2009. CP 271. Notably, to this day, Mr. Mell, currently age 76, continues to work as CFO for LB Stone Properties Company, an affiliate of SCAFCO. CP 272.

272. Consequently, it also confirmed that Mr. Scholz's potential for professional advancement with SCAFCO had ceased. CP 272. This was merely one of numerous incidents demonstrating that he was unable to adequately manage the detail-oriented work required of a Financial Controller. See CP 270-274; see also CP 47-51.

Eventually, over a period of time, SCAFCO began to increasingly divest Mr. Scholz of his duties, delegating numerous functions previously performed by the Financial Controller to other employees better suited to perform them. CP 273; CP 48-9. Ultimately, SCAFCO lost all confidence in Mr. Scholz's ability to do his job. CP 273A; CP 49. Accordingly, SCAFCO terminated Mr. Scholz's employment in January 2013. CP 273A; CP 49. Mr. Scholz was terminated because of incompetence and unsatisfactory performance totally unrelated to any aspect of his age. Indeed, by that time, Mr. White had already absorbed and was performing nearly 75% of Mr. Scholz's duties in order to ensure they were completed properly. CP 49. The following timeline of undisputed events relevant to Mr. Scholz's frivolous age discrimination claim further clarifies the specious nature of his suit against SCAFCO.

**B. Timeline Of Events.**

**November 2004:** SCAFCO, by and through its President Larry Stone (age 58) hired Patrick Scholz, then age 50 to be SCAFCO's Financial Controller as an at-will employee. See CP 270-71.

**October 24, 2005:** Mr. Scholz signed SCAFCO's Annual Employee Records Update Survey & Emergency Contact Information ("Employee Survey") confirming that no one at SCAFCO "[t]reated [him] unfairly or made offensive comments, which in any way related to [his] gender, religion, sexual orientation, *age, creed, color, sex...*" See CP 224-229.

**2006 - 2007:** Mr. Scholz was relieved from his duties of interfacing with the company's outside attorney who temporarily withdrew from representing SCAFCO because of objectionable conduct by Mr. Scholz. CP 42-43, 102. Mr. Mell was forced to intercede and take over Mr. Scholz's duties on the matter. CP 43.

**March-April 2008:** Company President Stone told Mr. Scholz he was "[n]ot a good fit as CFO" and "*not the right person for SCAFCO*" in that position. See CP 41.

**April 7, 2008:** Mr. Scholz signed an Employee Survey confirming no one had treated him unfairly related to his age. See CP 224-28, 232.

**March 2009:** Mr. Scholz signed an Employee Survey confirming no one had treated him unfairly related to his age. See CP 224-228, 235.

**April 2, 2010:** Mr. Scholz signed an Employee Survey confirming no one had treated him unfairly related to his age. See CP 224-228, 237.

**April 16, 2010:** Dan Jondal, who had replaced Mr. Mell as CFO and Mr. Scholz's supervisor, generated Mr. Scholz's second to last performance evaluation. CP 191-196.

**September/October 2010:** SCAFCO's Credit Department, which reported to Mr. Scholz, failed to adhere to Mr. Stone's pre-lien notice policies, causing SCAFCO to suffer an almost \$200,000 loss forcing SCAFCO into litigation. CP 203-4; CP 216-22.

**October 2010:** Mr. Scholz's department overstated SCAFCO's financials reflecting an error of over \$1,000,000. CP 273.

**October/November 2010:** Additional pre-lien notices were ineffectively handled by Scholz's department. CP 221-22.

**December 2010:** Mr. Scholz over-accrued and authorized payments between SCAFCO and an affiliate causing SCAFCO to overpay the affiliate's B&O tax liability by over \$135,000. CP 204; CP 273.

**March 2011:** Kurt Dehmer, then SCAFCO CFO, informed Mr. Scholz that he would not be receiving a 2010 year-end bonus due to the lien/pre-lien notice issues. CP 219-220.

**April 2011:** Mr. Scholz signed an Employee Survey confirming no one had treated him unfairly related to his age. See CP 224-228, 240.

**July 2011:** Jeffrey White (then age 55) was hired as SCAFCO's CFO. CP 48.

**February 27, 2012:** Mr. White generated his first "annual" performance evaluation of Scholz, which in reality was Mr. Scholz's final evaluation with SCAFCO. CP 112-114. The evaluation reflected Mr. White's personal observations of Scholz's performance. CP 112-114.

**March 2012:** Mr. Scholz overvalued SCAFCO's inventory by over \$800,000, inaccurately reflecting the inventory in SCAFCO's financials at ten times what it should have been. CP 33; CP 48.

**April 3, 2012:** Mr. White and Mr. Scholz discussed Scholz's February 27, 2012 performance evaluation. See CP 140.

**March-May 2012:** Mr. Scholz and Mr. White discussed SCAFCO's decision not to provide him a 2011 bonus. CP 32-3, CP 48. Mr. White was "*critical of [Mr. Scholz's] performance issues*" relating to the March 2012 inventory overvaluation. See CP 32-3, 119-20.

**October 2012:** Mr. Scholz's subordinates informed Mr. White they had grave concerns about Mr. Scholz's leadership. CP 48.

**January 18, 2013:** Mr. Scholz was terminated from SCAFCO employment. CP 4; CP 49.

To date, the SCAFCO position Mr. Scholz formerly held has not been filled. CP 49. His former duties are presently performed by various other SCAFCO employees, with the majority currently handled by Mr. White and one of Mr. Scholz's former subordinates, Tammy Cook, age 50. CP 49.

### III. ARGUMENT

*“If a plaintiff cannot establish specific and material facts to support each element of the prima facie case, the defendant is entitled to judgment as a matter of law. If a plaintiff cannot present evidence that the defendant's reasons are untrue or mere pretext, summary judgment is proper. **Even if both parties meet their requisite burdens, summary judgment is still proper if no rational trier of fact could conclude the action was discriminatory.**”*

Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 77-78 (2004)(emphasis added). Plaintiff has failed to produce any evidence supporting his baseless age discrimination claim.

Plaintiff relies solely on conclusory opinions and irrelevant and misleading assertions insufficient to raise a genuine issue of material fact as to his discrimination claim. Plaintiff is unable to establish “*specific and material facts*” supporting 1) his contention that his work was satisfactory when the termination decision was made, or 2) his burden of showing he was replaced by someone significantly younger. Plaintiff presents no evidence or credible arguments rebutting the events and in fact concedes the reasons Defendant gave as justification for terminating his employment occurred. Finally, Plaintiff fails to produce even a scintilla of

evidence from which a rational trier of fact could conclude that age discrimination occurred. See Id. Thus, the Trial Court properly granted summary judgment.

**A. Standard of Review**

*“On appeal of summary judgment, the standard of review is de novo and the appellate court performs the same inquiry as the trial court.”* Brownfield v. City of Yakima, 178 Wn. App. 850, 875 (2014)(citation omitted). A moving party is entitled to summary judgment when there is no genuine issue of material fact. CR 56(c). A party asserting a claim for relief *“must set forth specific facts showing that there is a genuine issue for trial.”* CR 56(e).

Once a party demonstrates there is no genuine issue of material fact, summary judgment is appropriate if the nonmoving party *“fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.”* Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225 (1989) (internal citations omitted). *“A nonmoving party may not rely on speculation or on having its affidavits considered at face value.”* Domingo, supra at

87, n. 41. “*Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment.*” Greenhalgh v. Dep’t of Corrections, 160 Wn. App. 706, 714 (2011). “*A court properly grants summary judgment in the absence of a genuine issue of material fact or when reasonable minds could not differ that the moving party is entitled to judgment as a matter of law.*” Baumgartner v. State Dep’t of Corr., 124 Wn. App. 738, 743 (2004).

Here, the undisputed facts, including Mr. Scholz’s own admissions, confirm that summary judgment was proper.

**B. Plaintiff Failed To Establish a Prima Facie Case of Age Discrimination.**

It is well understood and accepted that Washington is an at-will employment state. See Quedado v. Boeing Co., 168 Wn. App. 363, 367 (2012) (“*Generally, an employment contract that is indefinite as to duration is terminable at will by either the employee or employer.*”). Indeed, Mr. Scholz was hired by SCAFCO as an at-will employee. CP 39-40. Subject to few exceptions, when an employee in Washington is hired as an at-will employee “*the ‘American rule’, [governs] termination of employees and employers*

*[can] discharge employees for no cause, good cause or even cause morally wrong without fear of liability.”* Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 226 (1984). Mr. Scholz was well aware that his employment with SCAFCO could be terminated at any point. CP 39-40.

Nonetheless, SCAFCO in fact had abundant good cause to terminate Mr. Scholz due to his disregard for company policy and his inability to competently manage his job duties. Plaintiff, bitter about his discharge, subsequently sought to punish SCAFCO by asserting without proof or any credible evidence that he was terminated based on his age. His claim was made despite knowing that SCAFCO is a company that employs an “*older working population*” and which in fact had hired him at age 50, just over 8 years earlier. CP 44; see also CP 50, CP 271-272.

For employment discrimination claims under Washington’s Law Against Discrimination (“WLAD”), Washington courts employ the burden shifting analysis from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Domingo, supra at 77. A plaintiff bears the initial burden of proving a prima facie case. See Id. In

order to establish a prima facie case of age discrimination under the WLAD, an employee must demonstrate that he “(1) belongs in a protected class; (2) was discharged; (3) was doing satisfactory work when the termination decision was made; and (4) was replaced by someone not in the protected class” or “someone significantly younger.” Griffith v. Schnitzer Steel Indus., Inc., 128 Wn. App. 438, 446 (2005).

*To defeat an employer's motion for summary judgment in an employment discrimination case, **an employee ‘must do more than express an opinion or make conclusory statements’**; she must establish ‘specific and material facts’ to support each element of her prima facie case.*

Short v. Battle Ground Sch. Dist., 169 Wn. App. 188, 196 (2012)(emphasis added) *overruled on other grounds by* Kumar v. Gate Gourmet, Inc., 325 P.3d 193 (May 22, 2014). Here, Plaintiff failed to establish the latter two elements.

**1. Plaintiff Failed To Demonstrate He Was Doing Satisfactory Work.**

Plaintiff provides nothing more than conclusory opinions that his purported “evidence” “*certainly supports a finding that he was doing more than satisfactory work.*” See Appellant’s Opening Brief,

p. 15. However, the “*evidence*” Plaintiff relies upon consists solely of repeated references to irrelevant performance evaluations and red-herring issues with regard to immaterial facts. Here, the Trial Court properly recognized that Mr. Scholz failed to demonstrate his work was satisfactory. See CP 278; Donatelli v. D.R. Strong Consulting Engineers, Inc., 179 Wn.2d 84, 111 (2013)(noting that “[o]n summary judgment, ‘when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.’”).

Notwithstanding Mr. Scholz’s self-interested description of his evaluations as “exemplary” no fewer than 10 times in his opening brief, Mr. Scholz’s evaluations do not create any issues of fact relating to his unsatisfactory performance. Plaintiff failed to advise this Court that only one of his referenced evaluations actually occurred and/or was generated during the relevant timeframe. The only written evaluation generated between Mr. Scholz’s second to last performance evaluation (by former CFO Dan Jondal on April 16, 2010) and his termination in January 2013, was his final SCAFCO evaluation (generated by current CFO Jeffrey White dated

**February 27, 2012**). See CP 112-4, CP 135, CP 140, CP 196. Mr. White was hired as SCAFCO's CFO as well as Mr. Scholz's supervisor in **July 2011**. See CP 48, 112-3, 272. Mr. White's February 27, 2012 review of Mr. Scholz was based solely on his own observations. See CP 48, 112-3, 272.

Mr. Scholz's misleading references to his past evaluations seek to obscure the numerous performance issues which he admits occurred after April 16, 2010, but before Mr. White's hiring in July 2011. Specifically, 1) Mr. Scholz admits a department reporting to him failed to follow Mr. Stone's pre-lien notice policies in **September or October 2010** (CP 203-4, 216-22); 2) Mr. Scholz does not address or dispute that his department overstated inventory by \$1,000,000 in **October 2010** (CP 273); 3) Mr. Scholz confirms additional pre-lien notices were ineffectively handled by his department in **October or November 2010** (CP 221-22); 4) Mr. Scholz does not dispute he over-accrued and authorized payments resulting in a \$135,000 B&O tax liability overpayment in **December 2010** (CP 204); and 5) Mr. Scholz acknowledges he was informed in **March 2011** that he would not receive a 2010 bonus due to errant

lien issues (CP 219-23). Mr. Scholz also admits that *after* February 27, 2012, (**March 2012**) he overvalued SCAFCO's inventory by over \$800,000, and that Mr. White was "*critical of [his] performance*" relating to the overvaluation. CP 32-3, 120.

The fact that neither the April 16, 2010 evaluation nor any of the five evaluations preceding it document performance issues which occurred *after* April 16, 2010, certainly does not create any genuine factual issue as to either the occurrence of those events or Mr. Scholz's performance at the time they occurred. Similarly, there is no probative value to the fact that the February 27, 2012 final evaluation does not document performance issues which undisputedly occurred before the date the preparer, Mr. White, joined SCAFCO. Furthermore, no factual issues are implicated by the fact that none of the written performance evaluations mention Mr. Scholz's *March 2012* overvaluation of inventory which occurred after his final annual written evaluation was prepared. Finally, the fact that Mr. Scholz admits and/or fails to dispute his above performance issues renders the performance evaluations wholly irrelevant regardless of timing. Since Mr. Scholz acknowledged his

work was deficient in admitting these matters, the Trial Court properly recognized Mr. Scholz failed in his burden to show he was doing satisfactory work.

Next, Plaintiff speciously claims an issue of fact exists as to his March 2012 inventory discrepancy because he disagrees with whether Mr. White discussed the matter with him before or after they discussed his February 27, 2012 evaluation. Mr. Scholz further confusingly suggests that summary judgment was inappropriate because he purportedly disagrees with whether it was he or Mr. White who first realized his \$800,000 accounting error had occurred. Mr. Scholz's arguments glaringly fail to recognize that only *genuine issues of material fact* defeat summary judgment motions; not manufactured disputes as to irrelevant and ministerial details. See CR 56. "*A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome.*" Youker v. Douglas Cnty., 178 Wn. App. 793 (2014) review denied, 180 Wn.2d 1011 (2014)(citations omitted).

Plaintiff clearly does not dispute responsibility for the \$800,000 error. CP 202. He does not dispute that his error occurred

in March 2012 - subsequent to the date his February 27, 2012 written performance evaluation was prepared. CP 32-3; CP 202. Nor does Plaintiff dispute the conversation with Mr. White, wherein Mr. White was “*critical of [his] performance*” regarding this issue. CP 32-3. When that conversation actually took place, or who first caught the inventory error are wholly immaterial to the question of whether Mr. Scholz was performing satisfactory work. The only relevant material fact regarding the 2012 inventory discrepancy is the undisputed fact that it was the Plaintiff who overvalued the inventory. CP 202 (“*I acknowledge I made the error.*”).

These undisputed facts confirm that the Trial Court properly found Mr. Scholz had failed to establish he was doing satisfactory work when SCAFCO decided to terminate his employment.

**2. Plaintiff Was Not Replaced By Someone Significantly Younger.**

Mr. Scholz similarly fails to present any evidence demonstrating he was replaced by someone younger. Mr. Scholz provides nothing more than his own vague and conclusory opinion that a Mr. Patrick Palmer “essentially replaced” him. CP 69, 97. Plaintiff utterly fails to identify any “*specific and material facts*” in

support of this unsubstantiated conclusion. See Short, 169 Wn. App. at 196. In fact, Mr. Scholz's former position has not yet been filled by any one person. CP 49. As a consequence, Mr. Scholz has not and cannot establish this element of his prima facie case.

C. **SCAFCO Legitimately Terminated Plaintiff's Employment Solely Due To Poor Work Performance.**

Defendant SCAFCO in any event satisfied the next step in the burden shifting analysis, "*present[ing] evidence that the plaintiff was terminated for a legitimate reason,*" thereby rebutting any inference of discrimination. See Domingo, supra at 77. SCAFCO terminated Mr. Scholz's employment not because of his age, but rather due to legitimate reasons, i.e. his inability to competently manage SCAFCO's day-to-day financial affairs as consistently demonstrated between 2010 and his 2013 termination. See Section II, Timeline of Events supra. Mr. Scholz's repeated inattention to detail and failure to follow company policies resulted in significant exposure and lost profits to the company, ultimately causing extra work for SCAFCO, Mr. White, and SCAFCO's other employees. See CP 49, 273-273A.

Indeed, SCAFCO's dissatisfaction with Mr. Scholz's performance came as no surprise to Mr. Scholz. Mr. Scholz concedes he knew Mr. Stone was "*very upset that SCAFCO missed an opportunity to execute a lien*" following the 2010 incident, and specifically that Mr. Stone was upset with him personally. See CP 34-35. Mr. Scholz also admits he was informed that pre-lien issues formed the basis for SCAFCO withholding his 2010 discretionary bonus. CP 219-23. His 2011 discretionary bonus was similarly withheld, and as discussed supra, Plaintiff admits that in 2012 Mr. White criticized his job performance based on his shocking over-

//

//

//

//

//

//

//

//

//

valuation of inventory by hundreds of thousands of dollars.<sup>3</sup> CP 32-3, 120.

The Trial Court accurately concluded it was Mr. Scholz's substandard performance, and not age, which prompted SCAFCO to terminate his employment. CP 279.

**D. Plaintiff Failed To Present Evidence That SCAFCO's Reasons for Termination Were Untrue or Mere Pretext.**

In the face of SCAFCO's legitimate and nondiscriminatory reasons for terminating Plaintiff's employment, namely numerous and escalating performance issues over two years, Plaintiff is required to present evidence indicating these reasons are "*unworthy*

---

<sup>3</sup> Mr. Scholz asserted in a declaration "...although we discussed the inventory overstatement, I was neither criticized nor disciplined for it," referring to this incident and his conversations about it with Mr. White. However, in his deposition he testified as follows:

*"Q. Other than Mr. White telling you that it seemingly was a personal conflict between you and Mr. Stone that led to the decision of no 2011 bonus, was there any other discussion in this 40-to-60-minute review that had Mr. White being **critical of any performance issues that had occurred in the prior year?**"*

*"A. I believe that he made a comment about one instance to where we mis- -- and I was directly responsible for this, for misvaluing an inventory at one of the locations."*

CP 32-33 (emphasis added). Mr. Scholz's subsequent self-serving and contradictory declaration denying criticism of his performance thus cannot create an issue of fact. See Overton v. Consol. Ins. Co., 145 Wn.2d 417, 430 (2002) ("When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.")

of belief” or “mere pretext for discrimination” to survive summary judgment. Domingo, supra at 87; Scrivener v. Clark College, 176 Wn. App. 405, 411 (2013). Mr. Scholz wholly fails to present any such evidence, and thus his claims were properly dismissed as a matter of law.

**1. Plaintiff’s subjective and self-serving response to the events cited by SCAFCO is not evidence of pretext.**

Defendant terminated Mr. Scholz’s at-will employment because his repeated and dramatic errors, financial and otherwise, proved him inadequate for the job thus destroying SCAFCO’s confidence in his abilities to perform his duties without exposing SCAFCO to unacceptable risks. See CP 271-273A. To that end, SCAFCO provided abundant and uncontroverted evidence of Mr. Scholz’s subpar performance.

In response, Plaintiff makes the puzzling assertion that Defendant’s reasoning “*has no basis in fact,*” or that SCAFCO “*conjure[d] up*” the reasons for his termination. Opening Brief, at p. 21. Yet, Plaintiff does not and cannot dispute the factual occurrence of the events cited by his former employer, SCAFCO. In fact, he either fails to dispute, or affirmatively concedes that each event

occurred. The basis for Plaintiff's claim of pretext appears to be simply that Plaintiff now subjectively and self-servingly asserts his belief that each of the numerous incidents taken in isolation is insignificant or excusable. However, Plaintiff's subjective opinion on these matters is wholly irrelevant. See e.g. Griffith, supra at 453 (*"The employer's justifications were either undisputed or challenged only with Griffith's irrelevant subjective assessments and opinions."*); see also Fulton v. State Dep't of Soc. & Health Servs., 169 Wn. App 137, 162 (2012) (*"[A]n employee's disagreement with her supervisor's assessment of her job performance does not demonstrate pretext or 'give rise to a reasonable inference of discrimination.'"*)

The Grimwood case repeatedly cited by Plaintiff addressed arguments similar to Plaintiff's which the Grimwood court found inadequate to defeat summary judgment. See Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 365 (1988). In Grimwood, the defendant employer terminated the plaintiff's employment based on an act it felt demonstrated continued "*noncooperation*," citing to warnings of earlier incidents involving "*ineffective communication*

*with employees, failure to complete probationary reviews and annual performance appraisals in a timely fashion, as well as repeated complaints about [his] uncooperative behavior or attitude to be serious.”* Id., at 357-358. The Grimwood court noted that the plaintiff “*did not dispute the factual contents of the defendant’s affidavit or the deposition.*” Id. Instead, the plaintiff introduced letters of praise, a performance evaluation, copies of a manual, and his own conclusory opinions as to the nature of those events. Id.

The Grimwood court noted that whereas the defendant employer had cited specific facts, by contrast the “*plaintiff’s affidavit in opposition presented only his conclusions and opinions as to the significance of the facts set forth in defendant’s affidavit, e.g., that was ‘petty,’ this was a ‘pretext,’ that was ‘an exaggeration,’ or a fact set forth was ‘much ado about nothing.’*” Id. at 360. The Grimwood court confirmed that “[t]he ‘facts’ required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature...[u]ltimate facts or conclusions of fact are insufficient.” Id. at 359-360.

The Grimwood court explained that if the plaintiff had denied the events at issue, the outcome might have been different; however,

“*[t]o describe the incident instead as ‘much ado about nothing’ may express his sincere belief and conclusions as to the occurrences at issue, but does not set forth ‘facts.’*” Id. Accordingly, the Grimwood court held the “*Plaintiff’s conclusory opinions [did] not amount to material facts admissible in evidence showing there is a genuine issue for trial as to his age discrimination claim.*” Id., at 365. That is precisely the case here. For example:

**a. Kristofferson Matter and B&O Tax Liability Issue.**

Mr. Scholz admits the 2010 Kristofferson lien notice incident occurred (CP 203), acknowledges that pre-lien notices were the responsibility of his department (CP 85; 219); admits he believes that “*the company ended up taking a hit*” as a result (CP 218); and confirms that when he left the company in 2013, the issue was still in litigation (CP 218). Mr. Scholz also confirms that where one is “*in charge of certain operations, affairs, the buck has to stop with the person in charge...*,” and admits he knew Mr. Stone was upset with him personally regarding the Kristofferson matter because the “*credit manager reported to me on a day-to-day basis.*” CP 87; CP 34-35; CP 219. Plaintiff now lamely suggests his personal belief

that former CFO Dan Jondal should be blamed rather than himself for his department's error, creates a factual issue as to pretext. It does not. See Fulton, supra at 162.

Similarly, Mr. Scholz does not deny he was the person who over-accrued and authorized the payment resulting in SCAFCO's \$135,000 B&O tax liability overpayment in 2010. CP 204. He now merely appears to complain that it isn't fair to hold him responsible for this error because he believes the company's outside accounting firm should have caught and fixed his mistake. CP 204.

Notably, no evidence exists that Mr. Scholz ever informed Mr. Stone he believed someone else was to blame for these incidents. Indeed, Mr. Scholz admits that though he knew Mr. Stone was upset with him about the Kristofferson matter, he never told Mr. Stone he believed Dan Jondal was actually to blame. See CP 34-5; see also CP 86-7.

In any event, Washington courts acknowledge that "*[i]t is reasonable for an employer to be troubled by an employee who permits questionable policies to continue even if that employee did not initiate the policies.*" Griffith, 128 Wn. App. at 451. Further

“[a]n employer may hold its management accountable for failing to keep abreast of matters it reasonably deems to be in the company’s best interests.” Id. As SCAFCO’s Financial Controller, Mr. Scholz was accountable for his failure to “keep abreast of matters” relating to its financial affairs, up to and including for his own numerous financial errors. Id. Mr. Scholz’s conclusory opinions about whether he did so competently, is wholly irrelevant. Id.

**b. Inventory Overstatements, Additional Pre-lien Notice Issues, and Subordinates’ Concerns About Plaintiff’s Leadership.**

As explained above, Plaintiff also has failed to present evidence creating any genuine issues of material fact as to the March 2012 inventory overstatement, notwithstanding his meritless assertions regarding who caught his mistake, and/or when it was discussed. See Section III(B)(1) supra. Mr. Scholz utterly fails to address his Department’s earlier December 2010 inventory overstatement of \$1,000,000, the additional pre-lien notice issues he admits occurred in October-November 2010, or his subordinates’ October 2012 communication to Mr. White expressing that they

lacked confidence in Mr. Scholz's leadership abilities. See CP 273, 221-22, 48.

Although Plaintiff acknowledges that each of the occurrences cited by SCAFCO did happen, he nonetheless attempts to demonstrate pretext by merely opining to the effect that "*they should have been over it by then*" (referring to the alienation of the attorney in 2006/2007; the 2010 Kristofferson pre-lien matter; and the 2010 \$135,000 tax liability issue); "*it wasn't my responsibility*" (Kristofferson pre-lien matter and \$135,000 tax liability); or "*all's well that ends well*" (\$135,000 tax liability and inventory overvaluation by over \$800,000 in 2012). See CP 46, 201-204. As in Grimwood, Mr. Scholz's subjective expression and excuses here attempting to minimize the significance of these events do not constitute evidence, much less create any genuine factual issues as to pretext or discrimination. See Grimwood, supra at 360.

The Trial Court here correctly held that Mr. Scholz failed to produce evidence supporting his claim that SCAFCO's decision to terminate him based on his continual deficient performance issues, was pretext for discrimination.

**2. Plaintiff's subjective performance evaluations are irrelevant and insufficient evidence of pretext.**

As explained above, Mr. Scholz's reliance on prior performance evaluations as having any relevance or materiality to his age discrimination claim is patently misleading and unquestionably misplaced. Remarkably, Plaintiff Scholz nonetheless also seeks to rely on his performance evaluations as his sole external evidence of pretext. However, as discussed above, Plaintiff's evaluations are temporally disconnected from the majority of the events leading up to his termination. See Section III(B)(1) supra. Furthermore, his own testimony belies his claim of pretext.

Where a Plaintiff acknowledges "*repeated discussions during his employment about each of the issues*" provided by his employer as justification for termination, the fact that such reasons were not documented is insufficient circumstantial evidence of pretext. See e.g. Griffith, supra at 450. Here, as previously discussed, Plaintiff admits the occurrence of the events cited by SCAFCO, and at that he was aware that SCAFCO's President was upset with him as a result of the pre-lien issues as of March 2011. CP 34-5; CP 219-23. Further, Plaintiff acknowledges that Mr. White, SCAFCO's CFO,

was critical of his performance issues regarding the inventory overvaluation in 2012. CP 32-3.

Indeed, Mr. Scholz's 2012 performance evaluation itself documents the Company's concerns about his performance, stating "[t]he accuracy of the accounting system falls under Pat's perview [sic]. He needs to work with his reports to insure [sic] that tasks are completed in a timely [and] accurate manner." CP 139. As in Griffith, Plaintiff's acknowledgment of these issues, and that he had been spoken to by his supervisors about them and/or that he knew they were displeased, renders the lack of documentation of the issues and/or Plaintiff's performance evaluations wholly insufficient to create factual issues as to pretext.

Further, Plaintiff's own testimony also undermines any significance he claims the performance evaluations have. Mr. Scholz confirmed in his deposition that no "*objective criteria*" was used in preparing the forms and evaluating his performance, stating "[i]t was all subjective." CP 246-48 ("Q. So, you're saying, sitting here today, that your evaluations were all subjective by the supervisors that you had at the company?" ... "A. Yes."). As such,

the evaluations are wholly irrelevant to the question at hand. Even ignoring the timing disconnect, subjective performance evaluations by Mr. Scholz's supervisors have little to no bearing on the Company's decision to terminate Mr. Scholz's at-will employment. This is especially so based on his performance issues over several years and under various supervisors. The dated evaluations certainly do not create any genuine issue of material fact as to whether the legitimate reasons cited by SCAFCO for terminating Mr. Scholz's employment were mere pretext for discrimination.

Mr. Scholz failed to prove that Defendant's justifications for his termination, namely his failure to perform as demonstrated by a pattern of deficiencies, were pretext. Thus, his claims were appropriately dismissed as a matter of law and fact by the Trial Court.

**E. No Reasonable Trier Of Fact Could Or Would Conclude Plaintiff Was Fired Due To His Age.**

Finally, the Trial Court properly dismissed Plaintiff's claims based on its determination that "*Mr. Scholz has failed to present competent, admissible evidence that his termination was substantially motivated by a discriminatory purpose.*" CP 279; see

Domingo, 124 Wn. App. at 78 (“*Even if both parties meet their requisite burdens, summary judgment is still proper if no rational trier of fact could conclude the action was discriminatory.*”)(emphasis added).

Mr. Scholz steadfastly denied the existence of discrimination throughout his employment with SCAFCO. He was asked to take and sign SCAFCO Employee Surveys in 2005, 2008, 2009, 2010, and 2011, each of which specifically asked whether anyone at SCAFCO had “[t]reated you unfairly or made offensive comments, which in any way related to your gender, religion, sexual orientation, age, creed, color, sex...” CP 224-229, 232, 235, 237, 240. Mr. Scholz confirmed he responded truthfully in answering “*No*” on each survey, the last of which he signed on April 15, 2011. CP 224-228.

Now it appears Mr. Scholz is belatedly claiming SCAFCO and Mr. Stone inexplicably developed an animus against his age when he was terminated at 58 years old. This is despite the fact that he had previously truthfully sworn that no such age discrimination or animus existed just over a year and a half earlier. Plaintiff’s sole

support for his present claim, that age factored into his termination, consists of only two events: The first is the 2012 hiring of an undisputedly qualified Financial Reporting Manager, a position different from that held by Mr. Scholz. The second is an equally immaterial comment allegedly made in early 2012 which Mr. Scholz attributes to Mr. White. Neither of these could conceivably enable a “*rational trier of fact [to] conclude the action was discriminatory.*” Domingo, 124 Wn. App. at 78. Further, a strong inference that Mr. Scholz was not discriminated against based on his age is created by the fact that he was in the same protected class when SCAFCO and Mr. Stone hired him as he was when they terminated his employment. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 189 (2001) overruled on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214 (2006) (quoting Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270–71 (9th Cir. 1996)). Mr. Scholz has not and cannot defeat this inference.

//

//

//

**1. Hiring a Subsequent Employee Is Irrelevant and Unrelated To Plaintiff's Termination or His Discrimination Claim.**

Plaintiff insists that support for his age discrimination claim exists because SCAFCO hired a younger man, Patrick Palmer, in March 2012 to be SCAFCO's Financial Reporting Manager. Mr. Scholz apparently suggests that because he was not invited to as many "pizza/bunko parties" or company meetings after Mr. Palmer was hired, he must have been excluded from those events simply because Mr. Palmer was hired and/or simply because he was younger. See CP 62 (claiming that "[s]oon after Palmer was hired Scholz discovered he was being excluded from business meetings and social and business functions he had previously routinely been invited to and attended."); see also CP 92-98; 103. However, as is generally the case with such *post hoc ergo propter hoc* logical fallacies, Mr. Scholz provides no evidence of, nor is there any correlation between Mr. Palmer's hiring and Mr. Scholz's purported exclusion from these events. Further, Plaintiff is unable to show any relation between this and his termination beyond the fact that the former preceded the latter.

Indeed, a cursory examination of Mr. Scholz's sole bases for his claims shows them to be nothing more than grumblings of a disgruntled former at-will employee with no semblance of anything even remotely approaching or supporting an age discrimination claim. CP 243 (*"To bring somebody in at that age, with that little bit of experience, and to pay him that amount, that's what I perceived as age discrimination."*). Yet, Mr. Palmer's salary was in fact more than \$20,000 less than that being paid to Plaintiff at the time of his termination. See CP 243; see also CP 245 (*"Q. So, is it just the fact that he made \$90,000 coming in as a young guy that you believe supports your claim that you were the victim of age discrimination?"* "A. Yes.")

Not surprisingly, Mr. Scholz fails to explain how Mr. Palmer's starting salary in a totally different position, nearly a decade after Mr. Scholz's own hiring, relates to his own at-will termination. Nor does he cite to or provide any actual evidence beyond his own self-serving testimony and conclusory statements that Mr. Palmer assumed his duties and *"essentially replaced him."*

Indeed, as noted above, Mr. Scholz's position remains unfilled, while a majority of his duties are instead handled by others. CP 49.

Mr. Scholz's attempt to demonstrate age discrimination through the mere act of Mr. Palmer's hiring is further weakened by the fact that Patrick Palmer had both taken and passed the CPA exams before he was hired. CP 207-8, 210-11. Mr. Scholz has not. CP 244. Further, in addition to his nearly eight years' prior work experience, Mr. Palmer also had a Master of Business Administration degree when he was hired. See Supp. Decl. of Stone. CP 207-8, 210-11.

**2. The Uncorroborated Statement Plaintiff Relies On Is At Most A Stray Comment Insufficient To Support Plaintiff's Discrimination Claim.**

Plaintiff's final "pound the table argument" in his bid to keep his baseless age discrimination claim alive is the uncorroborated claim that on or before the March 2012 hiring of Mr. Palmer, Mr. White allegedly made a statement to the effect that "[y]ou and I are not getting any younger...[w]e need to find some new talent out there." CP 92.

Division II of the Washington Court of Appeals recently analyzed a virtually identical statement in Scrivener v. Clark College, 176 Wn. App. 405 (2013), holding the statement to be insufficient evidence of discrimination. Id., at 411-418. In that case, the plaintiff sought to rely upon a statement allegedly made by the President of the college that “*perhaps the most glaring need for increased diversity is in our need for **younger talent**. 74% of Clark College’s workforce is over forty. And though I have a great affinity for people in this age group, employing people who bring different perspectives will only benefit our college and community.*” Id., at 414 (emphasis added).

Like Mr. Scholz, the plaintiff in that case claimed the comment provided evidence that the hiring of two younger individuals was discriminatory and the justifications put forth for the hiring pretext for discrimination. See Id. The Scrivener court disagreed, noting that the “*isolated comment about seeking younger talent to balance the college’s faculty demographics and to bring diverse perspectives to the college faculty cannot be directly tied to Scrivener or the English department hirings.*” See Id., at 415. The

Scrivener court thus held that the “*younger talent*’ remark was a *stray comment that does not give rise to an inference of discriminatory intent and cannot demonstrate pretext.*” Id.

In support of this, the Scrivener court likened the comment to those made in the case Kirby v. City of Tacoma, 124 Wn. App. 454 (2004), where a police chief had made comments about older officers being the “*old guard*” and “*wanting to get ‘gray-haired old captains to leave.*”” Id. (quoting, Kirby, supra at 467 n. 10). The Scrivener court also cited to Domingo, supra where an employer had told the plaintiff she was “*no longer a spring chicken*” three months before she was fired. Scrivener, supra at 415-16 (quoting Domingo, supra at 89-90.). The Scrivener court noted that the plaintiffs in both cases also sought to rely upon these comments as evidence of pretext and/or discrimination. Scrivener, supra, at 415-17. In those cases, the comments were held to be nothing more than “*stray*” comments which in Kirby “*were insufficient to demonstrate that the employer relied on illegitimate criteria,*” and which the Domingo court characterized as having “*create[d] such a weak issue of fact that no*

*rational trier of fact could conclude that [defendant] fired Domingo because of her age” respectively. Id.*

The comment Plaintiff seeks to rely upon here was allegedly made nearly a full year before Mr. Scholz was terminated, and does not relate to or in any way foreshadow his later termination. In fact, the comment included within its scope Mr. White himself, who was hired at 55 and is presently 57. CP 48. Also, much like in Scrivener where the court noted the statement at issue was made under circumstances where 53% of the company’s new hires and 44% of the company’s newly hired faculty were over the age of 40; here, Mr. Scholz likewise acknowledges that SCAFCO too employs an “*older working population.*” Scrivener, supra at 414; CP 44. As in Scrivener, Kirby, and Domingo, the comment here which Plaintiff attributes to Mr. White was nothing more than an innocent stray comment.

The Trial Court properly held that neither the stray comment Mr. Scholz attributes to Mr. White, nor Mr. Palmer’s hiring demonstrates age discrimination. CP 279.

**3. Plaintiff's age at the time of his hiring confirms his age was immaterial to his termination.**

Mr. Scholz's attempt to attribute his termination to his age is further undermined by his actual age at the time he was hired, as compared to his age when terminated. *"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."* Hill, 144 Wn.2d at 189.

*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.*

Id., at 190, n. 13. As Division II of the Washington Court of Appeals has confirmed, a "short period of time" between hiring and firing is not essential where a plaintiff's class does not change. See Griffith, supra at 455 (citing cases applying the inference where the period of time involved ranged between two to at least five years) (citing Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th

Cir. 1995)); see also Griffith, supra at 455, n. 9 (concluding the “five-year period here, taking Griffith from 52 to 57 years of age, falls within the short period of time required.”).

The protected class of individuals in this case includes those between 40 and 70 years of age. Id., at 447. Mr. Stone, President and owner of SCAFCO, both when Mr. Scholz was hired and when he was terminated, was integral to both decisions. See CP 270-273A. Plaintiff Scholz’s date of birth is January 23, 1954. CP 158. He was hired on November 1, 2004, at which time he would have been 50 years old. See CP 4, 158. He was fired just over eight (8) years later at the age of 58<sup>4</sup>. See CP 4. Mr. Scholz remained both in the protected class and in fact in his 50s at all times relevant to his employment and termination, and the eight-year period involved merely took Scholz from 50 to 58 years of age. Thus a “*strong inference*” exists that age was not a factor in Mr. Scholz’s termination. See Hill, supra; see also Griffith, supra; Barker, supra.

---

<sup>4</sup> Incidentally, Plaintiff Scholz imprecisely and inaccurately states that he was 59 years old at the time of his termination. See e.g. Opening Brief, CP 4; CP 260. However, as he testifies that he was officially terminated on January 18, 2013, he was actually terminated prior to his 59<sup>th</sup> birthday. See CP 33.

To overcome this inference, a plaintiff “*must produce evidence sufficient to reconcile the inherent contradiction.*” Barker v. Advanced Silicon Materials, LLC, (ASIMI), 131 Wn. App. 616, 625 (2006) (noting a plaintiff “*must overcome a strong inference that the adverse decision was not discrimination when the same decision maker has hired or promoted the plaintiff in the recent past.*”)

*An employee under such circumstances cannot rely on simply presenting a prima facie case of discrimination and rebutting the justifications proffered for his termination. To prevail, the employee must also present sufficient evidence ‘answer[ing] an obvious question: if the employer is opposed to employing persons with a certain attribute, why would the employer have hired such a person in the first place?’*

Griffith, supra at 454 (quoting Hill, supra at 189–90) (internal citation omitted)(alteration to the original in the quoted text changing “*why would the employer have hired such a person in the first place,*” to “*why would the employer have [promoted] such a person in the first place*” omitted) (emphasis added).

Plaintiff Scholz was and is unable to overcome the strong inference that age was not a factor in his at-will termination. He has provided no evidence to even remotely answer this “*obvious*

*question.*” Plaintiff failed to demonstrate that a question of fact exists regarding his specious age discrimination claim and the Trial Court appropriately granted summary judgment in favor of SCAFCO.

**IV. RAP 18.9 MOTION FOR ATTORNEY FEES AND COSTS**

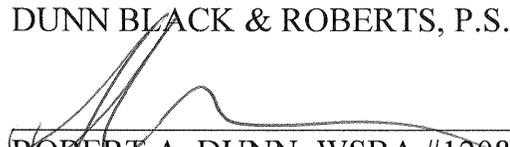
SCAFCO respectfully requests an award of reasonable attorney fees and costs incurred on appeal pursuant to RAP 18.9.

**V. CONCLUSION**

Based upon the foregoing, Respondent SCAFCO Corporation respectfully requests that this Court affirm the Trial Court’s decision granting SCAFCO Summary Judgment dismissing Mr. Scholz’s claims with prejudice, as a matter of fact and law.

DATED this 28 day of July, 2014.

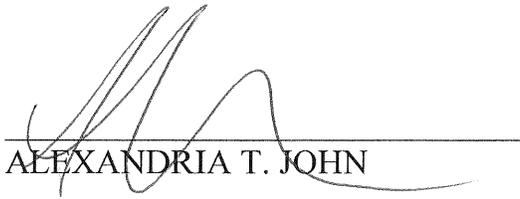
DUNN BLACK & ROBERTS, P.S.

  
ROBERT A. DUNN, WSBA #12089  
ALEXANDRIA T. JOHN, WSBA #45188  
Attorneys for Respondent SCAFCO  
Corporation

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 28 day of July, 2014, I caused to be served a true and correct copy of the foregoing document to the following:

- |                                     |                  |                              |
|-------------------------------------|------------------|------------------------------|
| <input checked="" type="checkbox"/> | HAND DELIVERY    | Paul J. Burns                |
| <input type="checkbox"/>            | U.S. MAIL        | Paul J. Burns, P.S.          |
| <input type="checkbox"/>            | OVERNIGHT MAIL   | One Rock Pointe              |
| <input type="checkbox"/>            | FAX TRANSMISSION | 1212 N. Washington, Ste .116 |
| <input type="checkbox"/>            | EMAIL            | Spokane, WA 99201            |

  
ALEXANDRIA T. JOHN