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CASE NO. 335283

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

KIM MIKKELSEN,

Appellant,

v.

PUBLIC UTILITY DISTRICT #1 OF KITTITAS COUNTY, JOHN HANSON, PAUL ROGERS, ROGER SPARKS and CHARLES WARD,

Appellees.

BRIEF OF DEFENDANT/APPELLEE CHARLES WARD

James M. Kalamon, WSBA #7922
Paine Hamblen LLP
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
(509) 455-6000

Attorneys for Defendant/Appellee
Charles Ward

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF ISSUES 2

III. STATEMENT OF THE CASE 3

A. A Tumultuous Relationship 3

B. Evidence of Ward's Alleged Bias 6

C. The "Last Straw." 7

D. Mikkelsen's Termination 9

E. Ward and the PUD Hire Genine Pratt 10

F. Mikkelsen's Lawsuit 10

IV. ARGUMENT 11

A. Standard of Review 11

B. The Trial Court Did Not Err in Granting Summary Judgment in Favor of Ward and the PUD Due to the Uncontested Fact That, After Mikkelsen's Termination, Ward and the PUD Hired a 51 Year Old Woman to Replace Mikkelsen 12

1. Washington's Law Against Discrimination and the *McDonnell Douglas* Prima Facie Test 12

2. The Washington Cases Cited by Mikkelsen Do Not Support Her Argument that a Flexible Application of the McDonnell Douglas Prima Facie Test Requires Courts to Disregard the Fourth Element in Age and Gender Discrimination Cases 15

3. The Federal Cases Cited by Mikkelsen Do Not Support Her Argument that the Fourth Element Should be Eliminated 21

C. Even Assuming, For Purposes of Analysis Only, the Trial Court Legally Erred in Finding Mikkelsen Failed to Meet Her Prima Facie Burden to Show Discriminatory Intent, She Would Still Not Meet Her Burden Under Part Three of the McDonnell Douglas Framework to Put Forth any Evidence that Ward's and PUD's Legitimate and Nondiscriminatory Reasons for Terminating Her Were Pretextual 27

D. Mikkelsen Failed to Put Forth Evidence that Established a Genuine Issue of Material Fact that (1) Ward Breached the PUD Corrective Action Policy, or (2) Mikkelsen's Termination was Outrageous 34

1. There is no Genuine Issue of Material Fact as to Whether Ward Breached the PUD Corrective Action Policy Because Ward was Not a Party to the Alleged Contract 34

2. There is No Genuine Issue of Material Fact as to Whether Mikkelsen's Termination was Outrageous Because (a) Her Outrage Claim is Duplicative and (b) There is No Evidence of Outrageous Behavior.... 35

a. Mikkelsen's outrage claim is duplicative 36

b. Mikkelsen's outrage claim is not supported by evidence of outrageous behavior 36

E. Ward is Immune from Liability for His Official Actions as General Manager of the PUD 39

V. CONCLUSION 40

TABLE OF AUTHORITIES

Cases

Anaya v. Graham, 89 Wn. App. 588, 950 P.2d 16 (1998)..... 36

Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963) 11

Becker v. Wash. St. Univ., 165 Wn. App. 235, 266 P.3d 893 (2011) 14

Birklid v. Boeing Co., 127 Wn.2d 853, 904 P.2d 278 (1995)..... 37, 39

Brown v. McLean, 159 F.3d 898 (4th Cir. 1998)..... 23, 26

Burnside v. Simpson Paper Co., 123 Wn.2d 93, 864 P.2d 937 (1994)..... 16

Byers v. Dallas Morning News, Inc., 209 F.3d 419 (5th Cir. 2000)..... 23

Callahan v. Walla Walla Housing Authority,
126 Wn. App. 812, 110 P.3d 782 (2005) 19

Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684,
317 P.3d 987 (2014))..... 11

Carson v. Bethlehem Steel Corp., 82 F.3d 157 (7th Cir. 1996)..... 22, 34

Cluff v. CMX Corp. Inc., 84 Wn. App. 634,
929 P.2d 1136 (1997)..... 19, 20, 21, 33

Cumpiano v. Banco Santander Puerto Rico,
902 F.2d 148 (1st Cir. 1990) 22, 23

Dicomes v. State, 113 Wn.2d 612, 782 P.2d 1002 (1989)..... 37

Domingo v. Boeing Employees' Credit Union,
125 Wn. App. 71, 98 P.3d 1222 (2004) 14

France v. Johnson, 795 F.3d 1170 (9th Cir. 2015)..... 14

Fulton v. State, Dep't of Soc. & Health Servs.,
169 Wn. App. 137, 279 P.3d 500 (2012) 19, 21, 33

Griffith v. Schnitzer Steel Indus., Inc.,
128 Wn. App. 438, 115 P.3d 1065 (2005) 32, 33

Grimsby v. Samson, 85 Wn.2d 52, 530 P.2d 291 (1975) 37

Grimwood v. University of Puget Sound, Inc.,
110 Wn.2d 355, 753 P.2d 517 (1988) ..... passim

Harlow v. Fitzgerald, 457 U.S. 800,
102 S. Ct. 2727, 73 L. Ed.2d 396 (1982) 40

Hatfield v. Columbia Federal Sav. Bank,
57 Wn. App. 876, 790 P.2d 1258 (1990) 16, 17, 21, 24

Haubry v. Snow, 106 Wn. App 666, 31 P.3d 1186 (2001) 36

Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 837 P.2d 618 (1992) 12

Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 23 P.3d 440 (2001),
overruled on other grounds by McClarty v. Totem Elec., 157 Wn.2d
214, 137 P.3d 844 (2006) ..... passim

Hines v. Todd Pac Shipyards Corp.,
127 Wn. App. 356, 112 P.3d 522 (2005) 32

Houser v. City of Redmond, 16 Wn. App. 743,
559 P.2d 577, 580 (1977) *affirmed* 91 Wn.2d 36,
586 P.2d 482 (1978) 34, 35

Kahn v. Salerno, 90 Wn. App. 110, 951 P.2d 321 (1998) 12

Kloepfel v. Bokor, 149 Wn.2d 192, 66 P.3d 630 (2003) 38

Lewis v. Bell, 45 Wn. App. 192, 724 P.2d 425 (1986) 37

Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979) 18

Marquis v. City of Spokane, 130 Wn.2d 97, 922 P.2d 43 (1996) 12

McDonnell Douglas Corp. v. Green, 411 U.S. 792,
93 S. Ct. 1817, 36 L. Ed.2d 668 (1973) ..... passim

Meiri v. Dacon, 759 F.2d 989 (2d Cir. 1985) 34

Nieto v. L&H Packing Co., 108 F.3d 621 (5th Cir. 1997) 23, 34

Pivirotto v. Innovative Sys., Inc., 191 F.3d 344 (3d Cir. 1999) 22

Rice v. Janovich, 109 Wn.2d 48, 742 P.2d 1230 (1987) 37

Ruff v. King County, 125 Wn.2d 697, 887 P.2d 886 (1995) 11

Scrivener v. Clark Coll., 181 Wn.2d 439, 334 P.3d 541 (2014) 11, 33

Sellsted v. Washington Mutual Savings Bank,
69 Wn. App. 852, 851 P.2d 716 (1993) 13

Statutes

RCW 4.24.470 ..... 39, 40

RCW 4.24.470(2)(a) 39

RCW 49.44.090(1) 14

RCW 49.60.010 13

RCW 49.60.180(2) 13

RCW 54.12.110 39

RCW 54.16.100 ..... 39, 40

Rules

CR 56(c) 11

Other Authorities

B. Schlei & P. Grossman, *Employment Discrimination Law* (2d Ed. 1983) 17

Restatement (Second) of Torts § 46 (1965) 37

I. INTRODUCTION

Appellee Charles Ward became the General Manager of Public Utility District #1 of Kittitas County ("the PUD") in 2010. Ward oversaw about 12 employees in the PUD's office, including Appellant Kim Mikkelsen, who was the PUD's longtime Finance Manager. Although Ward and Mikkelsen initially got along well together, their relationship gradually deteriorated over a series of conflicts and disagreements. Mikkelsen found Ward's management style abrasive and believed he engaged in gender discrimination. Ward found Mikkelsen disagreeable and disrespectful. Ward and Mikkelsen eventually stopped communicating altogether. Without Ward's knowledge, Mikkelsen shared her concerns about Ward's poor management with at least one Commissioner of the PUD Board of Commissioners. Discovering Mikkelsen's maneuvering, Ward could no longer tolerate Mikkelsen's insubordination. After obtaining approval from the Commissioners, Ward terminated Mikkelsen's employment. Mikkelsen brought suit against Ward, the PUD, and the individual Commissioners alleging, among other claims, that she had been terminated illegally on account of her age and gender.

II. STATEMENT OF ISSUES

Issue No. 1: Whether under Washington law, the trial court properly granted summary judgment in favor of Ward and the PUD based on the court's finding that Mikkelsen, a woman over age 40, failed to establish a prima face case, and, where there is no showing of discriminatory intent when Ward and the PUD hired a similarly aged woman to replace Mikkelsen.

Issue No. 2: Whether under Washington law, Mikkelsen put forth sufficient evidence to establish that Ward's stated reason for terminating her was a pretext to discriminatory reasons.

Issue No. 3: Whether under Washington law, Ward is liable for breach of the PUD's employee operations policy where Ward was not a party to the contract allegedly created by the policy.

Issue No. 4: Whether under Washington law, Mikkelsen's termination was outrageous where her claimed damages are duplicative of her discrimination claim and where Ward's actions that she alleges support her claim do not rise to the level of intentional or reckless infliction of emotional distress.

III. STATEMENT OF THE CASE

Appellee Charles Ward, the General Manager of the PUD, terminated the PUD's Finance Manager, Appellant Kim Mikkelsen, after a complete breakdown in their professional relationship.

A. A Tumultuous Relationship.

When Ward became the PUD's General Manager in July 2010, he initially got along well with Mikkelsen. Clerk's Papers (CP) at 110. Mikkelsen had been involved in the hiring process that led to Ward becoming the PUD's General Manager. CP at 43, 57-58, 105. But after about six or seven months, Ward and Mikkelsen began to disagree about a number of issues. CP at 242.

Ward and Mikkelsen attempted to develop a policy to guide the PUD's extension of powerlines. But they supported different proposals and disputed the extent to which the Commissioners needed to be involved in developing the policy. CP at 178-82, 187, 191, 425-26.

Ward and Mikkelsen were involved in union negotiations together. CP at 145. At first they were both participated, but Mikkelsen stopped attending the negotiations. CP at 192. Mikkelsen claimed that Ward stopped inviting her to the negotiations; Ward attributed Mikkelsen's absences to the fact that she was out of town on account of her consultant business. CP at 145-46, 415.

Ward and Mikkelsen also ran into conflict when Ward asked Mikkelsen to research the possibility of upgrading the PUD's internet service. CP at 187, 428-29. Ward thought Mikkelsen failed to communicate with him about this project. CP at 187. Ward was dissatisfied with Mikkelsen's results because Mikkelsen indicated that Ward denied her proposed upgrade and considered this an example of him using the PUD's budget as "a weapon rather than a tool." CP at 334.

Further friction developed between Ward and Mikkelsen when it was discovered that the PUD had improperly billed a number of customers. CP at 177. Some customers were overbilled, some were under billed. CP at 191. Ward believed Mikkelsen was responsible for the errors and that she withheld pertinent information from him and the Commissioners. CP 177, 183-84, 191. Mikkelsen attributed the improper billing to metering and software issues. CP at 337, 436-37. The billing inconsistencies resulted in a State audit. CP at 182-83.

Ward was aware that Mikkelsen used the PUD's resources in connection with her private consulting business. CP at 194-95, 213-14, 444-45. Mikkelsen worked part-time at the PUD, set her own hours, and was sometimes gone for days at a time when traveling for her consulting business. CP at 76, 79. Ward found it difficult to determine when Mikkelsen would be in the PUD office. CP at 144, 147-48. Mikkelsen also

used the PUD's computers, printers, and telephone for purposes of her consulting business, although she claims she reimbursed the PUD for all the resources that she used. CP at 445. Ward thought Mikkelsen prioritized her consulting business over her work at the PUD. CP at 145-46.

Ward found Mikkelsen insubordinate. On one occasion, Mikkelsen told Ward that she did not want him to discuss certain matters with employees under her supervision without her present. CP at 111-12; *see also* CP at 336-37 (Mikkelsen expressing frustration that Ward discussed matters with employees under her supervision). On another occasion, Mikkelsen entered Ward's office, shut the door, and demanded that they have a discussion about a variety of topics including management issues and what Mikkelsen perceived to be Ward's gender discrimination. CP at 114, 137-38, 187-89, 333-38. Ward found Mikkelsen's tone and accusations disrespectful and insubordinate. CP at 188. Ward later learned that Mikkelsen had told another employee that she (Mikkelsen) viewed the meeting as a "come to Jesus" meeting. CP at 188. Ward's understanding of a "come to Jesus" meeting was a confrontation where one person gets "dressed down" or "chewed out." CP at 188-89. Ward was disturbed that Mikkelsen would feel entitled to confront him in such a way. CP at 188-89.

Mikkelsen did not approve of Ward's management style, which she described as "termination and insubordination," with a tendency to blame other people and act impulsively. CP at 109-10, 113-14, 236. Mikkelsen also thought Ward attempted to ruin her good relationship with the Commissioners. CP at 116, 120. Mikkelsen was frustrated when Ward would change office processes when she was out of the office. CP at 112. Mikkelsen did not like it when Ward would speak over her and disregard what she had to say. CP at 114, 337, 435.

Due to the fact that they could not see eye-to-eye on so many issues, Mikkelsen and Ward eventually had, in Mikkelsen's words, a mutual "communication breakdown." CP at 114. Mikkelsen lost her trust in Ward and felt like her job was in jeopardy. CP at 123, 130.

B. <u>Evidence of Ward's Alleged Bias</u>.

Over the period of time they worked together, Mikkelsen found some of Ward's remarks and behavior inappropriate and indicative that he was biased against women and older people.

Mikkelsen thought Ward was biased against women, especially women in upper management. CP at 86. Mikkelsen alleged that Ward consistently disregarded her ideas, but if the same ideas were proposed by a male colleague, Ward was receptive. CP at 434-36, 555-56. Mikkelsen thought Ward exhibited gender bias when he made a comment that he

would purchase uniforms in any color except pink. CP at 86. Ward also referred to the PUD's office workers (an all-female staff) as "ladies"; Mikkelsen found this offensive because she thought it closely associated women with clerical duties. CP at 86-87. Mikkelsen alleged that when Ward would sit down in her office, he would put his hand in his pocket and rearrange his genitals. CP at 88, 134.

Mikkelsen thought Ward was biased against people who had spent their entire career with one employer. Mikkelsen testified that Ward made statements that long-term employees "were old and stale." CP at 90. Mikkelsen recounted an incident when Ward expressed disbelief that a longtime PUD employee had worked for the PUD for many years. CP at 90-91.

Mikkelsen discussed with Ward her concerns about him exhibiting gender bias, CP at 556, but did not officially share her concerns to the Commissioners, CP at 129.

C. <u>The "Last Straw."</u>

Ward and Mikkelsen's tumultuous relationship came to a head while Ward was on vacation. One of the Commissioners contacted Mikkelsen and asked her how things were going at the PUD. CP at 83. Mikkelsen explained that Ward had put her through some "hard times" and "all communication had pretty much ceased between [the two of

them]." CP at 83, 85. The Commissioner asked Mikkelsen what she thought could be done about the situation. Mikkelsen proposed that the Commissioners could circulate an anonymous survey asking for the PUD's employees' opinions concerning a variety of workplace matters, including issues with Ward's management. CP at 82-84, 93-97, 248-267, 318-19. Mikkelsen thought the survey would be the best way to ensure that her opinions were shared by other PUD employees. Mikkelsen had an employee survey in her consulting files, and she emailed the survey to the Commissioners. CP at 82, 94. The survey included questions asking whether the survey takers agreed with statements such as "The General Manager is biased on the basis of race," and "The General Manager is biased on the basis of gender." CP at 265.

Mikkelsen was aware that in proposing the survey, she was going behind Ward's back and knew that Ward would not approve of her actions. CP at 96-97. Mikkelsen characterized her communications regarding the survey as a "massive conspiracy." CP at 85.

One of the Commissioners informed Ward of the survey. CP at 149. This was the first Ward had heard of the survey. *Id.* Ward knew that Mikkelsen had brought complaints against the PUD's prior general manager, which had led to the prior general manager's resignation. *See* CP 118-22 (Mikkelsen's testimony describing complaint against prior general

manager). Although Ward did not see the actual survey Mikkelsen sent to the Commissioners until sometime later, he suspected that Mikkelsen was trying to have him fired as she had done with the prior general manager. CP at 148. Ward "lost all trust and all confidence in [Mikkelsen]." CP at 203. Ward considered Mikkelsen's attempt to distribute the survey to be "the last straw." CP at 152. The survey was never distributed.

D. Mikkelsen's Termination.

Ward asked the Commissioners whether it would be within his rights to terminate Mikkelsen. CP at 174-77. The Commissioners verified that such a decision was Ward's to make. CP at 44, 177.

Ward fired Mikkelsen, telling her "it wasn't working out." CP at 99. Ward further drafted a memorandum detailing the conflicts and disagreements that led Ward to conclude that terminating Mikkelsen was justified. CP at 186, 242-46. The memorandum described how Ward and Mikkelsen initially worked well together, but their relationship gradually deteriorated. CP at 242. Ward described Mikkelsen's uncooperativeness when working on projects including the line extension policy, a proposed online bill paying system, and upgrading the PUD's internet. CP at 243-44. Ward described the "come to Jesus" meeting and how he found Mikkelsen's initiation of the meeting "unfounded" and "disrespectful." CP at 244. Ward described the billing errors incident and how Mikkelsen

withheld information from him and the Commissioners. CP at 245. Ward concluded by noting conflicts between Mikkelsen and other PUD employees and how Mikkelsen's actions and attitude were disruptive, unprofessional, disrespectful, and rude. CP at 245-46. Ward also alluded to other issues including Mikkelsen working on her consulting business on "company time" and having "double standards." CP at 246.

At the time of her termination, Mikkelsen was 57 years old and had been the PUD's Finance Manager for 27 years. CP at 75, 89.

E. Ward and the PUD Hire Genine Pratt.

After Mikkelsen's termination, the PUD hired (on a contract basis) Ms. Genine Pratt, a Certified Public Account, to carry on the duties of the Finance Manager. CP at 65, 383. After about eight months, Ward and the PUD hired Pratt as the PUD Finance Manager. CP at 65, 205, 383. At the time she was hired as the Finance Manager, Pratt was 51 years old. CP at 383.

F. Mikkelsen's Lawsuit.

Mikkelsen filed suit in Yakima County naming Ward, the PUD, and the individual Commissioners as defendants. CP at 3-13. Mikkelsen alleged (1) she was terminated in breach of the PUD's policy and operations manual, (2) she was unlawfully terminated because of her gender and age, (3) the PUD negligently hired, trained, and supervised

Ward, and (4) defendants intentionally inflicted emotional distress. CP at 9. Ward and the PUD moved for summary judgment, which the trial court granted. CP at 531-33, 534-37.

IV. ARGUMENT

A. Standard of Review.

The Appellate Court reviews a trial court's grant of summary judgment de novo. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014) (citing *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014)). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). When reasonable minds can reach but one conclusion, questions of fact may be determined as a matter of law. *Ruff v. King County*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995). The purpose of summary judgment is to avoid a useless trial. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

In response to a motion for summary judgment, the non-moving party must produce more than mere speculation and unsupported assertions to defeat the motion. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988). In order for an

employee alleging discrimination in the workplace to overcome a motion for summary judgment, the employee must do more than express an opinion or make conclusory statements. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996); *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). The employee has the burden to establish *specific* and *substantial* evidence to support each and every element of her case. *Hiatt*, 120 Wn.2d at 66; *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

Based on the standard articulated above, Ward respectfully submits that this court should affirm the trial court's grant of summary judgment, which held as a matter of law, Mikkelsen did set forth specific facts showing that there was a genuine issue for trial.

B. The Trial Court Did Not Err in Granting Summary Judgment in Favor of Ward and the PUD Due to the Uncontested Fact That, After Mikkelsen's Termination, Ward and the PUD Hired a 51 Year Old Woman to Replace Mikkelsen.

1. Washington's Law Against Discrimination and the *McDonnell Douglas* Prima Facie Test.

Washington's Law Against Discrimination (WLAD) makes it unlawful for employers "[t]o discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability."

RCW 49.60.180(2). The purpose of WLAD is to eliminate and prevent discrimination in the workplace. RCW 49.60.010.

Washington courts have recognized that discharged employees rarely have direct evidence that an employer engaged in discriminatory behavior. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001), o*verruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). In the absence of direct evidence of discriminatory intent courts must apply a three part "evidentiary burden-shifting protocol" (hereinafter referred to as "the *McDonnell Douglas* framework") on summary judgment to allow a discharged employee to have "his [or her] day in court despite the unavailability of direct evidence of intentional discrimination." *Id.* at 180 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973); *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 864, 851 P.2d 716 (1993)).

The first part of the *McDonnell Douglas* framework requires the plaintiff-employee to put forth a prima facie case of unlawful discrimination. *Hill*, 144 Wn.2d at 181 (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817). A plaintiff can establish a prima facie case of age discrimination by showing he or she was (1) "within the statutorily protected age group of employees 40 years of age or older";

(2) "discharged [by the defendant]"; (3) "doing satisfactory work"; and (4) replaced by someone under 40 years old or a significantly younger person[1]." *Becker v. Wash. St. Univ.*, 165 Wn. App. 235, 252, 266 P.3d 893 (2011) (citing RCW 49.44.090(1); *McClarty*, 157 Wn.2d 214). A plaintiff can establish a prima facie case for gender discrimination by showing she (1) "is a member of a protected class," (2) "was discharged," (3) "was doing satisfactory work," and (4) "was replaced by a person of the opposite sex or otherwise outside the protected group." *Domingo v. Boeing Employees' Credit Union*, 125 Wn. App. 71, 80, 98 P.3d 1222 (2004) (footnote omitted). "Unless a prima facie case of discrimination is set forth, the defendant is entitled to prompt judgment as a matter of law." *Id.* at 181 (citation omitted). The second and third parts of the *McDonnell Douglas* framework are discussed in Section C *infra*.

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[1] Mikkelsen, 57 years old when terminated, does not argue that she was replaced by someone "significantly younger" than her. The court should find that Mikkelsen waived any argument on that issue. But even if Mikkelsen made such an argument, she cannot make a showing that Pratt, who was 51 years old when she was hired by the PUD, was a significantly younger person. *France v. Johnson*, 795 F.3d 1170, 1174 (9th Cir. 2015) (presuming that an age difference of less than ten years is insubstantial).

On summary judgment, Ward conceded that Mikkelsen satisfied the first two elements of the *McDonnell Douglas* prima facie test, but disputed the third element, i.e., that Mikkelsen performed satisfactory work. The trial court gave Mikkelsen the "benefit of the doubt" that she performed satisfactory work. CP at 532. On appeal, Ward maintains that Mikkelsen failed to satisfy the third element for the reasons discussed in the Statement of Facts *supra*.

On appeal, Mikkelsen argues that the trial court erred by using the fourth element as the determining factor in dismissing her discrimination claim. The trial court found Mikkelsen failed to satisfy the fourth element because "[t]here is absolutely no doubt that after her termination [Mikkelsen] was replaced by a person within both [(age and gender)] protected classes." CP at 532. The trial court explained that there may be some circumstances where the fourth element is not required, but Mikkelsen failed to put forth evidence that would justify "obviat[ing] the requirement of the fourth element." CP at 532.

2. The Washington Cases Cited by Mikkelsen Do Not Support Her Argument that a Flexible Application of the *McDonnell Douglas* Prima Facie Test Requires Courts to Disregard the Fourth Element in Age and Gender Discrimination Cases.

Mikkelsen argues that the trial court erred by rigidly applying the *McDonnell Douglas* prima facie test and failing to follow Washington

precedent finding that the fourth element is not absolute. App. Br. at 22-23. Ward agrees that the *McDonnell Douglas* prima face test should not be "rigid, mechanized, or ritualistic," or the exclusive method of proving a claim. *Grimwood*, 100 Wn.2d at 363. But flexible application of the framework does not require courts to disregard the fourth element in age and gender discrimination cases, as argued by Mikkelsen. Furthermore, the Washington cases relied upon by Mikkelsen provide guidance about when courts need not apply the fourth element, but do not support wholesale abandonment of the element.

Mikkelsen first cites to *Hatfield v. Columbia Federal Sav. Bank*, 57 Wn. App. 876, 882, 790 P.2d 1258 (1990),[2] for the proposition that the fourth element is not applicable "as it relate[s] to the replacement of a discharged employee by a younger person." App. Br. at 22. In *Hatfield*, the court of appeals reversed the trial court's grant of summary judgment in favor of a defendant-employer because there were genuine issues of material fact as to whether the employer's reasons for terminating a 56-year old employee were pretext for discriminatory reasons. In determining whether the plaintiff-employee had put forth a prima facie case, the court

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[2] *Overruled on other grounds by Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 106, 864 P.2d 937 (1994).

noted that it was unclear whether the plaintiff-employee had been replaced by a younger person. *Id.* at 881. There was some evidence that another employee had taken over some of the plaintiff-employee's responsibilities, but the employer apparently did not hire a new employee. *Id.* The court noted that in limited situations, the fourth element should not be the determining factor. *See Id.* at 882 ("The fourth part of the *McDonnell Douglas* test, that the job remained open, has been dispensed with in reduction-in-force cases *and in cases where the plaintiff has introduced direct or circumstantial evidence of discriminatory intent* or statistical evidence of discriminatory conduct.") (*quoting* B. Schlei & P. Grossman, *Employment Discrimination Law* (2d ed. 1983)). The court found the uncertainty of whether the plaintiff-employee was replaced by a younger employee presented an exceptional case that did not warrant the application of the fourth element to analyze the plaintiff-employee's discrimination claim.

This case is distinguishable from *Hatfield* because, in this case, there is no dispute that Mikkelsen was replaced by a 51 year old female employee to do the same work that Mikkelsen performed. *Hatfield* does not stand for the proposition that the fourth element is not applicable "as it relate[s] to the replacement of a discharged employee by a younger person." App. Br. at 22. Rather, *Hatfield* suggests that the fourth element

should generally be applied subject to limited exceptions, such as when it is unclear whether a discharged employee has been replaced.

Mikkelsen next cites to *Grimwood*, 110 Wn.2d at 363. In *Grimwood*, the court did not address whether the plaintiff-employee made a prima facie showing because the court found that, even if the plaintiff-employee had put forth a prima facie case, his discrimination claim would still fail because he did not satisfy the third part of the *McDonnell Douglas* framework—pretext. *Id.* at 364; *see also infra* (discussing second and third parts of the *McDonnell Douglas* framework). In dicta, the court briefly discussed the showing a plaintiff-employee must make to satisfy the fourth element of the *McDonnell Douglas* prima facie test:

> The element of replacement by a younger person or a person outside the protected . . . group is not absolute; rather, the proof required [to meet the fourth element] is that the employer "sought a [younger] replacement with qualifications similar to [the discharged employee's], thus demonstrating a continued need for the same services and skills."

Grimwood, 110 Wn.2d at 363 (quoting *Loeb v. Textron*, 600 F.2d 1003, 1013 (1st Cir. 1979)).

Mikkelsen cites this dicta in support of her argument that the fourth element is not absolute. App. Br. at 22. Mikkelsen ignores the fact that this dicta provides guidance in how courts should apply the fourth element, which suggests that the fourth element has not been abandoned.

Mikkelsen cannot make the showing necessary to satisfy the fourth element as the court understood it in *Grimwood*, i.e., (1) the employer sought a younger person with (2) skills similar to the discharged employee. It is undisputed that the PUD continued to need a person with services and skills like Mikkelsen's. Pratt had similar skills and was qualified to perform the duties of the PUD Finance Manager. But as Pratt was a woman about the same age as Mikkelsen, Mikkelsen fails to show that the PUD sought a younger female or male employee. Since Mikkelsen fails to meet her burden to meet the fourth element as described in *Grimwood*, that element should not be disregarded.

Mikkelsen additionally cites to *Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 152, 279 P.3d 500 (2012), *Callahan v. Walla Walla Housing Authority*, 126 Wn. App. 812, 820, 110 P.3d 782 (2005), and *Cluff v. CMX Corp. Inc.*, 84 Wn. App. 634, 637, 929 P.2d 1136 (1997). App. Br. at 23. Although these courts recognize flexibility in applying the *McDonnell Douglas* prima facie test, they involve unique fact situations and legal standards that are not applicable to this case. *See Fulton*, 169 Wn. App. at 152-56 (recognizing the need for a relaxed prima facie standard in the "failure-to-promote context" when the promotion was not advertised); *Callahan*, 126 Wn. App. at 820 (addressing whether a plaintiff-employee met her prima facie burden to show that she was fired

based on a real or perceived disability, an analysis that does not require the plaintiff-employee to show that she was replaced by someone else); *Cluff*, 84 Wn. App. at 634-37 (declining to apply fourth element in an employee's handicap discrimination claim where it was uncontested that the employee's position was eliminated and no replacement employee was hired). These cases suggest that courts properly apply the prima facie case with flexibility. These cases do not "eliminate" the fourth element as argued by Mikkelsen. App. Br. at 23.

Additional Washington authority suggests that the inquiry made under the fourth element plays an important role in the discrimination analysis. In *Hill*, the court discussed how to prove discriminatory intent in the context of the same actor defense. 144 Wn.2d at 189-190. The court suggested that an employer's hiring decisions can be evidence of the lack of a discriminatory intent in the mindset of the employer. *See Id.* ("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 . . . After all, if the employer is opposed to employing persons with a certain attribute, why would the employer have hired such a person in the first place?"). The court's recognition that an employer's hiring decisions are probative of the employer's discriminatory

intent (or lack thereof) is contrary to Mikkelsen's assertion that the fourth element "add[s] nothing to the discrimination analysis." App. Br. at 24.

In sum, the Washington cases cited by Mikkelsen do not support her argument that the fourth element of the *McDonnell Douglas* prima facie test is only a "potential" or "perceived" element that courts should disregard. App. Br. at 19, 21. Rather, these cases support that courts should apply the fourth element subject to limited circumstances, *see Hatfield*, 57 Wn. App. at 882, because the fourth element is probative of discriminatory intent, *see Hill*, 144 Wn.2d at 189-190. These cases display how the prima facie elements of discrimination claims are flexible, and, when the factual circumstances of the case warrant it, the fourth element is not absolute and can be set aside to avoid illogical conclusions. *See, e.g.*, *Grimwood*, 110 Wn.2d 355; *Cluff*, 84 Wn. App. 634; *Fulton*, 169 Wn. App. 137. In this case, however, the fourth element is directly relevant and applicable and the trial court did not err in dismissing Mikkelsen's discrimination claim on the grounds that Mikkelsen failed to show that she was replaced by someone outside her protected class of age and/or gender.

3. <u>The Federal Cases Cited by Mikkelsen Do Not Support Her Argument that the Fourth Element Should be Eliminated.</u>

Mikkelsen argues that a number of federal cases have "eliminated" the fourth element. *See* App. Br. at 24-26 (citing *Pivirotto v. Innovative*

Sys., Inc., 191 F.3d 344, 347 (3d Cir. 1999) and additional federal cases). Although the federal cases cited by Mikkelsen suggest that the fourth element should not be the deciding factor in certain cases, the cases also affirm that, in other cases, the fourth element continues to have evidentiary value in determining whether a plaintiff-employee has proven a defendant-employer's discriminatory intent.

In *Pivirotto*, the Third Circuit held that a Title VII gender discrimination case does not "require a plaintiff to prove that she was replaced by someone outside her class in order to make out a prima facie case." *Pivirotto*, 191 F.3d at 355. The Third Circuit did not hold that the fourth element should be eliminated, but instead noted, "The fact that a female plaintiff claiming gender discrimination was replaced by another woman might have some evidentiary force, and it would be prudent for a plaintiff in this situation to counter (or explain) such evidence." *Pivirotto*, 191 F.3d at 354.

Other federal cases cited by Mikkelsen similarly recognize that the fourth element may be probative of discriminatory intent in appropriate cases. *See, e.g.*, *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996) (per curiam) ("That one's replacement is of another race, sex, or age may help to raise an inference of discrimination."); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990) ("the

attributes of a successor employee may have evidentiary force in a particular case"); *Nieto v. L&H Packing Co.*, 108 F.3d 621, 624 (5th Cir. 1997) ("While not outcome determinative, [the attributes of a successor employee] [are] certainly material to the question of discriminatory intent.") (footnote omitted).

At least one federal court has explicitly rejected an argument similar to the one made by Mikkelsen, i.e., that courts should eliminate the fourth element. *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000). In *Byers*, the Fifth Circuit found that such an argument would improperly create "a presumption that replacement by someone within one's protected class is irrelevant." *Id.* at 427. In a different case, the First Circuit criticized the "essential pointlessness of arguments" like Mikkelsen's that focus on the "artificial striations of the burden-shifting framework" and that "unduly complicate" the prima facie inquiry. *Cumpiano*, 902 F.2d at 155.

The Fourth Circuit has articulated a slightly different approach to the fourth element that is more consistent with Washington precedent in that it generally applies the fourth element except in limited circumstances. *Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998) (affirming a district court's dismissal of a sex discrimination claim by a man because the plaintiff was replaced by another man). In *Brown*, the

Fourth Circuit articulated some "limited situations" where an employee-plaintiff may not need to show that his or her position was ultimately filled by someone not a member of the protected class, including:

- "age discrimination cases where a plaintiff within the protected class is replaced by another, but significantly younger, person within the same class,"
- "where there has been a significant lapse of time between the plaintiff's application and [the employer's] eventual decision to hire another individual within the same protected class," or
- "where the employer's hiring of another person within the protected class is calculated to disguise its act of discrimination toward the plaintiff."

159 F.3d at 905. The approach followed by the Fourth Circuit, i.e., that courts should generally apply the fourth element subject to limited exceptions, is consistent with the approach followed by the Washington Court of Appeals. *Hatfield*, 57 Wn. App. at 882. This approach also better accounts for the evidentiary importance of the inquiry made by the fourth element.

This court should follow the Fourth Circuit in recognizing that disregarding the fourth element of the *McDonnell Douglas* prima facie test

should be the exception, not the rule. Contrary to Mikkelsen's argument, App. Br. at 24, the fourth element *does* add substance to the discrimination analysis. It is common sense that if an employer terminates a person who is a member of a protected class, and then rehires a person from the same class, the reason the employer terminated the employee had nothing to do with the characteristics of the person's protected class. If an employer fired a woman over age 40, and rehired a different woman of a similar age, then one must logically infer that the employer was not discriminating against the discharged employee based on age or gender. In *Hill*, discussed *supra*, the Washington State Supreme Court recognized these logical inferences that can be drawn from an employer's hiring decisions.

Furthermore, Mikkelsen's argument that the *McDonnell Douglas* framework should be applied flexibly is at odds with her argument that courts should "eliminate" the fourth element in age/gender discrimination cases. App. Br. at 24. The rule advocated by Mikkelsen is just as rigid and inflexible as requiring courts to consider every element in every case. A truly flexible application of the *McDonnell Douglas* framework would allow courts to take into account the fourth element when, as in this case, it would be essential in analyzing discriminatory intent.

In the case at bar, the trial court understood how to flexibly apply the *McDonnell Douglas* prima facie test. The trial court found reliance on

the fourth element appropriate and necessary because Mikkelsen failed to set forth "substantial facts" suggesting discrimination. CP at 532. In light of the sparsity of direct or indirect evidence of discrimination, the trial court properly concluded that Mikkelsen failed to put forth a prima facie case because she was unable to show that Ward and the PUD hired someone outside of her protected classes to replace her. Within days of Mikkelsen's termination, Ward and the PUD hired Genine Pratt, a 51 year old woman and a Certified Public Accountant, to carry out Mikkelsen's former duties on a contract basis. CP at 65. Ward and the PUD eventually hired Pratt full time as the PUD's Finance Manager.

There is no evidence that the hiring of Pratt was a sham act, i.e., an act to disguise Ward's and the PUD's act of discrimination, that justified the obviation of the fourth element. Pratt was a logical choice to replace Mikkelsen as Pratt had skills and qualifications similar to Mikkelsen and had worked for Ward and PUD before being hired as a regular employee. Consistent with the Fourth Circuit's rule articulated in *Brown* and the Washington cases discussed *supra*, the trial court properly relied on the fourth element of the *McDonnell Douglas* test to find that Mikkelsen had failed to establish a prima facie case.

C. Even Assuming, For Purposes of Analysis Only, the Trial Court Legally Erred in Finding Mikkelsen Failed to Meet Her Prima Facie Burden to Show Discriminatory Intent, She Would Still Not Meet Her Burden Under Part Three of the *McDonnell Douglas F*ramework to Put Forth any Evidence that Ward's and PUD's Legitimate and Nondiscriminatory Reasons for Terminating Her Were Pretextual.

Even assuming, for purposes of analysis only, the trial court erred in dismissing Mikkelsen's discrimination claim based solely on the fact that she did not meet the fourth element of the *McDonnell Douglas* prima facie test, summary judgment would still be appropriate because Mikkelsen has made no showing that Ward's legitimate, nondiscriminatory reasons for firing her were pretextual.

At the second part of the *McDonnell Douglas* framework, if a plaintiff-employee presents a prima facie case, a "legally mandatory, rebuttable presumption of discrimination temporarily takes hold . . . and the evidentiary burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action sufficient to raise a genuine issue of fact as to whether the defendant discriminated against the plaintiff." *Hill*, 144 Wn.2d at 181 (internal quotation marks, alterations, and citations omitted). This is merely a burden of production, not of persuasion. *Id.* "If the defendant fails to meet this production burden, the plaintiff is entitled to an order establishing liability as a matter of law, because no issue of fact remains in

the case." *Id.* at 181-82 (internal quotation marks and citations omitted). "If, however, the defendant meets this intermediate production burden, the *presumption* established by the prima facie evidence is rebutted and, having fulfilled its role of forcing the defendant to come forward with some response, the presumption simply drops out of the picture." *Id.* at 182 (internal quotation marks and alterations omitted).

At the third stage of the *McDonnell Douglas* framework, the burden of proof shifts back to the plaintiff, who must then "be afforded a fair opportunity to show that [defendant's] stated reason for [the adverse action] was in fact pretext." *Id.* (quoting *McDonnell Douglas,* 411 U.S. at 804, 93 S.Ct. 1817). Plaintiffs may satisfy the pretext prong of the *McDonnell Douglas* framework by "offering sufficient evidence to create a genuine issue of material fact either (1) that the employer's articulated reason for its action is pretextual or (2) that, although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." *Scrivener*, 181 Wn.2d at 441-42. "If the plaintiff cannot prove pretext, the defendant becomes entitled to judgment as a matter of law." *Hill*, 144 Wn.2d at 182.

In this case, Ward met his burden of production at the second part of the *McDonnell Douglas* framework by providing legitimate, nondiscriminatory reasons for terminating Mikkelsen. These reasons

include Mikkelsen's multiple material billing errors in the system for which she was responsible, errors in her drafting of Board Reports, disruptive nature with other employees, complete lack of respect for her supervisor (Ward), improper use of PUD resources, and improper attempt to distribute a biased employee survey about her supervisor. The totality of these circumstances caused Ward to lose all trust and confidence in Mikkelsen as a manager. Mikkelsen acknowledged that she and Ward disagreed over numerous workplace issues, that she was aware that she was going behind Ward's back in sending the survey to the Commissioners, and that she and Ward had a mutual "communication breakdown." CP at 114. It is undisputed that Ward and Mikkelsen had serious problems working together and these problems led to Mikkelsen's termination. Neither age nor gender discrimination was a factor in Mikkelsen's termination.

On appeal, Mikkelsen alleges that Ward failed to meet his burden to show a nondiscriminatory reason for terminating Mikkelsen. Mikkelsen argues (1) that at the time she was terminated, Ward provided no explanation other than "it wasn't working out," (2) on Mikkelsen's unemployment benefits paperwork, the PUD certified that Mikkelsen had been terminated without cause, and (3) there is no documentation of any deficiencies in Mikkelsen's work performance. App. Br. at 27.

Mikkelsen cites no authority suggesting that an employer's decision to terminate an employee is somehow legally inadequate if the employer terminates the employee with little explanation. Furthermore, certifying that Mikkelsen's termination was "without cause," CP at 402, is not necessarily inconsistent with Ward's explanations for terminating Mikkelsen; Mikkelsen acknowledged that she and Ward had a mutual "communication breakdown," CP at 114.

But the alleged inconsistencies identified by Mikkelsen do not detract from the overriding evidence put forth by Ward that establishes legitimate reasons for why he terminated Mikkelsen. In a memorandum dated August 22, 2011, Ward goes into great detail about why he terminated Mikkelsen. CP at 242-46. At his deposition, Ward testified that he terminated Mikkelsen for the reasons he mentioned in his memorandum. Mikkelsen's own deposition testimony corroborates Ward's recitation of conflicts and disagreements that occurred between Ward and Mikkelsen. The employer's burden at part two of the *McDonnell Douglas* framework is a burden of production, not of persuasion. *Hill*, 144 Wn.2d at 181. Ward has met his burden of production to show that he had legitimate nondiscriminatory reasons to terminate Mikkelsen.

When Ward satisfied his burden of production at part two of the *McDonnell Douglas* framework, the burden shifts to Mikkelsen to prove that the proffered reason for her termination was a pretext.

On appeal, Mikkelsen attempts to establish pretext by attacking the memorandum prepared by Ward that outlined his reasons for terminating her. App. Br. at 27-33. Mikkelsen argues that the memorandum prepared by Ward was not in Mikkelsen's employee file and there was no evidence that the memorandum was seen by the Commissioners. App. Br. at 30. Mikkelsen further disputes the contents of the memorandum. Mikkelsen argues that (1) Commissioner Hanson requested the employee survey, she did not initiate the request and she did not request a special board meeting, (2) Mikkelsen never withheld information from the Commissioners concerning the line extension policy, (3) Mikkelsen never said Ward could not talk to employees under her supervision outside her presence, (4) there were no billing errors, rather it was a metering and software issue, (5) Mikkelsen never claimed to have a "come to Jesus" meeting with Ward, but did meet with him to discuss several issues, including gender discrimination, (6) Mikkelsen never withheld information from Ward, (7) Mikkelsen compensated the PUD for using its resources for her consulting business. App. Br. at 30-33.

Even accepting as true Mikkelsen's interpretation of the events leading up to her termination, Mikkelsen makes no showing that Ward's reasons were a pretext to ulterior, discriminatory motives. The arguments presented by Mikkelsen reflect her side of the story, her subjective interpretation of the events cited by Ward as his reasons for terminating Mikkelsen. Mikkelsen's subjective belief that Ward's decision to terminate her was motivated by her age or gender is not sufficient to satisfy the pretext prong of the *McDonnell Douglas* test. *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005) (a discharged employee's belief that he was discriminated against, when unsupported by the objective evidence, "is irrelevant and cannot be the basis to create a genuine issue of fact to defeat summary judgment."); *Hines v. Todd Pac Shipyards Corp.*, 127 Wn. App. 356, 372, 112 P.3d 522 (2005) ("Speculation and belief are insufficient to create a fact issue as to pretext.").

The undisputed evidence in the record reveals that Mikkelsen and Ward disagreed on a number of workplace issues and ultimately they stopped communicating and trusting one another. The disagreements, communication problems, and lack of trust between Ward and Mikkelsen are established by the record and are well documented as Ward's reasons for terminating Mikkelsen. Mikkelsen fails to show that Ward's reasons

for terminating her were pretextual or that discrimination was a "substantial factor motivating" Ward. *Scrivener*, 181 Wn.2d at 442; *Griffith*, 128 Wn. App. at 447.

Accordingly, judgment as a matter of law in favor of Ward would be appropriate even if this court found that Mikkelsen put forth a prima facie case. *See Hill*, 144 Wn.2d at 182 ("If the plaintiff cannot prove pretext, the defendant becomes entitled to judgment as a matter of law."); *Grimwood*, 110 Wn.2d at 365 (summary judgment in favor of defendant-employer appropriate where, assuming plaintiff-employee made out a prima facie case, plaintiff-employee failed to "show a sufficient factual basis to support a genuine issue of material fact that his discharge was motivated by a discriminatory purpose rather than the reasons articulated by the defendant employer."); *Cluff*, 84 Wn. App. 634 (summary judgment in favor of defendant-employer appropriate in disability discrimination case when plaintiff-employee met prima facie burden, but failed to establish pretext); *Fulton*, 169 Wn. App. at 156 (summary judgment in

favor of employer appropriate in failure-to-promote case when plaintiff-employee met prima facie burden, but failed to establish pretext).[3]

D. Mikkelsen Failed to Put Forth Evidence that Established a Genuine Issue of Material Fact that (1) Ward Breached the PUD Corrective Action Policy, or (2) Mikkelsen's Termination was Outrageous.

1. There is no Genuine Issue of Material Fact as to Whether Ward Breached the PUD Corrective Action Policy Because Ward was Not a Party to the Alleged Contract.

There is no genuine issue of material fact as to whether Ward breached the PUD corrective action policy because Ward was not a party to the alleged contract. An employee, acting on behalf of his employer in an official capacity in regards to contracts between the employer and other employees, or third parties, cannot be held personally liable for his employer's breach. *Houser v. City of Redmond*, 16 Wn. App. 743, 747, 559 P.2d 577, 580 (1977) *affirmed* 91 Wn.2d 36, 586 P.2d 482 (1978).

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[3] In several of the federal cases cited by Mikkelsen, the federal courts of appeals likewise affirmed the district courts' grant of summary judgment in favor of the defendant-employers because the plaintiff-employees failed to prove pretext. *Carson*, 82 F.3d at 159; *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985); *Nieto*, 108 F.3d at 624.

The alleged contract that Mikkelsen claims was breached, was between her and her employer, the PUD, allegedly arising from "policies contained in the operations manual." CP at 5, 9. In no way was Ward personally a party to the alleged employment contract between Mikkelsen and the PUD; furthermore, Ward gained no benefit from such a contract. It is undisputed that Ward was Mikkelsen's direct supervisor, the General Manager of the PUD, and himself an employee of the PUD. As such, Ward cannot be held personally liable for the alleged breach by the PUD of the corrective action policy. *Houser*, 16 Wn. App. at 747. Although Mikkelsen dedicates substantial briefing to this issue, App. Br. at 33-48, at no point does she address how Ward can be individually liable for a breach of a policy that he is not a party to. Summary judgment dismissing Mikkelsen's breach of employment policy claim was proper.

2. **There is No Genuine Issue of Material Fact as to Whether Mikkelsen's Termination was Outrageous Because (a) Her Outrage Claim is Duplicative and (b) There is No Evidence of Outrageous Behavior.**

Mikkelsen's argument that there are genuine issues of material fact regarding her claim of intentional infliction of emotional distress (outrage) fails because it is duplicative and there is no evidence of outrageous behavior.

a. Mikkelsen's outrage claim is duplicative.

Mikkelsen fails to show that the damages suffered on account of Ward's allegedly outrageous conduct are separate and apart from her discrimination claim. When outrage damages are premised on a defendant's alleged discriminatory misconduct, the damages are duplicative of the discrimination claim, and dismissal of the outrage claim is appropriate to avoid double recovery. *Anaya v. Graham*, 89 Wn. App. 588, 595-96, 950 P.2d 16 (1998); *Haubry v. Snow*, 106 Wn. App 666, 678-679, 31 P.3d 1186 (2001). Mikkelsen does not reference a single incident apart from her alleged discriminatory termination in support of her outrage claim. "The fact of termination is not itself sufficient to support [an outrage claim]." *Anaya*, 89 Wn. App. at 596. If Mikkelsen had been successful in proving her discrimination claims, emotional distress damages would have been available, if properly established. Therefore, the trial court properly dismissed Mikkelsen's outrage claim because it duplicates her discrimination claim.

b. Mikkelsen's outrage claim is not supported by evidence of outrageous behavior.

Mikkelsen has not established genuine issues of material fact that suggest that she satisfies the elements of an outrage claim.

To state a claim for the tort of outrage a plaintiff must prove: (1) the defendant engaged extreme and outrageous conduct; (2) the defendant intentionally or recklessly inflicted emotional distress; and, (3) that the plaintiff suffered severe emotional distress. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995) (quoting *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); *Restatement (Second) of Torts* § 46 (1965)). Whether conduct is extreme and outrageous is initially for the Court to determine, if reasonable minds could not differ on the issue. *Id.*

Regarding the first element of an outrage claim, the conduct in question must be "so outrageous in character, and as extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Birklid*, 127 Wn.2d at 867 (*quoting Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). The conduct must be such that a retelling of the facts to the average member of the community would induce an exclamation of "outrageous!" *Lewis v. Bell*, 45 Wn. App. 192, 195, 724 P.2d 425 (1986). To that end, a plaintiff "must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration." *Grimsby*, 85 Wn.2d at 59. Mere insults, indignities, threats, annoyances, petty oppression or other trivialities will not support outrage. *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

Regarding the third element of an outrage claim, "Severe emotional distress is . . . not transient and trivial[,] but distress such that no reasonable man could be expected to endure it." *Kloepfel v. Bokor*, 149 Wn.2d 192, 203, 66 P.3d 630 (2003) (internal quotation marks omitted).

Under these standards, Mikkelsen cannot establish any element of her outrage claim against Ward. Mikkelsen attempts to substantiate her outrage claim by referencing news articles written and published by third parties about Mikkelsen's termination, which include statements made by Ward and the Commissioners made during public meetings. Mikkelsen believes the articles have "very scary implication[s]" for her future work as an independent consultant. CP at 102-03, 215-17; App. Br. at 50. But Mikkelsen cannot remember the particular statements and admittedly failed to produce the articles in discovery. CP at 103, 217. Mikkelsen also testified that being involved in this litigation caused her emotional distress. CP at 232. Mikkelsen has received no counseling, and takes no medications, in relation to emotional distress following her termination. CP at 233. On appeal, Mikkelsen describes the circumstances surrounding her termination as "unacceptable," not outrageous. App. Br. at 50.

These facts are not "outrageous!" and do not evidence that Ward engaged in extreme and outrageous conduct or that Ward intentionally or recklessly inflicted emotional distress on Mikkelsen, or that Mikkelsen

suffered severe emotional distress. *See Birklid*, 127 Wn.2d at 867. The trial court properly dismissed Mikkelsen's outrage claim as a matter of law.

E. Ward is Immune from Liability for His Official Actions as General Manager of the PUD.

As a manager of a PUD, Ward is immune from civil liability in the "good faith performance of acts within the scope of [his] official duties involving the exercise of judgment and discretion." RCW 54.12.110. "[A]n appointed or elected official or member of the governing body of a public agency is immune from civil liability for damages for any discretionary decision . . . within his official capacity, but liability shall remain on the public agency for the tortious conduct of its officials or member of the governing body." RCW 4.24.470. "Public agency" is defined to include, but not be limited to, "municipal corporations, quasi-municipal corporations, special purpose districts, and local service districts." RCW 4.24.470(2)(a). Furthermore, RCW 54.16.100 specifically authorizes PUD managers to "hire and discharge employees under [their] direction." Federal courts have recognized similar qualified immunity:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed.2d 396 (1982).

At all times relevant to this litigation, Ward was acting as General Manager of the PUD, a public agency in Washington. Ward, as General Manager, had discretion to terminate Mikkelsen's employment. RCW 54.16.100. Pursuant to RCW 4.24.470 and 54.12.110, Ward is immune from civil liability arising from the execution of discretionary decisions made in his official capacity as the General Manager of the PUD. On this basis, independent of the court's decisions concerning the other issues presented on appeal, Ward respectfully requests dismissal, with prejudice, of all claims asserted against him by Mikkelsen.

V. CONCLUSION

For the above-stated reasons, Appellee-Defendant Charles Ward respectfully requests that the decision of the trial court be affirmed.

RESPECTFULLY SUBMITTED this 23d day of November, 2015.

PAINE HAMBLEN LLP

By: _____

James M. Kalamon, WSBA #7922
Attorneys for Defendant Charles Ward

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was sent via regular mail, postage prepaid, on this day, to:

J. Jay Carroll
Halverson|Northwest P.C.
405 E. Lincoln Ave.
P.0. Box 22550
Yakima, WA 98907

Sarah L. Wixson
Stokes Lawrence Velikanje Moore & Shore
120 N. Naches Avenue
Yakima, WA 98901-2757

Dated this 23rd day of Nov. 2015, at Spokane, Washington.

James M. Kalamon

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