

No. 93731-1

**IN THE SUPREME COURT OF
THE STATE OF WASHINGTON**

KIM MIKKELSEN

Petitioner,

v.

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

Respondents.

MR. WARD'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The Court granted Plaintiff-Petitioner Kim Mikkelsen’s Petition for Review, which sought discretionary review on two issues: (1) whether Ms. Mikkelsen satisfied the third prong of the *McDonnell Douglas*¹ summary judgment framework, and (2) how Washington courts interpret language contained in employee handbooks at summary judgment. The Court of Appeals’ decision also refined the first prong of the *McDonnell Douglas* framework by stating that plaintiffs alleging discriminatory termination need not show that they were replaced by someone of the opposite sex or someone significantly younger in order to meet their prima facie burden. *Mikkelsen v. Pub. Util. Dist. # 1 of Kittitas Cty.*, 195 Wn. App. 922, 943, 380 P.3d 1260 (2016).

In this supplemental brief, Mr. Ward accepts the Court of Appeals’ holding regarding the replacement factor. Mr. Ward submits that the Court need not address this issue, which has not been presented for review, because the case should be decided in favor of Mr. Ward on other grounds. If the Court nevertheless does reach this issue, Mr. Ward asks this Court to emphasize, as did the Court of Appeals, that replacement of a person with

¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973).

the same protected attributes as the plaintiff, although perhaps not necessary to establish a prima facie case, is still relevant regarding the employer's motive in terminating the plaintiff.

Second, Mr. Ward argues this Court should affirm the Court of Appeals' dismissal of Ms. Mikkelsen's discrimination claims because Ms. Mikkelsen failed to meet her burden at the third prong of the *McDonnell Douglas* framework to show that (1) Respondents' legitimate reasons for terminating her were pretext to discriminatory reasons, or (2) Respondents were substantially motivated by discriminatory reasons. The only evidence submitted by Ms. Mikkelsen in opposition to Respondents' motions for summary judgment was her subjective beliefs of discrimination and isolated occurrences from which she inferred discriminatory animus, which is not sufficient evidence to meet her burden at the third prong of the *McDonnell Douglas* framework.

Third, regarding Ms. Mikkelsen's claims relating to breach of employment policy, Mr. Ward reasserts his defense that he cannot be individually liable for the alleged breach of a purported contract between Ms. Mikkelsen and the PUD. Even if the Court finds the trial court erred in dismissing this claim, the Court should affirm the dismissal of Ms. Mikkelsen's breach of employment policy claims against Mr. Ward because he was not a party to the purported contract.

Fourth, this Court should affirm dismissal of Ms. Mikkelsen's outrage claim because termination of employment does not rise to the level of outrageous behavior.

Finally, even if the Court finds reversible error regarding the lower courts' consideration of Ms. Mikkelsen's claims, the Court should affirm dismissal of all claims against Mr. Ward because he is immune from liability for his official actions as General Manager of the PUD.

Mr. Ward respectfully requests that the Court affirm the Court of Appeals and the trial court's dismissal of this case.

II. ARGUMENT

- A. **Although the Issue of Whether Ms. Mikkelsen Met her Prima Facie Burden is Outside the Scope of Review and Not Necessary to Address, if the Court Reaches the Issue, it Should Emphasize that the Personal Attributes of the Replacement of a Plaintiff Alleging Discriminatory Termination is Still Relevant to the Employer's Motive in Terminating the Plaintiff.**

The issue of whether Ms. Mikkelsen met her prima facie burden even though she was unable to show she was replaced by a man or someone significantly younger appears technically outside this Court's scope of review. RAP 13.7(b). Neither Ms. Mikkelsen nor Respondents sought discretionary review of this issue and the Court's February 8, 2017 Order granting Ms. Mikkelsen's Petition for Review did not specify any issues it would address not raised by the Petition for Review.

Although this issue appears technically outside the scope of this Court's review, Mr. Ward recognizes the Court's inherent authority to resolve issues not presented in a Petition for Review. *E.g.*, *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 389-90, 113 P.3d 463 (2005) (citing *inter alia* RAP 1.2(c), 7.3).

Despite having the power to do so, Mr. Ward submits that the Court need not address the prima facie burden issue raised by Ms. Mikkelsen in the lower courts because her discrimination claims can be resolved on other grounds, i.e., the third prong of the *McDonnell Douglas* framework.² *See Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000) (“Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, [the Court] should resolve the case on that basis without reaching any other issues that might be presented.”) (Internal quotation marks omitted); *see also Walker v. St. Anthony's Med. Ctr.*, 881 F.2d 554, 561 (8th Cir. 1989) (Wollman, J., concurring) (stating that “I would reserve until a later day the question whether a plaintiff's replacement by a person outside the protected group is an essential element

² Also, Mr. Ward is immune from civil liability for his official actions as General Manager of the PUD. *See infra*.

of a prima facie case . . . [where] the district court correctly found that [plaintiff] was discharged for budgetary reasons unrelated to her sex.”).

If the Court does address the plaintiff’s prima facie burden under the *McDonnell Douglas* framework, Mr. Ward assumes for purposes of this brief that the Court of Appeals correctly concluded that the plaintiff need not prove replacement by someone without plaintiff’s personal attributes to make a prima facie case. Mr. Ward does not seek reversal of this issue, but does ask that the Court emphasize the Court of Appeals’ observation that replacement by someone within the protected class “is relevant evidence, helpful to the employer, that will bear on the step three determination of whether a plaintiff claiming discrimination has established that the employer’s proffered reason was pretext or that discrimination was a substantially motivating factor in the employment decision.” *Mikkelsen*, 195 Wn. App. at 943.

This observation is consistent with the notion that it is irrational for an employer to fire one employee based on his or her personal, protected attributes and then proceed to hire another person with the same attributes. Evidence of a terminated employee’s replacement is relevant in determining whether an employer was motivated by unlawful discriminatory reasons in terminating the plaintiff. *See Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 354 (1999) (“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.”); *see also Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 189-90, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006) (“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?”).

In sum, although it is not necessary for the Court to reach the prima facie burden issue, if it does, Mr. Ward requests that the Court give particular emphasis to the Court of Appeals’ observation that trial courts may consider the personal attributes of a plaintiff’s replacement at the third stage of the *McDonnell Douglas* framework.

B. The Trial Court and Court of Appeals Did Not Err in Finding that Ms. Mikkelsen failed to Meet Her Burden at the Third Prong of the McDonnell Douglas Framework; Thus, Even if Ms. Mikkelsen Met Her Prima Facie Burden, Dismissal of Her Discrimination Claims was Appropriate.

Assuming that Ms. Mikkelsen met her prima facie burden, Ms. Mikkelsen’s discrimination claims were still properly dismissed

because she failed to satisfy the third prong of the *McDonnell Douglas* framework. The only evidence she submitted of pretext or Respondents being substantially motivated by discriminatory reasons were her subjective beliefs of discrimination and isolated occurrences from which she inferred discriminatory animus. This evidence is not sufficient to overcome summary judgment under the *McDonnell Douglas* framework.

In *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014), this Court concluded that a plaintiff satisfied her burden at the third prong of the *McDonnell Douglas* framework. In that, plaintiff, Scrivener, sued Clark College for age discrimination after the college decided not to hire her as an English instructor, but instead hired two instructors who were under the age of 40. The trial court granted summary judgment in favor of the college, finding that Scrivener was unable to show that the college's legitimate reasons to terminate her were pretext for discriminatory reasons. The Court of Appeals affirmed, but this Court reversed. This Court held that Scrivener had presented sufficient evidence to show that there were genuine issues of material fact about whether the college's articulated reasons for terminating Scrivener were pretext.

The Court found that the following evidence presented by Scrivener satisfied her burden to show genuine issues of material fact concerning whether her age was a substantial factor motivating the college:

- The college hired two applicants under the age of 40 (Scrivener was 55 years old);
- In a “State of the College” speech, the college president stated there was a “glaring need” for younger talent within the college’s faculty;
- In a public forum, the college president advocated requiring no experience for the English positions;
- The college president hired many people under age 40 (only 44 percent of the tenure track faculty hires were 40 years of age or older during the 2005–06 school year);
- The college president requested applicants with “funk,” i.e., “youthfulness”; and,
- Scrivener “fulfilled all the minimum requirements and the desired qualifications, while neither of the hired candidates fulfilled all of the desired qualifications.”

Id. at 443, 448. Viewing this evidence in the light most favorable to Scrivener, this Court held that Scrivener created a genuine issue of material fact concerning whether age was a substantial motivating factor in the college’s decision not to hire her. *Id.* at 450.

Likewise in *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 89, 272 P.3d 865 (2012), the Court of Appeals reversed the trial court’s grant of summary judgment because it found that the plaintiff had put forth evidence

satisfying the plaintiff's burden to show that the employer's proffered reasons were pretext to discriminatory reasons. 167 Wn. App. at 89. In that case, plaintiff, Rice, sued his employer, OSI, for age discrimination after he was fired. *Id.* at 80. Although OSI offered legitimate reasons for terminating Rice, it found that Rice presented sufficient evidence to show these reasons were pretext. *Id.* at 90. Rice's evidence included (1) Rice's supervisor "routinely made age-related comments [for approximately two years]"; (2) Rice was replaced by a "much younger, less experienced employee"; and, (3) OSI gave inconsistent reasons for terminating Rice. *Id.* at 90-91.

In *Simmons v. Microsoft Corp.*, 194 Wn. App. 1049, 2016 WL 3660805 (July 5, 2016), an unpublished decision issued after the trial court's summary judgment ruling and a couple months before the Court of Appeals' decision in this case, Division One of the Court of Appeals affirmed summary judgment in favor of an employer where the plaintiff failed to present evidence sufficient to satisfy the third prong of the *McDonnell Douglas* framework. In *Simmons*, Plaintiff, Simmons, was hired by Microsoft as an Executive Business Administrator. *Id.* at *1. Initially, Simmons received positive performance evaluations. *Id.* But her lack of interpersonal skills eventually created strife in her workgroup and she was fired because her "job performance and competency levels [did]

not [meet] minimum performance standards and expectations for [her] position.” *Id.* at *1, *4. At the time she was fired, Simmons was 44 years old; she was replaced by a 32 year old woman. *Id.*

Simmons sued Microsoft alleging age and race discrimination. *Id.* at *5. Microsoft provided ample evidence of its non-discriminatory reasons for terminating Simmons. In proving that these reasons were pretext, the only evidence presented by Simmons was (1) her positive performance reviews, (2) arguments that the reasons given by Microsoft were inconsistent with past performance reviews, (3) the fact that she was replaced by a younger, less experienced employee, and (4) her supervisor’s one time remark that another person in their work group was the “real Kahuna” (Simmons identifies as Pacific Islander). *Id.* The Court of Appeals concluded that this evidence presented by Simmons did not raise a genuine issue of material fact as to whether age or race was a substantial factor in the decision to terminate her employment. *Id.* at *9.

In this case, the evidence submitted by Ms. Mikkelsen to meet her burden at the third prong of the *McDonnell Douglas* framework was similar to the evidence presented by Simmons and far less probative of discrimination than the evidence presented by Scrivener and Rice. The only evidence Ms. Mikkelsen could put forth regarding Mr. Ward’s alleged age and gender discrimination was her subjective beliefs of discrimination and

isolated occurrences from which she inferred discriminatory animus. This is not enough to overcome her burden at the third prong of the *McDonnell Douglas* framework. See, e.g., *Simmons*, 2016 WL 3660805 at *5 (plaintiff's evidence of, *inter alia*, inconsistent explanations for termination and supervisor's one time remark insufficient to prove pretext); see also *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.") (subsequent citation omitted).

The Court of Appeals' decision thoroughly explains how Mr. Mikkelsen's evidence, when viewed in the light most favorable to Ms. Mikkelsen, does not satisfy the pretext prong of the *McDonnell Douglas* framework. *Mikkelsen*, 195 Wn. App. at 945-49. Unlike the plaintiffs in *Scrivener* and *Rice*, Ms. Mikkelsen could not show that the PUD replaced her with someone significantly younger. Ms. Mikkelsen's replacement, Ms. Genine Pratt, was 51 years old when hired. Ms. Mikkelsen could not present any evidence of discriminatory intent on the part of Mr. Ward or the PUD such as the college president's public remarks in *Scrivener* or the pattern of ageist comments tolerated by the employer in *Rice*. Finally, unlike the plaintiff in *Scrivener*, Ms. Mikkelsen did not show that her replacement, Ms. Pratt, lacked the minimum requirements or the desired qualifications for the position.

This Court should affirm dismissal of Ms. Mikkelsen's discrimination claims because she failed to meet her burden at the third prong of the *McDonnell Douglas* framework.

C. **This Court Should Affirm Dismissal of Ms. Mikkelsen's Breach of Employment Policy Claim Against Mr. Ward Because the Claim Fails on the Merits and Because He Cannot Be Held Personally Liable for Breach of the Alleged Contract.**

Mr. Ward has consistently maintained that he cannot be personally liable for Ms. Mikkelsen's breach of employment policy claims because he is not a party to the alleged employment contract between Ms. Mikkelsen and the PUD. *See* CP at 278-79 (Mr. Ward's Points and Authorities in Support of His Motion for Summary Judgment); Ward's App. Br. at 34-35. Neither the trial court nor the Court of Appeals reached the issue of Mr. Ward's individual defenses because they determined that Ms. Mikkelsen's claims failed on the merits. *See* CP at 531-33 (trial court's letter ruling); *Mikkelsen*, 195 Wn. App. at 934 n.2.

In support of Mr. Ward's defense that he cannot be held personally liable for breach of employment policy claims, he relied on the case of *Houser v. City of Redmond*, 16 Wn. App. 743, 559 P.2d 577 (1977), *aff'd* 91 Wn.2d 36, 586 P.2d 482 (1978), which held that an employee cannot sue his employer for tortious interference with a contract. No reported Washington case appears to have addressed whether a manager can be held

individually liable for breach of an employment policy between the plaintiff-employee and his or her employer. But numerous courts outside of Washington conclude that an employee's breach of employment policy claim cannot be maintained against the employee's manager because the manager lacks privity of contract. *E.g.*, *Redmon v. Griffith*, 202 S.W.3d 225, 239 (Tex. App. 2006); *Samadder v. DMF of Ohio, Inc.*, 798 N.E.2d 1141, 1147 (Ohio Ct. App. 2003); *Lawrence v. Kennedy*, 936 N.Y.S.2d 487, 493 (N.Y. Sup. Ct. 2011) *aff'd as modified by Lawrence v. Kennedy*, 95 A.D.3d 955, 959 (N.Y. App. Div. 2012).

This Court should affirm the dismissal of Ms. Mikkelsen's breach of employment policy claims because, as found by the Court of Appeals, the claims fail on their merits. If, however, this Court reverses and remands on Ms. Mikkelsen's discrimination claims, Mr. Ward respectfully requests that the Court affirm dismissal of Ms. Mikkelsen's breach of employment policy claim against Mr. Ward because he cannot be individually liable for this claim.

D. This Court Should Affirm Dismissal of Ms. Mikkelsen's Outrage Claim.

Ms. Mikkelsen did not seek discretionary review regarding the dismissal of her outrage claim. If the Court reaches this issue, the Court should affirm dismissal of Ms. Mikkelsen's outrage claim because her

termination from employment does not rise to the level of extreme or outrageous conduct, i.e., beyond all possible bounds of decency.

E. As General Manager of the PUD, Mr. Ward is Immune from Civil Liability for His Official Actions.

Neither the Court of Appeals nor the trial court reached the issue of Mr. Ward's immunity defense because the lower courts found that Ms. Mikkelsen's claims failed on the merits. As the General Manager of the PUD, Mr. Ward is immune from civil liability for his official actions. RCW 54.16.100; RCW 4.24.470; RCW 54.12.110; *see also* Mr. Ward's App. Br. at 39-40. If this Court finds that the trial court erred in dismissing any of Ms. Mikkelsen's claims, the Court should affirm the dismissal of her claims against Mr. Ward on the independent basis that Mr. Ward is immune from civil liability. *See Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002) (stating Court "may affirm the trial court on any grounds established by the pleadings and supported by the record.").

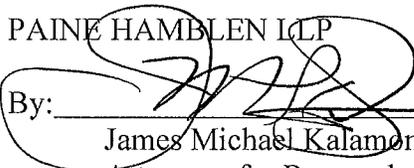
III. CONCLUSION

For the foregoing reasons, Mr. Ward respectfully requests that the Court affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 10th day of March, 2017.

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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 email and regular mail, postage prepaid, on this day, to:

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