RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 07, 2014, 4:33 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

NO. 89377-2

SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN SCRIVENER,

Appellant,

v.

CLARK COLLEGE,

Respondent.

ANSWER TO WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION'S AMICUS CURIAE BRIEF

Sue-Del McCulloch
WSBA #32667
111 SW Columbia Street
Suite 1010
Portland, OR 97201
(503) 221-9706

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT: Substantial factor is the applicable standard of causation in WLAD claims 2

A. *McDonnell Douglas* burden-shifting framework is only one available summary judgment tool. 2

B. There is no distinction under the law between direct and indirect or circumstantial evidence.. 3

C. Division II's holding creates an "only factor" standard that is contrary to the law..5

D. Using the moniker "stray remarks" to exclude probative evidence at summary judgment impermissibly places courts in the shoes of triers of fact weighing evidence.. 6

III. CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Alonso v. Qwest Communications Co., LLC, No. 43703-1-II (Dec. 31, 2013) 315 P.3d 610 3

Carle v. McChord Credit Union, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992). 2

Costa v. Desert Palace, Inc.,

299 F.3d 838 (9th Cir. 2002) (*en banc*),

aff'd, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). 4

Hill v. BCTI-Fund-I,

144 Wn.2d 172, 23 P.3d 440 (2001) 2

Mackay v. Acorn Custom Cabinetry,

127 Wash.2d 302, 898 P.2d 284 (1995) 1

McDonnell Douglas Corp. v. Green,

411 U.S. 792, 93 S. Ct. 1817 (1973) 2,3,4,5, 6

Parsons v. St. Joseph's Hosp. and Health Care Center,

70 Wn.App. 804, 856 P.2d 702 (1993) 3

Reid v. Google,

50 Cal.4th 512, 235 P.3d 988 (2010) 7

Scrivener v. Clark College,

176 Wn.App. 405, 309 P.3d 613 (2013) 5

Statutes

RCW 49.60 (WLAD) 1,2,3,5

RCW. 49.60.010 5

Other Authorities – Washington Pattern Jury Instructions

WPI 330.01.01 1

I. INTRODUCTION

The issue on appeal is whether and to what extent the substantial factor causation analysis should have been applied in this case. The well–established standard for liability under the WLAD, RCW 49.60, is whether one of the enumerated attributes "was a 'substantial factor' in an adverse employment action." *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995); WPI 330.01. The Court of Appeals's holding that the substantial factor standard of causation is conditional, to be applied at summary judgment only when the plaintiff produces certain types of evidence and the court analyzes that evidence under a particular framework is clear error. The rigid invocation of the burden-shifting framework to analyze summary judgment motions in the absence of "direct evidence" and the confusing characterization of evidence are issues integral to this appeal. As ably discussed in the Amicus Curiae Brief, this Court should reject both the "stray remarks" doctrine, which places the court in the position of the factfinder weighing and discarding relevant evidence, and the characterization of evidence as direct or circumstantial for resolving discrimination claims. Amicus Brief, p. 9-10, 16.

II. ARGUMENT: Substantial factor is the applicable standard of causation in WLAD claims

A. *McDonnell Douglas* burden-shifting framework is only one available summary judgment tool

This appeal encompasses the proper application of the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *McDonnell Douglas* is a three-step, shifting-burden inquiry at summary judgment: (1) plaintiff must establish a prima facie case; (2) defendant must provide a nondiscriminatory explanation for its conduct; and (3) plaintiff must provide evidence of pretext. *See e.g. Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181-182, 23 P.3d 440 (2001). "When all three facets of the burden of production have been met, the case must be submitted to the jury." *Carle v. McChord Credit Union*, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992). The substantial factor standard is the evidentiary standard which must be applied whether or not the *McDonnell Douglas* analysis is followed, and it is error for a court to increase the evidentiary burden or change the legal standard a plaintiff faces by labeling evidence direct or indirect.

B. There is no distinction under the law between direct and indirect or circumstantial evidence

The *McDonnell Douglas* burden-shifting framework is only one available tool for analyzing evidence at summary judgment. *See Parsons v. Sf. Joseph's Hosp. and HealthCare Center*, 70 Wn.App. 804, 809, 856 P.2d 702 (1993); *see also* Appellant's Supplemental Brief, p. 14-15. Here, the Court of Appeals found that the burden-shifting analysis was required because the Court determined that plaintiff had not produced "direct evidence" of discrimination. The Amicus Brief ably sets forth the danger inherent in the Court of Appeals's approach, which would apply different "standards" of causation, depending upon a strained characterization of the evidence. Amicus Brief, p. 7-8. Reliance on the tortured labels "direct" and "circumstantial" evidence, initially based on federal law, should be abandoned by this Court, as has been done by federal courts. Amicus Brief, p. 10. Neither the label placed on evidence nor the burden-shifting analysis change the substantial factor standard of causation that applies to all WLAD claims. Divisions II's reliance on such distinctions has led it to apply inconsistent standards of causation to discrimination claims. *See Alonso v. Qwest Communications Co., LLC*, No. 43703-I-II (Dec. 31, 2013) 315 P.3d 610 (In a WLAD claim alleging disparate treatment,

harassment, discrimination, and retaliation based on plaintiff's combat veteran, disabled person, and Mexican-American statuses, Division II held that where the plaintiff produced "direct evidence," the substantial factor standard was applicable); *see also* Amicus Brief, p. 9.

The evidentiary distinction drawn by the Court of Appeals, and urged by Respondent, between the direct evidence model (which applies substantial factor) and the *McDonnell Douglas* model (which the lower courts found did not) provides no reason or justification to impose a higher evidentiary burden, and ultimately a different legal standard and outcome, on plaintiffs who are held to the *McDonnell Douglas* model. There is no probative difference between proving one's case through direct evidence (the direct evidence model) or indirect evidence (*McDonnell Douglas*), and no meaningful and reliable way to distinguish between direct and indirect evidence. Washington law has attempted this distinction because it followed federal law. But the Ninth Circuit has abandoned that distinction. *See* App. Supp. Br. 14-17 (citing *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851-54 (9th Cir. 2002), *aff'd* 529 U.S. 90 (2003)); Amicus Brief, p. 8-9.

C. Division II's holding creates an "only factor" standard that is contrary to the law

Division II committed a fatal error in its holding that the substantial factor standard did not apply under the *McDonnell Douglas* framework, that the plaintiff could only show pretext by showing that every proffered legitimate reason was untrue. *Scrivener v. Clark College,* 176 Wn. App. 405, 414, 309 P.3d 613 (2013). This effectively results in an "only factor" standard. *See id., 412 (*"A court may grant summary judgment when the record conclusively reveals some other, nondiscriminatory reason for the employer's decision" regardless of the presence of discrimination.) As the Amicus points out, the impetus of the WLAD is not to excuse discrimination in the presence of other motivation, as Division II's formulation would do, but to eliminate discrimination from the workplace altogether. Amicus Brief, p. 12; RCW 49.40.010.

Requiring a plaintiff to prove that the asserted non-discriminatory reason(s) played *no role* in the decision (by removing the substantial factor analysis from *McDonald Douglas*) is a *much* higher burden than the ultimate burden at trial: that the discriminatory motive was a *substantial factor* – not necessarily the only or main factor – in the disputed action. *See* App. Supp. Br. 3-5. Consider if Clark College did not hire Ms.

Scrivener because it did not like one aspect of her teaching style *and* because it was looking for younger professors (or analogously, white professors, male professors, etc.). Under Respondent's view, Ms. Scrivener would lose under *McDonnell Douglas* because she could not show that the "teaching style" issue was utterly pretextual if it was *a* motivating factor, however small, even though she could show that age was a substantial factor in her not being hired. Thus her case would die at the third step of *McDonnell Douglas,* even where discrimination was a substantial though not the sole factor in the decision. This is the state of the *McDonnell Douglas* analysis when the substantial factor standard is removed, leaving an *only factor* standard.

D. Using the moniker "stray remarks" to exclude probative evidence at summary judgment impermissibly places courts in the shoes of triers of fact weighing evidence

The Court of Appeals labeled as "stray remarks," and therefore insufficient to establish discrimination, the formal statements of President R. Wayne Branch, the final decision maker for the challenged decision, that the College had a "glaring need" for "younger talent" under 40 on the faculty and that "employing people [outside the over 40 age group] who bring different perspectives will only benefit our college and community."

CP 24. The statements of the ultimate decision maker on the subject of age in hiring, made in a campus-wide annua address setting forth college goals at the time that applications for the positions at issue here were being processed, are clearly relevant to the claim that age factored into those hiring decisions. The Court of Appeals impermissibly put itself in the shoes of the factfinder, finding that the statements were not relevant enough, characterizing them as "stray remarks" and as such not worthy of consideration. In this case, the Court of Appeals erred in labeling the comments of the decision maker regarding general faculty hiring goals as "stray remarks" and refusing to consider them. As properly argued by the Amicus, such use of the moniker "stray remarks" to permit a court to disregard otherwise relevant evidence is pernicious, has been abandoned by other courts and should be abandoned by this Court. Amicus Brief, p. 16-18. *See generally Reid v. Google,* 50 Ca1.4th 512, 540, 235 P.3d 988 (2010).

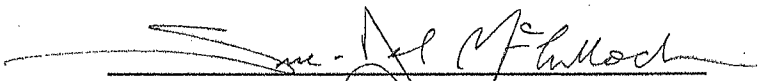
III. CONCLUSION

The Court of Appeals erred in affirming the trial court's dismissal of Appellant's age discrimination claim at summary judgment. As set forth above, there are numerous grounds upon which reversal is appropriate.

The Court of Appeals's decision should be reversed and this action remanded for trial.

DATED March 7, 2014.

Respectfully submitted,



Sue-Del McCulloch
Attorney for Appellant
WSBA #32667

CERTIFICATE OF SERVICE

I certify that on March 7, 2014, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

Christopher Lanese, WSBA #38045 Email: ChristopherL@atg.wa.gov Assistant Attorney General 7141 Cleanwater Drive SW PO Box 40126 Olympia, WA 98504-0126 Facsimile: (360) 586-6300	☐ ☐ ☐ ☐ ☒	U.S. Mail, Postage Prepaid Hand Delivered via Messenger Service Overnight Courier Facsimile Electronic Service
Jeffrey Needle Email: jneedlel@wolfenet.com 119 1st Avenue South Suite 200 Seattle, WA 98104	☐ ☐ ☐ ☐ ☒	U.S. Mail, Postage Prepaid Hand Delivered via Messenger Service Overnight Courier Facsimile Electronic Service

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of March, 2014.

LAW OFFICES OF SUE-DEL MCCULLOCH

By: /s/ Sue-Del McCulloch

Sue-Del McCulloch, OSB #32667
111 SW Columbia Street, Suite 1010
Portland, Oregon 97201
Telephone: (503) 221-9706
Facsimile: (503) 821-6018
E-mail: sdmcculloch@sdmlaw.net
Attorney for Appellant

OFFICE RECEPTIONIST, CLERK

To: Breon McMullin
Cc: 'Sue-Del McCulloch'; 'Kornmann, Melissa (ATG)'; 'Lanese, Christopher (ATG)'; jneedlel@wolfenet.com
Subject: RE: Scrivener v. Clark College, Supreme Ct. No. 89377-2

Received.

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Breon McMullin [mailto:bmcmullin@sdmlaw.net]
Sent: Friday, March 07, 2014 4:33 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Sue-Del McCulloch'; 'Kornmann, Melissa (ATG)'; 'Lanese, Christopher (ATG)'; jneedlel@wolfenet.com
Subject: Scrivener v. Clark College, Supreme Ct. No. 89377-2

Dear Clerk,

Attached please find for filing Appellant's Answer to Washington Employment Lawyers Association's Amicus Curiae Brief.

Thank you for your professional courtesies in this matter.

Breon E. McMullin
Legal Assistant to Sue-Del McCulloch

Law Offices of Sue-Del McCulloch LLC
111 SW Columbia Street, Suite 1010
Portland, Oregon 97201
phone: 503-221-9706
fax: 503-821-6018

PLEASE NOTE: New Address

CONFIDENTIALITY NOTICE:

This email is intended only for the person(s) to whom it is addressed and may contain attorney-client privileged or confidential communication. If you are not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this e-mail in error, please immediately notify us by return email or telephone call to (503) 221-9706, and destroy the original message. Thank you.