Supreme Court No. 100889-9
Court of Appeals No. 83301-4-I

IN THE SUPREME COURT OF
OF THE STATE OF WASHINGTON

JOHN BOESPFLUG,

Plaintiff/Appellant/Cross-Respondent/Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR AND INDUSTRIES,

Defendants/Respondents/Cross-Appellants,

AMENDED PETITION FOR REVIEW

THE SHERIDAN LAW FIRM, P.S.

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I. INTRODUCTION

RCW 42.40 is the Washington State Employee Whistleblower Law ("the Whistleblower Law" or "RCW 42.40"). It protects state employees from retaliation for reporting improper governmental actions. It contains a detailed definition section (RCW 42.40.020) and sets out procedures for proving and defending actions brought under the Whistleblower Law. RCW 42.40.050. A plain reading of the Whistleblower Law indicates that to prevail at summary judgment and at trial, Boespflug must prove two elements:

- That he is a whistleblower as defined in RCW 42.40.020, and
- That he was subjected to workplace reprisals or retaliatory actions.

RCW 42.40.050(1)(a).

The legislature chose not to require a separate causation element, and instead provides a presumption in favor of the claimant. "Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a

cause of action for the remedies provided under chapter 49.60 RCW." RCW 42.40.050(1)(a).

To overcome the prima facie case, the State must prove by a preponderance of the evidence:

- That there have been a series of documented personnel problems or a single, egregious event, or that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower, and
- That improper motive was not a substantial factor.

RCW 42.40.050(2).

Jurisdiction for the filing of a Whistleblower Law retaliation case in superior court under RCW 42.40.050(1)(a) is provided by the legislature in RCW 49.60.210(2), which makes retaliation under the Whistleblower Law an unfair practice giving rise to a civil claim. RCW 49.60.030(2).

As to damages, RCW 42.40.050(1)(a) authorizes the plaintiff to obtain the same remedies as civil rights plaintiffs in cases brought under the Washington Law Against Discrimination ("WLAD").

Here, the Court of Appeals proposes a sweeping consolidation of whistleblower law apparently intended to apply in all whistleblower retaliation cases, including cases brought under RCW 42.40: "To avoid summary judgment on a whistleblower retaliation claim, the employee must establish a prima facie case of retaliation: that the employee engaged in a protected activity, that the employer took an adverse action, and that the protected activity caused the adverse action." A001-2. The first two elements are similar to the RCW 42.40.050 elements, but the third element is not a part of the Whistleblower Law prima facie case.

This is a case of first impression. The Supreme Court has never considered whether the plain language of the Whistleblower Law should be the framework for proving liability. Divisions One and Two have operated under this Court's radar on this issue. In unreported cases, each division has overlooked the plain language of the Whistleblower Law, and either added elements or burdens from WLAD cases to the plaintiff's two-element burden under RCW 42.40.050. *Mendoza de Sugiyama v. State Dep't of Transp.*, No. 45087-9-

II, slip op. at 9 (Wash. Ct. App. Feb. 10, 2015) ("(1) she engaged in a statutorily protected activity (filing a whistleblower complaint), (2) the employer took an adverse employment action, and (3) the adverse action was caused by the employee's activity") (citing *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2015)); *Budsberg v. Trause*, No. 46658-8-II (Wash. Ct. App. Nov. 17, 2015); *Rainy v. State Horse Racing Com'n*, 134 Wn. App. 1023, 2006 WL 2131741, at *5 (Wash. Ct. App. Aug. 1, 2006).

This Court may accept review if the decision of the Court of Appeals conflicts with a decision of the Supreme Court. RAP 13.4(b). This Court should accept review because the unpublished opinion is contrary to Supreme Court precedent: "[A] court must not add words where the legislature has chosen not to include them." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). We assume the legislature 'means exactly what it says.'" *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

The Court may also accept review if the petition involves an issue of substantial public interest. RAP 13.4(b)(4). This

petition raises issues of substantial public interest because state employees have unique roles to play to ensure that government does the people's work without waste, gross mismanagement, or violations of the law, and the elements and procedures adopted by the legislature for use in litigation pertaining to the Whistleblower Law are unique to state employee whistleblowers. *Compare* RCW 42.40.050 *and* RCW 42.41.040; *Woodbury v. City of Seattle*, 172 Wn. App. 747, 292 P.3d 134 (2013).

Those unique elements and procedures in the Whistleblower Law are there to ensure that state employee whistleblowers are meaningfully protected from retaliation after they report improper governmental action.

Boespflug requests that this Court grant review on both of these grounds.

II. IDENTITY OF PETITIONER

John Boespflug is a citizen of Washington State. He recently retired from his job as an electrical inspector and compliance officer at the Washington State Department of Labor & Industries ("L&I"). During his employment,

Boespflug reported four separate improper governmental actions committed by his managers and suffered retaliation as a result. A016-17.

III. DECISION BELOW

Boespflug seeks review of the decision issued by Division One of the Court of Appeals on February 28, 2022. A copy of the decision is in the Appendix at A001-27. The Court of Appeals denied Boespflug's timely motions for reconsideration and publication on March 29, 2020. A028-30. Copies of RCW 49.60.030, RCW 49.60.210, RCW 42.40 are at A031-42.

IV. ISSUE PRESENTED FOR REVIEW

Whether, in analyzing the merits of a summary judgment motion in a state employee whistleblower retaliation case, the Court of Appeals may add an additional element not in the statute to the whistleblower's prima facie case (RCW 42.40.050)?

V. STATEMENT OF THE CASE

This case is about safety. Electricity lights our homes and businesses, and it powers our machinery and appliances so that we in Washington can live our modern lives. The Washington State

Department of Labor & Industries has a duty to make electricity safe by enforcing federal laws, state laws, and codes that regulate the installation and maintenance of electrical connections to homes and businesses. The L&I electrical inspectors are the point of the sword for ensuring we are protected.

The facts leading to this lawsuit occurred after the arrival of Supervisor Jeff Ault in 2013. CP 1386. Between April 2016 and February 2017, Boespflug made four Whistleblower complaints (referred to as Whistleblower #1-4). As a result, he was subjected to six reprisals or retaliatory actions.

In contrast to the oral opinion of the trial court (RP 37-40), the Court of Appeals found that all four whistleblower complaints met the requirement for Boespflug to be a whistleblower under RCW 42.40.020. A016-17.

As to retaliation, the trial court found that the actions alleged to be to be reprisals or retaliation did not meet the definition (RCW 42.40.050) as a matter of law. RP 38-40.

In analyzing retaliation, the Court of Appeals applied the unfounded causation element to the six reprisals or acts of

retaliation, and found that he failed to show causation in five of the six. A017-22.

A. With This Unpublished Opinion, Division One is Adding to the List of Unpublished Cases Injecting a Third Element into Plaintiff's Prima Facie Case

Boespflug sought to have the opinion published, but the Court of Appeals declined his request. A029. "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court [but] . . . may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1. In fact, they may become quasi-precedents, and the more cases that get "unpublished" at the Court of Appeals on a particular issue, the more those decisions gain power and force on that issue. This all occurs under the Supreme Court's radar, and over time, the unpublished decisions are treated as though they were published. Such is the case here.

Two Divisions of the Court of Appeals have injected into unpublished cases brought under RCW 42.40 additional liability elements, shifting burdens, and affirmative defenses

found in WLAD retaliation cases. *Rainy v. State Horse Racing Com'n*, 134 Wn. App. 1023, 2006 WL 2131741, at *5 (Wash. Ct. App. Aug. 1, 2006); *Mendoza de Sugiyama v. State Dep't of Transp.*, No. 45087-9-II, slip op. at 9 (Wash. Ct. App. Feb. 10, 2015); *Budsberg v. Trause*, No. 46658-8-II (Wash. Ct. App. Nov. 17, 2015).

These unpublished cases became support for the State's position that the *McDonnell Douglas* burden shifting framework should be applied at summary judgment instead of the elements and affirmative defenses delineated in the Whistleblower Law. CP 45.

Division One sees these unpublished decisions as formidable counterpoints to statutory interpretation principles. *See Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 852, 434 P.3d 39 (2019) (applying the plain language in the statute to hold an employer strictly liable for the discriminatory acts of an employee toward a consumer).

This Court should intervene to evaluate the holding in this case, which is representative of a cluster of unpublished

cases rejecting the plain language of RCW 42.40, to determine whether the Whistleblower Law language should prevail.

B. Division One Improperly Added a "Causation" Element to Whistleblower Law Cases

1. Courts must carry out the legislature's intent

"The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "When reviewing a statute, the court will give effect to the statute's plain language." *Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 852, 434 P.3d 39 (2019). "In determining if the statute is plain, [the court] will consider the ordinary meaning of words, basic rules of grammar, and statutory context. *Id.* (citing *Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 435, 359 P.3d 753 (2015)). A plain reading of RCW 42.40 does not support adding a causation element to plaintiff's burden.

It is the intent of the legislature to protect the rights of state employees making whistleblower disclosures, regardless

of whether an investigation is initiated under RCW 42.40.040. RCW 42.40.010. To that end the legislature tells courts that this act shall be broadly construed in order to effectuate the purpose of this act. LAWS OF 2008, ch. 266, §1. The holdings of the Court of Appeals are out of step with the legislative purpose and the legislative direction and are contrary to Supreme Court precedent on statutory interpretation.

2. RCW 42.40.050's plain language shows the legislative intent

In 1999, the Washington legislature voted nearly unanimously to amend the State Employee Whistleblower Protection Act, RCW 42.40.050.[1] In considering the amendment, it was "argued that the whistleblower is at a disadvantage in having to prove that the reason why an agency took … action against him or her is because the person was a whistleblower." Final B. Rep. on SSB 5672, at 1, 56th Leg., Reg. Sess. (Wash. 1999) (noting that in seven years, the Human Rights Commission received 65 whistleblower retaliation complaints, but found cause to believe retaliation

[1] The roll calls for votes on SB 5672 are available at https://app.leg.wa.gov/billsummary?BillNumber=5672&Year=1999.

occurred "only once").[2] The House summarized the amendment that it proposed and with which the Senate concurred, as "[c]hang[ing] the burden of proof … so that a state agency must demonstrate that a retaliatory action did not occur." *See* H.B. Rep. on SSB 5672, at 1, 2 (Wash. 1999) ("This reverses the legal burden of proof.").[3]

The United States Congress enacted a similar statutory scheme altering the respective burdens of proof in favor of federal employees claiming whistleblower retaliation under the federal whistleblower protection law. *Compare Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357, 1363 (Fed. Cir. 1998) (discussing RCW 42.40) *and Rouse v. Farmers State Bank of Jewell, Iowa*, 866 F. Supp. 1191, 1208 (N.D. Iowa 1994) ("The burden on the plaintiff in a whistle-blower case appears to be less than that upon the plaintiff in a Title VII case, and that upon the defendant is heightened.").

[2] Accessible at http://lawfilesext.leg.wa.gov/biennium/1999-00/Pdf/Bill%20Reports/Senate/5672-S.FBR.pdf?q=20201201104719.

[3] The State may focus on the legislative discussion about the history of outcomes in Human Rights Commission (HRC) investigations which is a red herring. *See also* WAC 162-08-098(5) ("Effect of findings. A finding that there is or is not reasonable cause for believing that an unfair practice has been or is being committed is not an adjudication of whether or not an unfair practice has been or is being committed.").

Such "examination of related statutes aids our plain meaning analysis 'because legislators enact legislation in light of existing statutes.'" *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 627, 278 P.3d 173 (2012); *see also Jametsky v. Olsen*, 179 Wn.2d 756, 766, 317 P.3d 1003 (2014) ("[t]he legislature is presumed to enact laws with full knowledge of existing laws").

3. As to the first element of the claim—whether Boesplug is a Whistleblower—the Court of Appeals got it right

a. Whistleblower #1

As to Whistleblower #1, Boespflug became a Whistleblower under RCW 42.40.020 on April 20, 2016, when he reported improper governmental action to Attorney General Designee Nancy Kellogg. CP 1389-91. On April 21, 2016, L&I management (Thornton and Jeffrey) received notice of Whistleblower #1. CP 1389-91. Boespflug reported that Ault favored certain electrical contractors and that in March 2015 Ault deleted four citations. CP 1389-1391; CP 1836-37.

In May 2016, HR Assistant Director David Puente ordered an investigation into Whistleblower #1. CP 1379.

Boespflug was interviewed by the investigator on May 20, 2016, and he provided detailed information about the deletions and other claims. CP 1380-81. On June 1, 2016, Ault was interviewed by the investigator and confronted with Boespflug's allegations. CP 1381-83. Ault admits he knew about Boesplug's complaint. CP103. At summary judgment, the inference is that Ault knew about Boespflug's Whistleblower #1 as early as April 21, but no later than June 1, 2016, when he was interviewed.

Ault claimed to the investigator that he may have inadvertently cancelled the group of tickets. CP 1392; CP 1383. But Faith Jefferies and other experts in the field told the investigator that each ticket had to be deleted individually showing Ault's mendacity. CP 1524; 1507.

b. Whistleblower #2

As to Whistleblower #2, Boespflug became a Whistleblower under RCW 42.40.020 on September 7, 2016, when he reported improper governmental action to the State Auditor. CP 137; CP 1837-39; CP 133. On October 12, 2016,

L&I management received notice of Whistleblower #2. CP 139.

In June 2016, Boespflug issued nine corrections to ERS Group. CP 1837-39; 1526-27. A few months later and in connection with this work, Boespflug alleged that Ault and Mike Hurlbut, the lead electrical inspector in Tacoma, "took advantage of a new inspector [Friend] and violated the safety of this site. . . ." *See* CP 2059; CP 2095; CP 1837-39. During the investigation, Friend confirmed that he had simply bent to the will of his superior, Hurlbut. *See* CP 2062-63 ("Friend said … Hurlbut said 'we want this to go away' 'we don't want John [Boespflug] to go back out there' 'make it go away'); CP 2120.

Again, at summary judgment, the inference is that Ault and management knew about Boespflug's Whistleblower #2 no later than October 12, 2016.

c. Whistleblower #3

As to Whistleblower #3, Boespflug became a Whistleblower under RCW 42.40.020 on December 9, 2016, when he reported improper governmental action to the state auditor's office about Ault's handling of citations written by

Boespflug regarding the Bonney Lake Fennel Creek sewage lift station. CP 1839-40. Boespflug alleged that the design was in violation of the National Electrical Code and the WAC, Thornton pre-approved electrical plans that failed to comply with the codes. *See* CP 1839-40. By February 2, 2017, L&I management (Thornton and Morris) discussed "going down the road of insubordination" regarding Boesflug's disagreement with their handling of the citations. CP 1549.

d. Whistleblower # 4

As to Whistleblower #4, Boespflug became a Whistleblower under RCW 42.40.020 in February 2017, when he reported improper governmental action to the state auditor's office about a department employee instructing electrical inspectors to approve installations that are not up to code. CP 1840; CP 2369.

e. Boespflug Satisfied Element One

The Court of Appeals correctly found that Whistleblowers #1-4 meet the requirements of RCW 42.40.020 and that, "Boespflug establishes that he 'engaged in statutorily

protected activity' as a whistleblower for all four of his complaints." A017.

C. Under the Whistleblower Law, Boespflug is not Required to Prove Motive

Adding the causation element to RCW 42.40.050 conflicts with established statutory interpretation precedent. "[A] court must not add words where the legislature has chosen not to include them." *Rest. Dev., Inc. v. Cananwill, Inc*., 150 Wash. 2d 674, 80 P.3d 598 (2003).

The court will not read into a statute words that it hoped the legislature inadvertently omitted, unless doing so is necessary to make it the statute rational. *State v. Taylor*, 97 Wn.2d 724, 728-29, 649 P.2d 633 (1982) (providing a discussion of cases about omissions, but ultimately declining to correct a perceived omission). "If a result is conceivable, the result is not absurd." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011).

Here, with little explanation, the court added a third element to Boespflug's prima facie requirement. In doing so it cited to *Milligan*, 110 Wn. App. at 628. *Milligan* is a WLAD retaliation case. *Id.* That case makes no mention of RCW

42.40, and yet, the court casually cited it to justify adding "causation" to the statute. *See id.* This is in conflict with Supreme Court precedent on the rules of statutory interpretation. *See* RAP 13.4(b). It leaves litigants puzzled as how their claim could be treated at summary judgement.

Under the Whistleblower Law, Boespflug bears no burden of proving his employer's retaliatory motive; instead, the statute provides that he meets his burden of proof by setting forth specific facts showing (1) he is a "Whistleblower" as defined in the statute, and (2) that he has been subjected to workplace reprisals or retaliatory actions, and having presented facts in support of those two elements, he is then presumed to have established a cause of action for the remedies provided by the WLAD. RCW 42.40.050(1)(a).

Consistent with the liberal interpretation demanded by the legislature, the definition of "reprisal or retaliatory action," is extremely broad. The statute provides a laundry list of fifteen possible actions with the caveat that the list is "<u>not limited to</u>" the items listed. A036.

Boespflug has identified six actions taken by the L&I management that are reprisals or retaliatory actions. All six of the listed reprisals or retaliatory actions happened after Boespflug became a Whistleblower.

Here are the reprisals or retaliatory actions offered by Boespflug:

1. Negative Performance Evaluation

On October 26, 2016, Ault gives Boespflug a negative performance evaluation. CP 1805-1810; CP 1841.

2. November Reprimand

On November 28, 2016, Ault gave Boespflug a reprimand for not charging a trip fee on the McCoy Permit Project. CP 1841. He also made false claims, accusing Boespflug of enabling NEC safety violations. CP 1841; CP 2433.

3. December McCoy Project Reprimand

On December 6, 2016, Ault further reprimanded Boespflug by removing him from the McCoy project and telling him "not to do any inspections for this permit." CP 1841-42; CP 1600.

4. December ERS Group Reprimand

On December 6, 2016, Ault gave Boespflug an unwarranted reprimand concerning citations he wrote to ERS Group, which were appropriate and done correctly. CP 1842; CP 1602.

5. January 2017 Vehicle Reassignment

On January 11, 2017, Ault notified Boespflug that his assigned car was to be turned in and another car issued without an ergonomic review, which was inadequate even though Boespflug's better car had more mileage to use before turn-in, was ergonomic and comfortable. CP 1842-43; CP 1605.

6. Bonnie Lake Transfer

On February 7, 2017, after 29 years, Boespflug was transferred from his Bonney Lake geographic assignment to a less favorable location. CP 1844-45. Boespflug was notified of the reassignment at the end of a hostile 2.5-hour-long meeting with Ault, Morris and Thornton. *Id*. Ault in his declaration says "the meeting was to address [alleged] issues with Inspector Boespflug's performance" and that "[d]uring the meeting, it was expressed that continued failure to follow these

management directives could lead to potential discipline." CP 103-04. Boespflug testified that at the meeting, they "brought up everything including the Kraft Electrical citations," the "ERS corrections and the corrections written on the Fennel Creek Sewage lift project." CP 1844; *accord* CP 2363 (referencing Kraft Electric and "pump station" in Ault's "talking points" for meeting). When she was asked about moving Boespflug, Morris claimed they move inspectors around to avoid "the opportunity to do favors." CP 1941-43. Ault claimed he was moved closer to his home to improve quality of life and due to electrical contractor complaints. CP 2144-51. Thornton claimed he wanted to move Boespflug closer to home and denied being affected by "complaints by certain… customers … in his [prior] geographic area." CP 1090-93; CP 214. Of course, the timing is at issue since he was never transferred for nearly three decades until he became a Whistleblower.

D. Division One Ignored the Plain Language of RCW 42.40.050 and Placed the Burden of Proving Causation on Boespflug Despite the Statutory Presumption in His Favor

1. Negative Performance Evaluation

The Court of Appeals required Boespflug to, "establish that his whistleblower activity caused Ault to give him the unsatisfactory performance evaluation. That requires a showing that when Ault made the evaluation, he knew or suspected Boespflug had engaged in protected activity." A018. The court goes on to mistakenly claim that Ault did not know about Whistleblower #1 until November, which would be weeks after the negative performance evaluation was given in October. A019.

As to Whistleblower #2, Boespflug became a Whistleblower under RCW 42.40.020 on September 7, 2016, when he reported improper governmental action to the State Auditor, and October 12, 2016, L&I management received notice of Whistleblower #2. CP 139.

First, under the Whistleblower Law, Boespflug does not have the burden of proving that when Ault made the October performance evaluation, he knew or suspected Boespflug had

engaged in protected activity. This simply is not an element of the claim.

Second, even if Boespflug had the burden of proving that when Ault made the October evaluation, he knew or suspected Boespflug had engaged in protected activity, the facts support this conclusion. The court ignored proximity in time, which is "one factor supporting retaliatory motivation." *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182 (2000). At summary judgment, it must be taken as true that L&I management knew about Whistleblower #1 as early as April 21 and for Ault, as early as April 21, 2016, but no later than June 1, 2016. L&I management knew about Whistleblower #2 by September 7, 2016. *See* CP 2631.

2. <u>The November Reprimand</u>

The Court dismissed Ault's attacks on Boespflug as mere "disagreements" that pre-dated his whistleblower status. A020. First, under the Whistleblower law, the burden is on the defendant to present evidence that these emails were unrelated to Whistleblowers #1 and #2.

Second, the Court of Appeals makes conclusions about these emails innocently being about standard work, but the Court did not consider that the "standard work" criticisms began in 2015 when Boesflug wrote multiple violations against Kraft Electric, which were secretly deleted by Ault (Whistleblower #1), so "standard work" became retaliation disguised as a criticism of Boespflug's job performance. CP 108. An issue of fact was also ignored by the Court since Boespflug denied that he failed to follow standard work. CP 2705, 2432-2433, 2125, 1826-28. Third, the Court did not connect the dots on the relationship between Ault and Kraft Electric owner Brandon Swenson. CP 1348, 1256, 2171-2172, 2642, 2125.

3. December McCoy Project Reprimand

Again, the court makes this incident out to be a simple disagreement at work, but it was much more. It was an attack on Boesflug's performance. A019-20.

First, under the Whistleblower Law, the burden is on the defendant to present evidence that these emails were unrelated to Whistleblowers #1 and #2.

Second, this attack was based on facts found later to be false, and they were reprisals or retaliatory actions:

> He was creating a record to try and prove that I had approved a serious NEC violation. This was a false accusation against me and he involved Chief Thornton and Bob Thomas to validate his false accusations. In the end Mr. Ault's accusations were unfounded by Bob Thomas and I was not disciplined. In addition, I was contacted by Kevin McCoy and he told me that Mr. Ault was very upset with me and did not defend me during their conversation. Mr. McCoy told me they were out to get me.

CP1841-42. These facts present a question for the jury.

4. <u>December ERS Group Reprimand</u>

The court tries to explain away emails telling Boespflug to do the work again without justification. A021-22.

First, under the Whistleblower law, the burden is on the defendant to present evidence that these emails were unrelated to Whistleblowers #1 and #2.

Second, On December 6, 2016, Ault gave Boespflug an unwarranted reprimand concerning citations he wrote to ERS Group, which were appropriate and done correctly. CP 1842; CP 1602. Again, these are questions for the jury.

5. January 2017 Vehicle Reassignment

The court agreed this issue should go to trial, but it also required Boespflug to carry the burden of causation, and it appears that the court attempted to utilize the affirmative defense, but fell into a *McDonnell Douglas* burden shifting analysis that would have the effect of adding to plaintiff's burden. A025.

Boesflug is pleased that the court agreed with the outcome, but unfortunately, the court failed to use the proper analysis to get there.

6. Bonnie Lake Transfer

The court held that to survive summary judgement, Boespflug must disprove the State's nondiscriminatory explanation although it is incredibly suspect based on timing. *See* A022-23.

First, under the Whistleblower Law, the burden is on the defendant to show that Boespflug's transfer was unrelated to his status as a Whistleblower. *See* RCW 42.40.050(2). Boespflug demonstrated that he was a Whistleblower who experienced a "reprisal or retaliatory action." RCW 42.40.050(1)(a). On

February 7, 2017, he was called into a meeting in which Boespflug was informed by Respondent's Regional Administrator that she was aware that he had filed a whistleblower complaint. Ault also informed him that he was being removed from his inspection area after 29 years, and being reassigned to a less favorable area. This transfer took effect on February 13, 2017. CP 2443.

Second, moving Boespflug after 29 years was retaliation. It was "a change in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish" as another example of reprisal or retaliation. RCW 42.40.050(1)(b)(xiii). Nowhere in this language does the legislature require that the express wish precede that retaliatory action. *Id.* In addition, the relocation was an "other action that is inconsistent compared to actions taken before the employee engaged in conduct protected the [Whistleblower Law]. . . ." RCW 42.40.050(1)(b)(xv). Yet, the court held that Boespflug must disprove the State's explanation that "Everyone. . . has been assigned to an inspection area closer to their home to improve their quality of life." A022.

This is not Boespflug's burden at summary judgment. Courts should not read additional requirements into the statute based on unrelated case law.

E. The Petition Presents Issues of Substantial Public Importance That Should be Determined by This Court, Namely, Whether Failure to Follow the Legislative Intent Will Make State Employee Whistleblowing Too Difficult to be Worthwhile

This petition raises issues of substantial public interest because state employees have unique roles to play in our state to ensure that government does the people's work without waste, gross mismanagement, or violations of the law, and the elements and procedures adopted by the legislature for use in litigation pertaining to the Whistleblower Law are unique to state employee whistleblowers.

As outlined above, the legislature made changes to the Whistleblower Law because it was an ineffective tool to encourage whistleblowing. Any deviation from the statutory language will be a move in the wrong direction.

VI. ATTORNEY FEES AND COSTS

Appellant requests an award of attorney fees and costs on review under RCW 42.40.050(1)(a), following remand and trial.

"Attorney fees abide the final outcome." *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 451, 334 P.3d 541 (2014).

VII. CONCLUSION

For the reasons set forth above, Boespflug asks this Court to grant review.

RESPECTFULLY SUBMITTED this 28th day of April 2022.

THE SHERIDAN LAW FIRM, P.S.

I certify that the word count is 4810 exclusive of exempt content listed in RAP 18.17(b).

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DECLARATION OF SERVICE

Tony Dondero states and declares as follows:

1. I am over the age of 18. I am competent to testify in this matter. I make this declaration based on my personal knowledge and belief.

2. On April 28, 2022 I served the following attorneys via the Court's e-filing application:

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a copy of the Notice of Withdrawal and Substitution of Counsel.

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

DATED this 28th day of April, 2022, at Seattle, Washington.

s/Tony Dondero
Legal Assistant

APPENDIX

FILED
2/28/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JOHN BOESPFLUG, an individual, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 83301-4-I UNPUBLISHED OPINION

VERELLEN, J. — John Boespflug appeals the summary judgment order dismissing his claims of whistleblower retaliation under RCW 42.40.050. This appeal presents an issue of first impression, whether we should apply the McDonnell Douglas[1] burden-shifting scheme to a summary judgment of a claim of whistleblower retaliation under RCW 42.40.050(1)(a) or whether we should apply the statute's rebuttable presumption standard under section .050(2). But because the outcome is the same under either standard, we need not decide this issue.

To avoid summary judgment on a whistleblower retaliation claim, the employee must establish a prima facie case of retaliation: that the employee engaged in a protected activity, that the employer took an adverse action, and that

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

the protected activity caused the adverse action. After the employee establishes a prima facie case of retaliation, under section .050(2), the burden shifts back to the employer to prove that there were "justified reasons" for the adverse action and that "improper motive" was not a substantial factor. Similarly, but not identically, under the McDonnell Douglas standard, the burden of production shifts back to the employer to show that there were "legitimate reasons" for the adverse action.[2] If the employer is successful, the burden of production shifts back to the employee to show that the employer's reasons were pretextual.[3]

Here, Boespflug establishes a prima facie showing that he is a whistleblower. There are questions of fact whether the failure by the Department of Labor & Industries (the Department) to provide him an ergonomic evaluation before assigning him a newer vehicle was a reprisal or retaliatory action, whether his whistleblower status caused his vehicle reassignment without an ergonomic evaluation, whether the Department's failure to conduct an ergonomic evaluation was "justified," and whether improper motive was not a substantial factor. And even if we apply the McDonnell Douglas burden-shifting scheme, Boespflug establishes that there are questions of fact regarding whether the Department's motivation in failing to conduct an ergonomic evaluation was pretextual.

Because Boespflug fails to establish that his other alleged acts of retaliation, present genuine issues of material fact under either the McDonnell

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[2] Id. at 802.

[3] Id. at 797.

Douglas burden-shifting scheme or the rebuttable presumption of section .050(2), the trial court properly granted summary judgment in favor of the Department as to those alleged acts of retaliation.

Therefore, we affirm in part and reverse in part.

FACTS

Many of the underlying facts are undisputed. In 1987, John Boespflug was hired as an electrical inspector and compliance officer for the Department. As an electrical inspector, Boespflug's job was to ensure that electrical installations were safe and satisfied the minimum safety codes. Boespflug was assigned to inspection area 4 in the vicinity of Bonney Lake. In 2014, Jeffrey Ault became Boespflug's supervisor.

In February 2015, Janet Morris, the regional administrator for the Department, received a complaint from Rian Gorden, the owner of ERS Group LLC, expressing his dissatisfaction with Boespflug's failure to call ahead before arriving at inspection sites.

Later that month, Boespflug inspected a site in which Kraft Electric was installing a new circuit for a tanning bed. After Boespflug's inspection, he wrote warning citations to Kraft Electric. A few months later, Ault deleted Boespflug's citations.

In March 2015, Boespflug inspected a Pacific Air Systems installation. As a result of the inspection, Boespflug wrote various citations to Pacific Air. That May, Ault sent Boespflug an e-mail stating that he had received complaints from various

contractors and requested that Boespflug follow standard work procedures and call ahead before arriving at inspection sites. In July, Boespflug received a call from Lauren Hines, a permit technician with the City of Bonney Lake, who informed him that Pacific Air had changed its corporate business license and therefore, the citations Boespflug issued were "moot."[4] In April 2016, Bob Matson, another inspector, told Boespflug that Ault deleted the citations he issued to Kraft Electric in 2015.

On April 21, 2016, Boespflug filed a complaint (whistleblower complaint number 1), with Nancy Kellogg, an assistant attorney general for the Department, expressing his dissatisfaction with Ault's handling of the citations he issued to Kraft Electric and Pacific Air.

In May 2016, Dixie Shaw, the human resources liability and prevention manager for the Department, investigated the allegations Boespflug made against Ault, which related to Ault's alleged favoritism of "certain customers and contractors."[5]

That June, Boespflug reinspected an ERS Group installation at an existing mobile home for a new accessory dwelling unit. Boespflug noted that the installation was "far from being in compliance" and issued nine corrections to ERS Group.[6] About a month later, the original inspector told Boespflug that the lead

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[4] CP at 1319.

[5] CP at 188.

[6] CP at 2100.

electrical inspector, Michael Hulbert, asked him to "make [Boespflug's] inspection go away."[7]

In August, Ault received another complaint about Boespflug's failure to call ahead before arriving at an inspection site. That September, Ault sent Morris an e-mail asking her advice on how to ensure that Boespflug follows standard work procedures when he "flatly refuses" to call ahead before arriving at inspection sites.[8]

On September 6, 2016, Boespflug filed a complaint (whistleblower complaint number 2) with Cynthia Baxley-Raves, the Department's personal liaison to the state auditor, expressing his concerns with Ault's handling of the citations he issued to ERS Group. The next day, Baxley-Raves interviewed Boespflug. During the interview, Boespflug expressed his dissatisfaction with management, noting that Morris "has a difficult management style" and that Ault "is not competent."[9]

A month later, Shaw completed her investigation. Shaw concluded that there was "a lack of direct evidence" supporting Ault's alleged "favorable treatment" but recommended that the allegations be reviewed by a technical specialist within the electrical program.[10] Soon after, Rob Mutch, a technical

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[7] Id.

[8] CP at 112.

[9] CP at 186.

[10] CP at 200.

specialist with the Department, provided a review of the inspection and suggested that various corrections be made to the citations Boespflug issued to ERS Group.

On October 26, 2016, Ault submitted a performance evaluation of Boespflug. In the evaluation, Ault stated that Boespflug was "above the office average" in conducting inspections, but noted that Boespflug needed to follow standard work procedures by "making access calls" before visiting inspection sites and "charging trip fees" for inspections.[11] On October 31, Morris reviewed Boespflug's performance evaluation.

Around this time, Boespflug inspected the City of Bonney Lake's Fennel Creek sewage lift station. As a result of this inspection, Boespflug wrote two corrections. At the direction of Stephen Thornton, the chief of the electrical program, Ault subsequently deleted Boespflug's corrections.

In November 2016, Ault attended a conference with the state auditor's office for a complaint that was filed against him for showing "favoritism to certain customers."[12] That month, Ault discovered that Boespflug was the complainant.

Between November and December 2016, Ault sent various e-mails to Boespflug asking him to follow standard work procedures, noting specifically that Boespflug failed to charge a trip fee when inspecting McCoy Electric's electrical installation and that he failed to correct various errors in the citations he issued to ERS Group.

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[11] CP at 120.

[12] CP at 103.

On December 9, 2016, Boespflug filed a complaint with the Washington State Human Rights Commission (whistleblower complaint number 3) regarding Ault's handling of the citations Boespflug wrote to the City of Bonney Lake's Fennel Creek sewage lift station. In January 2017, Ault sent Boespflug an e-mail stating that he would be receiving a newer vehicle with snow tires. The Department did not conduct an ergonomic evaluation before assigning Boespflug his newer vehicle.

That February, Boespflug filed a complaint with the state auditor's office (whistleblower complaint number 4) expressing his concerns that a "Department employee [was] instructing electrical inspectors to approve installations that are not up to code."[13] That month, Boespflug's inspection area was relocated from inspection area 4, to inspection area 5, in the vicinity of Eatonville where Boespflug resided. Boespflug did not object to the inspection area relocation.

Boespflug sued alleging whistleblower retaliation under chapter 42.40 RCW. In June 2020, the trial court issued its oral decision granting summary judgment in favor of the Department. Boespflug filed a motion for reconsideration. In July, Boespflug filed a notice of appeal.

That August, the trial court granted Boespflug's motion for reconsideration in part, stating that Boespflug's vehicle reassignment presented issues of material fact sufficient to proceed to the jury. The Department moved to vacate the trial court's order on reconsideration because Boespflug's appeal was already pending.

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[13] CP at 1557.

Neither party sought the permission of this court to allow the entry of the order on reconsideration. In September 2020, the trial court granted the Department's motion to vacate its order on reconsideration.

Boespflug appeals the summary judgment dismissing his claims.

ANALYSIS

I. Whistleblower Retaliation and the McDonnell Douglas Framework

As a preliminary matter, this case presents an issue of first impression, whether the proper framework for analyzing a whistleblower retaliation claim on summary judgment is the rebuttable presumption standard in the whistleblower retaliation statute, RCW 42.40.050, or under the McDonnell Douglas burden-shifting scheme.

Inherent in any actionable claim for retaliation are three concepts: (1) a protected activity, (2) an adverse action, and (3) a causal relationship between the protected activity and the adverse action.[14] As a consequence of this causal requirement, the employer or the agency must have knowledge or suspicion of the protected activity.[15] These concepts inherent to retaliation take the form of elements required for a plaintiff to establish a prima facie case of retaliation.[16] Specifically, they are the elements of a statutory cause of action for whistleblower retaliation under chapter 42.40 RCW.

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[14] See RCW 42.40.050. Without a causal relationship, an action for retaliation would take the form of strict liability.

[15] RCW 42.40.050.

[16] Id.

In the area of discrimination, our courts have adopted the McDonnell Douglas burden-shifting scheme "[w]here a plaintiff lacks direct evidence" of the discrimination.[17] Under the McDonnell Douglas standard, a "plaintiff bears the initial burden of establishing a prima facie case," but once the plaintiff has satisfied their initial burden, there is "a presumption of discrimination."[18] Specifically, "[i]f the plaintiff satisfies the McDonnell Douglas burden of production requirements, the case proceeds to trial, unless the judge determines that no rational fact finder could conclude that the action was discriminatory,"[19] thereby making it easier on a plaintiff who may not have direct evidence of the discrimination.

The only published decision addressing a claim of whistleblower retaliation and the McDonnell Douglas burden-shifting scheme is Milligan v. Thompson.[20] But in Milligan, an employee asserted a claim under the Washington Law Against Discrimination, specifically, RCW 49.60.210, discrimination against a person opposing unfair practices.[21] The employee claimed that his employer "retaliated against him by denying him the chance to work on Indian related issues."[22] Consistent with all claims made under chapter 49.60 RCW, the court adopted the McDonnell Douglas standard and noted that to establish a prima facie case of

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[17] Scrivener v. Clark Coll., 181 Wn.2d 439, 445, 334 P.3d 541 (2014).

[18] Id. at 446.

[19] Id.

[20] 110 Wn. App. 628, 42 P.3d 418 (2002).

[21] Id. at 638.

[22] Id.

retaliatory discrimination on summary judgment, the employee must establish: "(1) he engaged in a statutorily protected activity, (2) [the employer] took [an] adverse employment action against him, and (3) there is a causal link between the activity and the adverse action."[23] The court also concluded that "[t]he burden-shifting scheme is the same [for retaliation claims] as for discrimination claims."[24]

The court's approach in Milligan is consistent with our unpublished decisions adopting the McDonnell Douglas burden-shifting scheme to claims of whistleblower retaliation under RCW 42.40.050, the statute at issue here.[25] But no

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[23] Id. (citing Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 862, 991 P.2d 1182 (2000)).

[24] Id. (citing Wilmont v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991)).

[25] Notably, RCW 42.40.050(1)(a) expressly provides for a remedy under chapter 49.60 RCW. In Woodbury v. City of Seattle, this court recognized the relationship between the statutes, stating that "Chapter 42.40 RCW is the analogous whistle-blower protection statute for state government, as opposed to local government, employees. Chapter 49.60 RCW, Washington's law against discrimination, states that it includes whistleblowers as defined in chapter 42.40 RCW." 172 Wn. App. 747, 752, 292 P.3d 134 (2013) (citing RCW 42.40.050); see Budsberg v. Trause, No. 46658-8-II, slip op. at 7 n.1 (Wash. Ct. App. Nov. 17, 2015) (unpublished), http://courts.wa.gov/opinions/pdf/D2%2046653-8-II%20Unpublished%20Opinion.pdf ("Although Milligan addresses the standard for establishing a prima facie case for retaliation for opposing discriminatory practices under RCW 49.60.210, this standard is equally applicable to whistleblower retaliation because a whistleblower claim is derived from the same statute"); Mendoza de Sugiyama v. State Dep't of Transp., No. 45087-9-II, slip op. at 9 (Wash. Ct. App. Feb. 10, 2015) (unpublished), http://courts.wa.gov/opinions/pdf/D2%2045087-9-II%20%20Unpublished%20Opinion.pdf ("RCW 42.40.050 and RCW 49.60.210(2) prohibit retaliation against a whistleblower. To establish a prima facie case of retaliation, an employee must show that (1) she engaged in a statutorily protected activity (filing a whistleblower complaint), (2) the employer took an adverse employment action, and (3) the adverse action was caused by the employee's activity."); Rainy v. State Horse Racing Com'n, noted at 134 Wn. App. 1023, 2006 WL 2131741, at *5 (Wash. Ct. App. Aug. 1, 2006) ("RCW 42.40.050(2)'s language differs from the McDonnell Douglas burden-

published case has expressly addressed the rebuttable presumption contained in the 2008 and 1999 amendments to RCW 42.40.050.[26]

Recently, the California Supreme Court addressed a very similar issue in Lawson v. PPG Architectural Finishes, Inc.,[27] whether a whistleblower retaliation claim under California's Labor Code is governed by the McDonnell Douglas framework or the statutory presumption in section 1102.5.[28] Similar to Washington's 2008 and 1999 amendments, in 2003, California added a procedural provision to section 1102.5.[29] Specifically, section 1102.6 provides,

> In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.[30]

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shifting analysis by requiring the agency to show, by a preponderance of the evidence, that the agency's action was justified by reasons unrelated to the employee's whistleblower status. Under McDonnell Douglas, the employer must simply articulate a legitimate nonretaliatory reason for the adverse employment action. A McDonnell Douglas employee must then offer evidence that the employer's explanations are pretext. RCW 42.40.050(2) says nothing about the state employee's burden, if any, to counter the state employer's nonretaliatory reasons for its conduct. McDonnell Douglas deals with an obligation to produce evidence; RCW 42.40.050(2) deals with an obligation to persuade by a preponderance of the evidence.") (internal citation omitted).

[26] RCW 42.40.050(2).

[27] No. S266001, (Cal. Sup. Ct. Jan. 27, 2022), https://www.courts.ca.gov/opinions/documents/S266001.pdf.

[28] Id. at 1.

[29] Id. at 7.

[30] Id.

The court explained that the amendments were designed to "'encourage earlier and more frequent reporting of wrongdoing by employees and corporate managers when they have knowledge of specified legal acts by expanding employee protection against retaliation.'"[31] The court held that "section 1102.6, and not McDonnell Douglas, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower retaliation claims."[32]

The California Supreme Court's holding in Lawson is inconsistent with the trend of our unpublished decisions that apply the McDonnell Douglas burden-shifting scheme to whistleblower retaliation claims. And the briefing here does not address all of the complexities acknowledged in Lawson.[33] But we need not decide this issue of first impression because here, the outcome is the same under the rebuttable presumption standard in RCW 42.40.050(2) and the McDonnell Douglas burden-shifting scheme.

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[31] Id. (quoting Assem. Com. On Judiciary, Analysis of Sen. Bill No. 777 (2003-2004 Reg. Sess.), as amended May 29, 2003, p. 1).

[32] Id. at 9.

[33] For example, Lawson notes that some case law suggests that the McDonnell Douglas shifting burden of production scheme on motion practice may be compatible with the statutory rebuttable presumption because the first step of establishing a retaliation claim "requires plaintiffs to prove the employer's retaliatory intent." Id. at 11 (citing Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317, 354, 8 P.3d 1089 (2000)). But other case law rejects that concept because "McDonnell Douglas is not the only possible method of proving discriminatory or retaliatory intent." Id. (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985)).

II. RCW 42.40.050

Boespflug contends that the trial court improperly granted summary judgment in favor of the Department because there are genuine issues of material fact sufficient to proceed to the jury on his whistleblower retaliation claims.

We review an order granting summary judgment de novo.[34] "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[35] We review the evidence in the "light most favorable to the nonmoving party."[36] The motion should only be granted if "'reasonable persons could reach but one conclusion.'"[37] However, bare assertions that a genuine issue of material fact exists will not defeat summary judgment.[38]

The whistleblower retaliation statute, RCW 42.40.050(1)(a) provides, "Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW."

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[34] Trimble v. Washington State Univ., 140 Wn.2d 88, 92, 993 P.2d 259 (2000) (citing Benjamin v. Washington State Bar Ass'n, 138 Wn.2d 506, 515, 980 P.2d 742 (1999)).

[35] Id. at 93 (citing Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56 (c)).

[36] Id. (citing Clements, 121 Wn.2d at 249).

[37] Id. (citing Clements, 121 Wn.2d at 249).

[38] Id. (citing White v. State, 131 Wn.2d 1, 9, 929, P.2d 396 (1997)).

First, the employee must establish that he is a whistleblower. RCW 42.40.020 defines the term:

> (10)(a) "Whistleblower" means:
>
> (i) An employee who in good faith reports alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section; or
>
> (ii) An employee who is perceived by the employer as reporting, whether they did or not, alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section.
>
> (b) For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term "whistleblower" also means:
>
> (i) An employee who in good faith provides information to the auditor or other public official, as defined in subsection (7) of this section, and an employee who is believed to have reported asserted improper governmental action to the auditor or other public official, as defined in subsection (7) of this section, or to have provided information to the auditor or other public official, as defined in subsection (7) of this section, but who, in fact, has not reported such action or provided such information.

Subsection (7) defines a "public official" as the attorney general's designee or designees; the director, or equivalent thereof in the agency where the employee works; an appropriate number of individuals designated to receive whistleblower reports by the head of each agency; or the executive ethics board.

Second, the employee must establish that his employer took "adverse actions" against him. RCW 42.40.050(1)(b) provides:

> For the purposes of this section, "reprisal or retaliatory action" means, <u>but is not limited to</u>, any of the following:

> (i) Denial of adequate staff to perform duties;
>
> (ii) Frequent staff changes;
>
> (iii) Frequent and undesirable office changes;
>
> (iv) Refusal to assign meaningful work;
>
> (v) Unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations;
>
> (vi) Demotion;
>
> (vii) Reduction in pay;
>
> (viii) Denial of promotion;
>
> (ix) Suspension; (x) Dismissal; (xi) Denial of employment;
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> (xii) A supervisor or superior behaving in or encouraging coworkers to behave in a hostile manner toward the whistleblower;
>
> (xiii) A change in physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish;
> (xiv) Issuance of or attempt to enforce any nondisclosure policy or agreement in a manner inconsistent with prior practice; or
>
> (xv) Any other action that is inconsistent compared to actions taken before the employee engaged in conduct protected by this chapter, or compared to other employees who have not engaged in conduct protected by this chapter.[39]

Third, the employee must establish that his "whistleblower activity" caused the "adverse actions." The employee can establish causation "by showing that retaliation was a substantial factor motivating the adverse employment decision."[40]

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[39] (Emphasis added.)

[40] Allison v. Hous. Auth. of City of Seattle, 118 Wn.2d 79, 96, 821 P.2d 34 (1991).

Once the employee establishes a prima facie case of whistleblower retaliation under RCW 42.40.050(2), the burden shifts back to the employer to rebut the presumption of retaliation. Subsection (2) provides:

> The agency presumed to have taken retaliatory action under subsection (1) of this section may rebut that presumption by proving by a preponderance of the evidence that there have been a series of documented personnel problems or a single egregious event, or that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower and that improper motive was not a substantial factor.

A. Whistleblower

Boespflug claims that he is a whistleblower under RCW 42.40.020(10). We agree.

First, on April 20, 2016, Boespflug filed an "ethics complaint" with Nancy Kellogg regarding Ault's handling of the citations he issued to Pacific Air and Kraft Electric. Kellogg is an assistant attorney general in the labor and industries division of the state attorney general's office who is designated to receive whistleblower reports. Because Boespflug filed a complaint of "improper governmental action" to an attorney general "designee," he is a whistleblower as to his first complaint.

Second, on September 6, 2016, Boespflug reported a complaint of "unethical behavior" to Cynthia Baxley-Raves regarding Ault's handling of citations Boespflug issued to ERS Group. Baxley-Raves is the Department's personal liaison to the state auditor's office for whistleblower complaints. Because Boespflug filed a complaint of "improper governmental action" to an employee

acting as liaison to the state auditor's office, he is a whistleblower as to his second complaint.

Third, on December 9, 2016, Boespflug filed a complaint with the Washington State Human Rights Commission regarding Ault's handling of citations that Boespflug wrote to the City of Bonney Lake's Fennel Creek sewage lift station. Boespflug complained to Jacqueline Hawkins-Jones, an investigator with the auditor's office, who recommended he submit a complaint to the Washington State Human Rights Commission. Because Boespflug reported a complaint of "improper governmental action" to an employee of the state auditor's office, he is a whistleblower as to his third complaint.

Fourth, in February 2017, Boespflug filed a complaint with the auditor's office expressing his concerns "about a Department employee instructing electrical inspectors to approve installations that are not up to code."[41] Because Boespflug filed a complaint of "improper governmental action" with the state auditor's office, he is a whistleblower as to his fourth complaint.

Boespflug establishes that he "engaged in statutorily protected activity" as a whistleblower for all four of his complaints.

B. 2016 Performance Evaluation

Boespflug argues that his 2016 performance evaluation was "unsatisfactory," constituting "reprisal or retaliatory action."[42]

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[41] CP at 1557.

[42] Appellant's Br. at 36-37.

In October 2016, Boespflug received a performance evaluation from Ault, the author of the evaluation. In the evaluation, Ault states that Boespflug's "inspection stops" were "above the office average," that he "provides quality customer service," and that he "ensures the safety of Washington workers and citizens."[43]

But Ault also stated,

> In working with you, I have observed that you do not follow standard work [procedures] by going directly to a jobsite without first making access calls, and ensuring that you will have access to perform your inspection. You leave a door hanger or message for the homeowner to call and arrange access, and you mark the inspection request as a recorded stop. This creates unnecessary delay and confusion for the customer, and causes extra work for those of us in the office that answer the customer calls. Also, standard work [procedures] indicate[ ] that if the department spends the resources to go to an inspection request, then a trip fee is charged to help pay for the resources that have been utilized.[44]

Even accepting that there are genuine issues of material fact whether the October 2016 performance evaluation was unsatisfactory, Boespflug must establish that his whistleblower activity caused Ault to give him the unsatisfactory performance evaluation. That requires a showing that when Ault made the evaluation, he knew or suspected Boespflug had engaged in protected activity.

In February 2015, Boespflug inspected a site in which Kraft Electric was installing a new circuit for a tanning bed. After the inspection, Boespflug issued

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[43] CP at 1802, 1805.

[44] CP at 1805.

"four warning citations to Kraft Electric."[45] In April 2016, after discovering that Ault deleted his citations, Boespflug filed his first complaint. That June, Boespflug inspected ERS Group's mobile home service installation. In July, Boespflug discovered that the mobile home's service was approved even though Boespflug's corrections had not been made. The original inspector told Boespflug that he was asked to "make [Boespflug's] inspection go away."[46] That September, Boespflug filed another complaint. Boespflug contends that the first act of reprisal or retaliatory action occurred in October 2016 when he received an unsatisfactory performance evaluation from Ault. But Ault did not know that Boespflug was the complainant regarding his alleged "favoritism to certain customers" until November 2016, after he had submitted Boespflug's October 2016 evaluation.[47] And there is no evidence Ault suspected Boespflug had made complaints against him when he submitted the evaluation. Because retaliation is an "intentional act," an "employer cannot retaliate against an employee for an action of which the employer is unaware."[48] Therefore, Boespflug fails to establish that his whistleblower status caused his "unsatisfactory" performance evaluation. There are no genuine issues of material fact; the October 2016 evaluation does not support a violation of the whistleblower statute.

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[45] CP at 2100.

[46] CP at 2100.

[47] CP at 103.

[48] Cornwell v. Microsoft Corp., 192 Wn.2d 403, 414, 430 P.3d 229 (2018) (citing Marin v. King County, 194 Wn. App. 795, 818, 378 P.3d 203 (2016)).

C. November and December 2016 E-mails

Boespflug contends that the e-mails he received from Ault regarding the McCoy Electric electrical installation and the citations he wrote to ERS Group constituted retaliatory reprimands.

In evaluating whether the e-mails from Ault to Boespflug amounted to reprisal or retaliatory action, the context and the content of the e-mails are critical.[49] As to the context, the undisputed facts reveal a history of customer complaints about Boespflug resulting in disagreements whether he was complying with standard work procedures including charging trip fees, and this history predated his whistleblower status.

As to the content, on November 28, 2016, Ault sent an e-mail to Boespflug regarding Boespflug's October 17 inspection of the McCoy Electric electrical installation. The essence of this e-mail is a request for additional information from Boespflug. For example, Ault asked Boespflug why he did not follow standard work procedures and charge a trip fee, noting that it appeared Boespflug wrote on a piece of cardboard "ok to insulate," and asked why he did not use other standard procedures to record the result of his inspection. Ault also asked if Boespflug granted permission to use rebar not connected to the footing or foundation or any other rebar as a ground. The next day, Boespflug sent an e-mail questioning whether there was a homeowner permit for the installation, why Ault had not documented the permit Ault had inspected, and why Ault did not document his

[49] See Kahn v. Salerno, 90 Wn. App. 110, 125, 951 P.2d 321 (1998).

approval of a wall covering. That same day, Ault responded by e-mail asking Boespflug to answer the questions as set out in his initial e-mail. On December 6, 2016, Boespflug responded, "Reviewed standard work. Trip fee at discretion of inspector. [N]on warranted."[50] Another inspector completed the project, but there was no other consequence to Boespflug.

Based upon this context, and the content of the request for more information, the undisputed facts do not support any reasonable inference that Ault engaged in retaliation in his November 28 and November 29 e-mails. The longstanding dispute between Boespflug and Ault regarding the standard work procedures, including charging for trip fees, preexisted the e-mails, and the request for additional information was not an unwarranted or unsubstantiated reprimand.

Similarly, after receiving a complaint from Gordon, the owner of ERS Group, Ault asked Faith Jeffrey, a compliance team specialist, to reinspect the ERS Group installation. Jeffrey found various gaps in the citations Boespflug wrote to ERS Group. On December 6, 2016, Jeffrey sent Ault an e-mail noting the key areas that Boespflug needed to correct. A few days later, Ault sent Boespflug an e-mail based upon Jeffrey's analysis of Boespflug's citations, which culminated in Ault asking Boespflug to resubmit the citations based on prior directions he had received such as to add photos to the file, clarify how he sent a compliance request to ERS Group, indicate whether he had actually followed-up with others,

[50] CP at 1613.

and explain whether he made a closing phone call. These undisputed facts do not reveal any act of retaliation in the form of an unwarranted or unsubstantiated reprimand. Instead, they establish a request that Boespflug address the specific points Jeffrey made in her review of the citations Boespflug issued to ERS Group.

Therefore, the November and December 2016 e-mails from Ault to Boespflug do not amount to unwarranted or unsubstantiated reprimands. There are no genuine issues of material fact.

D. February 2017 Inspection Area Relocation

Boespflug contends that his inspection area relocation constituted reprisal or retaliatory action because the Department had never relocated him and therefore it was "inconsistent" conduct.[51]

In February 2017, after 29 years of working in Bonney Lake inspection area 4, Boespflug was reassigned to Eatonville, inspection area 5. And Boespflug filed his four whistleblower complaints in the months before he was assigned a new inspection area. But even accepting that there are genuine issues of material fact whether Boespflug's inspection area relocation was inconsistent conduct compared to actions the Department took before Boespflug was a whistleblower, Boespflug must establish that his whistleblower activity caused his inspection area relocation. Ault testified, "Everyone in my office has been assigned [to an inspection area] closer to their home to improve the[ir] quality of life."[52] Ault also

[51] Appellant's Br. at 38.

[52] CP at 70.

stated that Boespflug was being reassigned because of "[d]ocumented complaints and issues from the geographical location that he was inspecting previously."[53] Morris stated, "And it's always valuable if the inspectors move to different areas because different areas have different kinds of electrical problems. So it increases their knowledge, their experience, and those kind of things."[54] Thornton stated that "the reasoning for [relocation] originally [was due to] a large turnover in staff" and the Department's desire to make it more "convenient for the staff."[55]

Even viewing the evidence in the light most favorable to Boespflug, he does not establish that his status as a whistleblower was a substantial motivating factor in the Department's decision to relocate him to a different inspection area closer to home, the same as every other inspector.

Even if Boespflug could establish that his whistleblower status caused his inspection area relocation, the Department sufficiently rebutted his presumption of whistleblower retaliation under RCW 42.40.050(2). The Department established by a preponderance of the evidence that it had justified reasons for moving Boespflug's inspection area, namely, that the Department relocated all inspectors to inspection areas closer to their homes. Therefore, the undisputed facts rebut any presumption of whistleblower retaliation by demonstrating that there were justified reasons for the reassignment unrelated to his whistleblower status.

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[53] CP at 2146.

[54] CP at 80-81.

[55] CP at 407, 1090-91.

E. February 2017 Vehicle Reassignment

Boespflug argues that his vehicle reassignment without an ergonomic evaluation constituted reprisal or retaliatory action because it was "inconsistent" conduct by the Department "compared to other employees."[56]

In January 2017, Ault sent Boespflug an e-mail notifying him that he would be receiving "a much newer vehicle with new snow tires."[57] Ault also stated that Boespflug's vehicle was being replaced because it had almost 115,000 miles on it, the amount of mileage triggering mandatory replacement.[58] But Boespflug did not receive an ergonomic evaluation before his vehicle was replaced. Bob Matson, a Department employee, stated that "an ergonomic evaluation is part of the process to getting any new or used vehicle by motor pool."[59] And Hulbert stated that before he was assigned a new vehicle, he received an ergonomic evaluation.

Therefore, viewing the evidence in the light most favorable to Boespflug, there are genuine issues of material fact whether the Department's failure to conduct an ergonomic evaluation was inconsistent compared to the treatment of other employees and was therefore a reprisal or retaliatory action.

The Department contends the testimony of Matson and Hulbert reveal that an employee must request such an ergonomic evaluation, and Boespflug made no such request. But that argument depends on viewing the evidence in a light most

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[56] Appellant's Br. at 41-42.

[57] CP at 1605-08.

[58] Boespflug's vehicle had 105,444 miles on it. See CP at 44.

[59] CP 1042.

favorable to the Department. Viewed in a light most favorable to Boespflug, especially the testimony of Matson regarding a standard practice, the evidence establishes genuine issues of material fact whether retaliation was a substantial factor in the Department's decision to issue Boespflug a newer vehicle without first conducting an ergonomic evaluation.

Under the rebuttable presumption of RCW 42.40.050(2), questions of fact remain whether the Department can rebut the presumption of retaliation by demonstrating justified reasons unrelated to Boespflug's whistleblower status. Therefore, a trial is required.

The Department argues that the proper framework for determining a whistleblower retaliation claim is the McDonnell Douglas burden-shifting scheme. Under the McDonnell Douglas framework, the plaintiff still must establish a prima facie case of whistleblower retaliation. After the plaintiff has established a prima facie case, the burden shifts back to the employer to produce evidence of legitimate nonretaliatory reasons for the adverse employment actions.[60] And after the employer establishes legitimate nonretaliatory reasons for their adverse action, the burden then shifts back to the employee to show that the employer's proffered reasons for the adverse actions were pretextual."[61]

Here, even if we apply the McDonnell Douglas standard to Boespflug's whistleblower retaliation claims on summary judgment, the outcome is the same.

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[60] Scrivener, 181 Wn.2d at 446 (citing Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988)).

[61] Id.

Because the testimony of Matson and Hulbert establish a question of fact whether an ergonomic evaluation was "standard procedure" before assigning an employee a newer vehicle, Boespflug establishes that there are genuine issues of material fact as to whether the Department's "legitimate" reasons were pretextual.

Because here the outcome is the same under both the rebuttable presumption standard in RCW 42.40.050(2) and the McDonnell Douglas burden-shifting scheme, we need not decide this issue of first impression.

III. Cross Appeal

In its cross appeal, the Department argues that the trial court erred in considering various statements in witness declarations because the statements were hearsay. But because we are reversing summary judgment only on the issue of Boespflug's vehicle reassignment, we need only address the hearsay statements in the Department's cross appeal pertaining to that issue. The genuine issues of material fact as to Boespflug's vehicle reassignment are supported by the statements for which Boespflug, Hulbert, and Matson had personal knowledge. There was no abuse of discretion in considering those statements on summary judgment. We need not address hearsay issues on unrelated matters presented in the Department's cross appeal.[62]

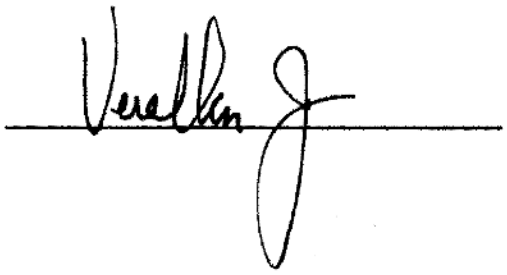
[62] We note this opinion does not preclude the Department from raising specific hearsay and lack of personal knowledge objections at trial based upon the particular foundation offered at that time.

IV. Attorney Fees

On remand, consistent with RAP 18.1(i), the trial court should determine whether Boespflug is entitled to attorney fees and costs under RCW 42.40.050 if he should prevail at trial.

Therefore, we affirm the summary judgment in favor of the Department except only the alleged act of retaliation involving the lack of an ergonomic evaluation for the selection of a replacement vehicle, which presents genuine issues of material fact.

We reverse in part and affirm in part.



WE CONCUR:

FILED
3/29/2022
Court of Appeals
Division I
State of Washington

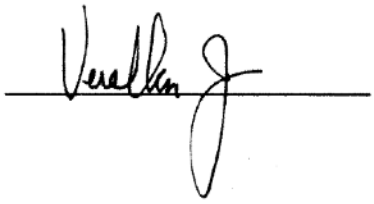
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JOHN BOESPFLUG, an individual, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 83301-4-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the court's February 28, 2022 opinion. The panel has determined the motion should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



FILED
3/29/2022
Court of Appeals
Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JOHN BOESPFLUG, an individual, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 83301-4-I ORDER DENYING MOTION TO PUBLISH OPINION

Appellant has filed a motion to publish the court's opinion filed February 28, 2022. The panel has determined the motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion to publish is denied.

Chapter Listing | RCW Dispositions

Chapter 42.40 RCW

STATE EMPLOYEE WHISTLEBLOWER PROTECTION

Sections

RCW 42.40.010

Policy.

It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures, regardless of whether an investigation is initiated under RCW 42.40.040. It is also the policy of the legislature that employees should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these employees.

[2017 c 44 § 1; 1995 c 403 § 508; 1982 c 208 § 1.]

NOTES:

Findings—Short title—Intent—1995 c 403: See note following RCW 34.05.328.

RCW 42.40.020

Definitions.

As used in this chapter, the terms defined in this section shall have the meanings indicated unless the context clearly requires otherwise.

A030

(1) "Auditor" means the office of the state auditor.

(2) "Employee" means any individual employed or holding office in any department or agency of state government.

(3) "Good faith" means the individual providing the information or report of improper governmental activity has a reasonable basis in fact for reporting or providing the information. An individual who knowingly provides or reports, or who reasonably ought to know he or she is providing or reporting, malicious, false, or frivolous information, or information that is provided with reckless disregard for the truth, or who knowingly omits relevant information is not acting in good faith.

(4) "Gross mismanagement" means the exercise of management responsibilities in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(5) "Gross waste of funds" means to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(6)(a) "Improper governmental action" means any action by an employee undertaken in the performance of the employee's official duties:

(i) Which is a gross waste of public funds or resources as defined in this section;

(ii) Which is in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature;

(iii) Which is of substantial and specific danger to the public health or safety;

(iv) Which is gross mismanagement;

(v) Which prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification, unless state law or a common law privilege prohibits disclosure. This provision is not meant to preclude the discretion of agency management to adopt a particular scientific opinion or technical finding from among differing opinions or technical findings to the exclusion of other scientific opinions or technical findings. Nothing in this subsection prevents or impairs a state agency's or public official's ability to manage its public resources or its employees in the performance of their official job duties. This subsection does not apply to de minimis, technical disagreements that are not relevant for otherwise improper governmental activity. Nothing in this provision requires the auditor to contract or consult with external experts regarding the scientific validity, invalidity, or justification of a finding or opinion; or

(vi) Which violates the administrative procedure act or analogous provisions of law that prohibit ex parte communication regarding cases or matters pending in which an agency is party between the agency's employee and a presiding officer, hearing officer, or an administrative law judge. The availability of other avenues for addressing ex parte communication by agency employees does not bar an investigation by the auditor.

(b) "Improper governmental action" does not include personnel actions, for which other remedies exist, including but not limited to employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of the state civil service law, alleged labor agreement violations, reprimands, claims of discriminatory treatment, or any action which may be taken under chapter **41.06** RCW, or other disciplinary action except as provided in RCW **42.40.030**.

(7) "Public official" means the attorney general's designee or designees; the director, or equivalent thereof in the agency where the employee works; an appropriate number of individuals designated to receive whistleblower reports by the head of each agency; or the executive ethics board.

(8) "Substantial and specific danger" means a risk of serious injury, illness, peril, or loss, to which the exposure of the public is a gross deviation from the standard of care or competence which a reasonable person would observe in the same situation.

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(9) "Use of official authority or influence" includes threatening, taking, directing others to take, recommending, processing, or approving any personnel action such as an appointment, promotion, transfer, assignment including but not limited to duties and office location, reassignment, reinstatement, restoration, reemployment, performance evaluation, determining any material changes in pay, provision of training or benefits, tolerance of a hostile work environment, or any adverse action under chapter 41.06 RCW, or other disciplinary action.

(10)(a) "Whistleblower" means:

(i) An employee who in good faith reports alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section; or

(ii) An employee who is perceived by the employer as reporting, whether they did or not, alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section.

(b) For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term "whistleblower" also means:

(i) An employee who in good faith provides information to the auditor or other public official, as defined in subsection (7) of this section, and an employee who is believed to have reported asserted improper governmental action to the auditor or other public official, as defined in subsection (7) of this section, or to have provided information to the auditor or other public official, as defined in subsection (7) of this section, but who, in fact, has not reported such action or provided such information; or

(ii) An employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.

[2017 c 44 § 2; 2008 c 266 § 2; 1999 c 361 § 1; 1995 c 403 § 509; 1992 c 118 § 1; 1989 c 284 § 1; 1982 c 208 § 2.]

NOTES:

Findings—Intent—2008 c 266: "The legislature finds and declares that government exists to conduct the people's business, and the people remaining informed about the actions of government contributes to the oversight of how the people's business is conducted. The legislature further finds that many public servants who expose actions of their government that are contrary to the law or public interest face the potential loss of their careers and livelihoods.

It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures. It is also the policy of the legislature that employees should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these employees.

This act shall be broadly construed in order to effectuate the purpose of this act." [2008 c 266 § 1.]

Findings—Short title—Intent—1995 c 403: See note following RCW 34.05.328.

RCW 42.40.030

Right to disclose improper governmental actions—Interference prohibited.

(1) An employee shall not directly or indirectly use or attempt to use the employee's official authority or influence for the purpose of intimidating, threatening, coercing, commanding, influencing, or attempting to intimidate, threaten, coerce, command, or influence any individual for the purpose of interfering with the right of the individual to: (a) Disclose to the auditor (or representative thereof) or other public official, as defined in RCW 42.40.020, information concerning improper governmental action; or (b) identify rules warranting review or provide information to the rules review committee.

(2) Nothing in this section authorizes an individual to disclose information otherwise prohibited by law, except to the extent that information is necessary to substantiate the whistleblower complaint, in which case information may be disclosed to the auditor or public official, as defined in RCW 42.40.020, by the whistleblower for the limited purpose of providing information related to the complaint. Any information provided to the auditor or public official under the authority of this subsection may not be further disclosed.

[2008 c 266 § 3; 1995 c 403 § 510; 1989 c 284 § 2; 1982 c 208 § 3.]

NOTES:

Findings—Intent—2008 c 266: See note following RCW 42.40.020.

Findings—Short title—Intent—1995 c 403: See note following RCW 34.05.328.

RCW 42.40.035

Duty of correctness—Penalties for false information.

An employee must make a reasonable attempt to ascertain the correctness of the information furnished and may be subject to disciplinary actions, including, but not limited to, suspension or termination, for knowingly furnishing false information as determined by the employee's appointing authority.

[1999 c 361 § 2.]

RCW 42.40.040

Report of improper governmental action—Investigations and reports by auditor, agency.

(1)(a) In order to be investigated, an assertion of improper governmental action must be provided to the auditor or other public official within one year after the occurrence of the asserted improper governmental action. The public official, as defined in RCW 42.40.020, receiving an assertion of improper governmental action must report the assertion to the auditor within fifteen calendar days of receipt of the assertion. The auditor retains sole authority to investigate an assertion of improper governmental action including those made to a public official. A failure of the public official to report the assertion to the auditor within fifteen days does not impair the rights of the whistleblower.

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(b) Except as provided under RCW **42.40.910** for legislative and judicial branches of government, the auditor has the authority to determine whether to investigate any assertions received. In determining whether to conduct either a preliminary or further investigation, the auditor shall consider factors including, but not limited to: The nature and quality of evidence and the existence of relevant laws and rules; whether the action was isolated or systematic; the history of previous assertions regarding the same subject or subjects or subject matter; whether other avenues are available for addressing the matter; whether the matter has already been investigated or is in litigation; the seriousness or significance of the asserted improper governmental action; and the cost and benefit of the investigation. The auditor has the sole discretion to determine the priority and weight given to these and other relevant factors and to decide whether a matter is to be investigated. The auditor shall document the factors considered and the analysis applied.

(c) The auditor also has the authority to investigate assertions of improper governmental actions as part of an audit conducted under chapter **43.09** RCW. The auditor shall document the reasons for handling the matter as part of such an audit.

(2) Subject to subsection (5)(c) of this section, the identity or identifying characteristics of a whistleblower is confidential at all times unless the whistleblower consents to disclosure by written waiver or by acknowledging his or her identity in a claim against the state for retaliation. In addition, the identity or identifying characteristics of any person who in good faith provides information in an investigation under this section is confidential at all times, unless the person consents to disclosure by written waiver or by acknowledging his or her identity as a witness who provides information in an investigation.

(3) Upon receiving specific information that an employee has engaged in improper governmental action, the auditor shall, within fifteen working days of receipt of the information, mail written acknowledgment to the whistleblower at the address provided stating whether a preliminary investigation will be conducted. For a period not to exceed sixty working days from receipt of the assertion, the auditor shall conduct such preliminary investigation of the matter as the auditor deems appropriate.

(4) In addition to the authority under subsection (3) of this section, the auditor may, on its own initiative, investigate incidents of improper state governmental action.

(5)(a) If it appears to the auditor, upon completion of the preliminary investigation, that the matter is so unsubstantiated that no further investigation, prosecution, or administrative action is warranted, the auditor shall so notify the whistleblower summarizing where the allegations are deficient, and provide a reasonable opportunity to reply. Such notification may be by electronic means.

(b) The written notification shall contain a summary of the information received and of the results of the preliminary investigation with regard to each assertion of improper governmental action.

(c) In any case to which this section applies, the identity or identifying characteristics of the whistleblower shall be kept confidential unless the auditor determines that the information has been provided other than in good faith. If the auditor makes such a determination, the auditor shall provide reasonable advance notice to the employee.

(d) With the agency's consent, the auditor may forward the assertions to an appropriate agency to investigate and report back to the auditor no later than sixty working days after the assertions are received from the auditor. The auditor is entitled to all investigative records resulting from such a referral. All procedural and confidentiality provisions of this chapter apply to investigations conducted under this subsection. The auditor shall document the reasons the assertions were referred.

(6) During the preliminary investigation, the auditor shall provide written notification of the nature of the assertions to the subject or subjects of the investigation and the agency head. The notification shall include the relevant facts and laws known at the time and the procedure for the subject or subjects of the investigation and the agency head to respond to the assertions and

information obtained during the investigation. This notification does not limit the auditor from considering additional facts or laws which become known during further investigation.

(a) If it appears to the auditor after completion of the preliminary investigation that further investigation, prosecution, or administrative action is warranted, the auditor shall so notify the whistleblower, the subject or subjects of the investigation, and the agency head and either conduct a further investigation or issue a report under subsection (9) of this section.

(b) If the preliminary investigation resulted from an anonymous assertion, a decision to conduct further investigation shall be subject to review by a three-person panel convened as necessary by the auditor prior to the commencement of any additional investigation. The panel shall include a state auditor representative knowledgeable of the subject agency operations, a citizen volunteer, and a representative of the attorney general's office. This group shall be briefed on the preliminary investigation and shall recommend whether the auditor should proceed with further investigation.

(c) If further investigation is to occur, the auditor shall provide written notification of the nature of the assertions to the subject or subjects of the investigation and the agency head. The notification shall include the relevant facts known at the time and the procedure to be used by the subject or subjects of the investigation and the agency head to respond to the assertions and information obtained during the investigation.

(7) Within sixty working days after the preliminary investigation period in subsection (3) of this section, the auditor shall complete the investigation and report its findings to the whistleblower unless written justification for the delay is furnished to the whistleblower, agency head, and subject or subjects of the investigation. In all such cases, the report of the auditor's investigation and findings shall be sent to the whistleblower within one year after the information was filed under subsection (3) of this section.

(8)(a) At any stage of an investigation under this section the auditor may require by subpoena the attendance and testimony of witnesses and the production of documentary or other evidence relating to the investigation at any designated place in the state. The auditor may issue subpoenas, administer oaths, examine witnesses, and receive evidence. In the case of contumacy or failure to obey a subpoena, the superior court for the county in which the person to whom the subpoena is addressed resides or is served may issue an order requiring the person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(b) The auditor may order the taking of depositions at any stage of a proceeding or investigation under this chapter. Depositions shall be taken before an individual designated by the auditor and having the power to administer oaths. Testimony shall be reduced to writing by or under the direction of the individual taking the deposition and shall be subscribed by the deponent.

(c) Agencies shall cooperate fully in the investigation and shall take appropriate action to preclude the destruction of any evidence during the course of the investigation.

(d) During the investigation the auditor shall interview each subject of the investigation. If it is determined there is reasonable cause to believe improper governmental action has occurred, the subject or subjects and the agency head shall be given fifteen working days to respond to the assertions prior to the issuance of the final report.

(9)(a) If the auditor determines there is reasonable cause to believe an employee has engaged in improper governmental action, the auditor shall report, to the extent allowable under existing public disclosure laws, the nature and details of the activity to:

(i) The subject or subjects of the investigation and the head of the employing agency;

(ii) If appropriate, the attorney general or such other authority as the auditor determines appropriate;

(iii) Electronically to the governor, secretary of the senate, and chief clerk of the house of representatives; and

(iv) Except for information whose release is specifically prohibited by statute or executive order, the public through the public file of whistleblower reports maintained by the auditor.

(b) The auditor has no enforcement power except that in any case in which the auditor submits an investigative report containing reasonable cause determinations to the agency, the agency shall send its plan for resolution to the auditor within fifteen working days of having received the report. The agency is encouraged to consult with the subject or subjects of the investigation in establishing the resolution plan. The auditor may require periodic reports of agency action until all resolution has occurred. If the auditor determines that appropriate action has not been taken, the auditor shall report the determination to the governor and to the legislature and may include this determination in the agency audit under chapter **43.09** RCW.

(10) Once the auditor concludes that appropriate action has been taken to resolve the matter, the auditor shall so notify the whistleblower, the agency head, and the subject or subjects of the investigation. If the resolution takes more than one year, the auditor shall provide annual notification of its status to the whistleblower, agency head, and subject or subjects of the investigation.

(11) Failure to cooperate with such audit or investigation, or retaliation against anyone who assists the auditor by engaging in activity protected by this chapter shall be reported as a separate finding with recommendations for corrective action in the associated report whenever it occurs.

(12) This section does not limit any authority conferred upon the attorney general or any other agency of government to investigate any matter.

[**2008 c 266 § 4**; **1999 c 361 § 3**; **1992 c 118 § 2**; **1989 c 284 § 3**; **1982 c 208 § 4**.]

NOTES:

Findings—Intent—2008 c 266: See note following RCW **42.40.020**.

RCW 42.40.050

Retaliatory action against whistleblower—Remedies.

(1)(a) Any person who is a whistleblower, as defined in RCW **42.40.020**, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter **49.60** RCW.

(b) For the purpose of this section, "reprisal or retaliatory action" means, but is not limited to, any of the following:

(i) Denial of adequate staff to perform duties;

(ii) Frequent staff changes;

(iii) Frequent and undesirable office changes;

(iv) Refusal to assign meaningful work;

(v) Unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations;

(vi) Demotion;

(vii) Reduction in pay;

(viii) Denial of promotion;

(ix) Suspension;

(x) Dismissal;

(xi) Denial of employment;

A036

(xii) A supervisor or superior behaving in or encouraging coworkers to behave in a hostile manner toward the whistleblower;

(xiii) A change in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish;

(xiv) Issuance of or attempt to enforce any nondisclosure policy or agreement in a manner inconsistent with prior practice; or

(xv) Any other action that is inconsistent compared to actions taken before the employee engaged in conduct protected by this chapter, or compared to other employees who have not engaged in conduct protected by this chapter.

(2) The agency presumed to have taken retaliatory action under subsection (1) of this section may rebut that presumption by proving by a preponderance of the evidence that there have been a series of documented personnel problems or a single, egregious event, or that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower and that improper motive was not a substantial factor.

(3) Nothing in this section prohibits an agency from making any decision exercising its authority to terminate, suspend, or discipline an employee who engages in workplace reprisal or retaliatory action against a whistleblower. However, the agency also shall implement any order under chapter 49.60 RCW (other than an order of suspension if the agency has terminated the retaliator).

[2008 c 266 § 6; 1999 c 283 § 1; 1992 c 118 § 3; 1989 c 284 § 4; 1982 c 208 § 5.]

NOTES:

Findings—Intent—2008 c 266: See note following RCW 42.40.020.

RCW 42.40.070

Summary of chapter available to employees.

A written summary of this chapter and procedures for reporting improper governmental actions established by the auditor's office shall be made available by each department or agency of state government to each employee upon entering public employment. Such notices may be in agency internal newsletters, included with paychecks or stubs, sent via electronic mail to all employees, or sent by other means that are cost-effective and reach all employees of the government level, division, or subdivision. Employees shall be notified by each department or agency of state government each year of the procedures and protections under this chapter. The annual notices shall include a list of public officials, as defined in RCW 42.40.020, authorized to receive whistleblower reports. The list of public officials authorized to receive whistleblower reports shall also be prominently displayed in all agency offices.

[2008 c 266 § 5; 1989 c 284 § 5; 1982 c 208 § 7.]

NOTES:

Findings—Intent—2008 c 266: See note following RCW 42.40.020.

A037

RCW 42.40.080

Contracting for assistance.

The auditor has the authority to contract for any assistance necessary to carry out the provisions of this chapter.

[1999 c 361 § 4.]

RCW 42.40.090

Administrative costs.

The cost of administering this chapter is funded through the auditing services revolving account created in RCW 43.09.410.

[1999 c 361 § 5.]

RCW 42.40.100

Assertions against auditor.

A whistleblower wishing to provide information under this chapter regarding asserted improper governmental action against the state auditor or an employee of that office shall provide the information to the attorney general who shall act in place of the auditor in investigating and reporting the matter.

[1999 c 361 § 6.]

RCW 42.40.110

Performance audit.

The office of financial management shall contract for a performance audit of the state employee whistleblower program on a cycle to be determined by the office of financial management. The audit shall be done in accordance with generally accepted government auditing standards beginning with the fiscal year ending June 30, 2001. The audit shall determine at a minimum: Whether the program is acquiring, protecting, and using its resources such as personnel, property, and space economically and efficiently; the causes of inefficiencies or uneconomical practices; and whether the program has complied with laws and rules on matters of economy and efficiency. The audit shall also at a minimum determine the extent to which the desired results or benefits established by the legislature are being achieved, the effectiveness of the program, and whether the auditor has complied with significant laws and rules applicable to the program.

The cost of the audit is a cost of operating the program and shall be funded by the auditing

services revolving account created by RCW 43.09.410.

[1999 c 361 § 8.]

RCW 42.40.910

Application of chapter.

Chapter 266, Laws of 2008 and chapter 361, Laws of 1999 do not affect the jurisdiction of the legislative ethics board, the executive ethics board, or the commission on judicial conduct, as set forth in chapter 42.52 RCW. The senate, the house of representatives, and the supreme court shall adopt policies regarding the applicability of chapter 42.40 RCW to the senate, house of representatives, and judicial branch.

[2008 c 266 § 9; 1999 c 361 § 7.]

NOTES:

Findings—Intent—2008 c 266: See note following RCW 42.40.020.

A039

RCW 49.60.030

Freedom from discrimination—Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, citizenship or immigration status, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW **48.30.300**, **48.44.220**, or **48.46.370** does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin, citizenship or immigration status, or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW **49.60.225** contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter **19.86** RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

[**2020 c 52 § 4**; **2009 c 164 § 1**; **2007 c 187 § 3**; **2006 c 4 § 3**; **1997 c 271 § 2**; **1995 c 135 § 3**. Prior: **1993 c 510 § 3**; **1993 c 69 § 1**; **1984 c 32 § 2**; **1979 c 127 § 2**; **1977 ex.s. c 192 § 1**; **1974 ex.s. c 32 § 1**; **1973 1st ex.s. c 214 § 3**; **1973 c 141 § 3**; **1969 ex.s. c 167 § 2**; **1957 c 37 § 3**; **1949 c 183 § 2**;

Rem. Supp. 1949 § 7614-21.]

NOTES:

Intent—1995 c 135: See note following RCW **29A.08.760**.

Severability—1993 c 510: See note following RCW **49.60.010**.

Severability—1993 c 69: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1993 c 69 § 17**.]

Severability—1969 ex.s. c 167: See note following RCW **49.60.010**.

Severability—1957 c 37: See note following RCW **49.60.010**.

Severability—1949 c 183: See note following RCW **49.60.010**.

RCW 49.60.210

Unfair practices—Discrimination against person opposing unfair practice—Retaliation against whistleblower.

(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

(2) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW.

(3) It is an unfair practice for any employer, employment agency, labor union, government agency, government manager, or government supervisor to discharge, expel, discriminate, or otherwise retaliate against an individual assisting with an office of fraud and accountability investigation under RCW 74.04.012, unless the individual has willfully disregarded the truth in providing information to the office.

[2011 1st sp.s. c 42 § 25; 1992 c 118 § 4; 1985 c 185 § 18; 1957 c 37 § 12. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

NOTES:

Findings—Intent—Effective date—2011 1st sp.s. c 42: See notes following RCW 74.08A.260.

Finding—2011 1st sp.s. c 42: See note following RCW 74.04.004.

A042

THE SHERIDAN LAW FIRM, P.S.

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