Washington Supreme Court No. 91255-6
Court of Appeals, Division One, No. 70757-4-I

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

KAMAL MAHMOUD,

Petitioner,

v.

SNOHOMISH COUNTY,

Respondent.

PETITIONER'S ANSWER TO AMICI CURIAE MEMORANDUM OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION AND THE WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. INTRODUCTION

The legislature requires the Public Record Act ("PRA") to be liberally construed and exemptions narrowly construed. RCW 42.56.030. The PRA states the statute of limitations (SOL) is triggered in one of two ways. RCW 42.56.550(6). First, an agency triggers the SOL by properly claiming an exemption. Id. The second way is by actually producing the responsive record(s) on a partial or installment basis. Id.

In 2009, this Court addressed how an agency triggers the PRA's SOL by properly claiming an exemption. Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 539-41, 199 P.3d 393 (2009) ("RHA") (holding inadequate exemption claims do not trigger the SOL). In 2010, Division One addressed how an agency triggers the SOL by producing responsive records. Tobin v. Worden, 156 Wash. App. 507, 515, 233 P.3d 906, 909 (2010) (holding incomplete production does not trigger the SOL). In 2011, interested parties attempted, and failed, to narrow Tobin's holding regarding the PRA's SOL using legislative means. SSB 5022, 62nd Leg., 2011 Reg. Sess. (Wash. 2011).

However, as pointed out in Amici's Memorandum, "this case represents a recurring and troubling practice of depriving litigants of their

right to sue for silently withheld records when the requestors learn of the withholding more than a year after the agency's inaccurate claim all records had been provided." Amici Curiae Memorandum Of Allied Daily Newspapers Of Washington, Washington Newspaper Publishers Association And The Washington Coalition For Open Government, at 1 ("Amici Memorandum"). As set forth below, since 2011 (when Petitioner filed his claims at issue), interested parties have been able to successfully reverse Tobin (and now RHA) through the judicial process.

In the process, the case law surrounding the PRA's SOL has become confusing to both litigants and courts. Some courts have applied a discovery rule, others have considered whether to apply a purported "catch-all" two-year SOL, while others have inconsistently applied the PRA's one-year SOL to different triggering events. See, e.g., Klinkert v. Washington State Criminal Justice Training Comm'n, 342 P.3d 1198, 1200 (Wash. Ct. App. 2015) (holding that categorical exemptions of 713 page document was sufficient to trigger one-year SOL); Anthony v. Mason Cnty., No. C13-5473 RBL, 2014 WL 1413421, at *5 (W.D. Wash. Apr. 11, 2014) (applying a discovery rule); Bartz v. State Dep't of Corr. Pub. Disclosure Unit, 173 Wash. App. 522, 538, 297 P.3d 737, 744 review

denied sub nom. Bartz v. Dep't of Corr., 177 Wash. 2d 1024, 309 P.3d 504 (2013) (rejecting Tobin and applying a one-year SOL); Reed v. City of Asotin, 917 F. Supp. 2d 1156, 1166 (E.D. Wash. 2013) (recognizing PRA claims may be barred by either a one-year or two year SOL but holding it was tolled by the discovery rule); Greenhalgh v. Dep't of Corr., 170 Wash. App. 137, 150, 282 P.3d 1175 (2012) (applying one-year SOL to PRA request even when the request seeks different types of records); Johnson v. State Dep't of Corr., 164 Wash. App. 769, 777-79, 265 P.3d 216, 220 (2011) (recognizing either a one-year or a two-year SOL may apply, but holding both would have expired).

This case has a thorough and complete record ready for review. The record and issues will allow this Court to address and resolve the conflicts and confusion that have arisen with respect to the PRA's SOL since RHA was decided. This Court now has the opportunity to undue the erroneous decisions by the trial and appellate courts, provide justice for Petitioner, and provide clarity for all regarding the manner and extent to which the statute of limitations under the Public Records Act is triggered.

II. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Courts and Litigants Need Clarity as to the PRA's SOL.

In RHA this Court clearly explained that the PRA's SOL is not triggered when an agency fails to adequately identify records when claiming they are exempt from disclosure. RHA, 165 Wn.2d at 538-39. Amici is correct in stating that Division One's approach in this case directly conflicts with RHA. Here, Division One held:

> For request 10–05383, the County produced records and claimed a partial exemption on August 16, 2010. The County concedes it did not produce all responsive records. But we do not reach the merits of this claim because the PRA statute of limitations also bars this claim.

Mahmoud v. Snohomish Cnty., 184 Wash. App. 1017 at *6 (2014).

Indeed, the record demonstrates the County withheld records that were not identified on its "partial exemption" log. CP 390 (identifying only one memo withheld). However, over a year later, in response to discovery (not a PRA request), the County produced the responsive yet undisclosed journal entries. CP 1622-27. As Division One points out, the County concedes the exemption log did not identify these unproduced journal entries. Thus, under RHA's clear holding, the PRA's SOL was not triggered when the County failed to identify the responsive journal entries on the exemption log; yet, Division One ignored this and narrowly construed the PRA's SOL to incorrectly bar Petitioner's claims.

Since 2011, when Petitioner filed his PRA claims, Washington Appellate Courts have reviewed the SOL defense to PRA claims on at least ten occasions. In every instance, the court has concluded its review by dismissing the PRA claims based on various interpretation of an SOL defense. See, e.g., Bartz, 173 Wash. App. at 538 (refusing to follow Division One's holding in Tobin); Greenhalgh, 170 Wash. App. at 150 (finding the one-year SOL had lapsed and the claim was time-barred); Johnson, 164 Wash. App. at 777-79 (finding that either a one year or a two-year "catch-all" SOL had expired before the claim was filed and that under either SOL the claim was time-barred.) In addition to these published cases, all the unpublished decisions that have reviewed SOL defenses have dismissed the PRA claims on that basis.

During that same period, the federal courts in Washington have analyzed the SOL defense to PRA claims in two lawsuits. On both occasions, the courts determined that the PRA's SOL was either tolled or never triggered. In 2013, the Eastern District of Washington stated:

> The statute of limitations on a PRA claim in Washington is either one or two years, depending upon the nature of the claim. A one-year statute of limitations applies to claims which are based upon (1) a state agency's claim of exemption from the PRA's disclosure requirements; or (2) an agency's "last production of a record on a

> partial or installment basis." RCW 42.56.550(6). A two-year statute of limitations applies to all other PRA claims. *Tobin v. Worden,* 156 Wash.App. 507, 514, 233 P.3d 906 (2010); *Johnson v. State Dep't of Corr.,* 164 Wash.App. 769, 777, 265 P.3d 216 (2011). Defendants concede that the two-year statute of limitations applies in this case.... There is no dispute that Plaintiff failed to file the instant lawsuit within two years of Defendant's June 16, 2009 response to his PRA request. However, Plaintiff maintains that the two-year statute of limitations on his claim was effectively tolled until approximately March or April of 2011, when he discovered that Defendant had failed to produce the documents at issue. The Court agrees.

Reed, 917 F. Supp. 2d at 1166. Reed found that although different SOLs can apply, they were tolled until the requestor "discover[ed] that the Defendant had failed to produce the documents at issue." Id.

In 2014, the Western District of Washington, similarly applied the discovery rule to a PRA claim by relying on the holding in Reed holding "Thus, the statute of limitations does not begin to run until after materials that were neither produced nor noted as exclusions are discovered." Anthony, 2014 WL 1413421, at *5 (reference to footnote omitted).

As Amici points out "this Court should accept the Petition for Review in this case not solely to aid Mahmoud but for the benefit of all requestors and all agencies and to state the law for courts below so all will know what is required to trigger" the statute of limitations. Amici

Memorandum, at 5. Indeed, this case will allow the Court to harmonize the different approaches taken by the different courts as to how and when an SOL defense to a PRA claim is triggered. This Court can now conclusively determine whether there are: 1) two separate statutes of limitations that apply to PRA claims; 2) whether an SOL can be triggered when the responding agency withholds records without identifying or otherwise referencing them on any exemption log; and, 3) whether an implied discovery rule exists as to PRA claims when a requestor does not know that the PRA has been violated because the responding agency failed to disclose or produce responsive record(s). If it so chooses, this Court may further clarify the necessary specificity with which an exemption claim triggers the PRA's SOL.

B. A Discovery Rule Should Apply to Certain PRA Claims.

As mentioned above, federal courts interpreting SOL defenses to PRA claims have applied a discovery rule. RHA is consistent with this:

> Failure to reveal that some records have been withheld in their entirety gives the requested the misleading impression that all document reflect to the request have been disclosed.

RHA, 165 Wn.2d at 537 (quoting Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wash. 2d 243, 270, 884 P.2d 592 (1994)).

In this case, the record conclusively establishes that the County did **not** disclose all the records responsive to Petitioner's PRA requests; despite this undisputed fact, Division One held the PRA SOL was triggered. Notably, two of the County's responses falsely indicated records may have been destroyed. CP 395-96, 418-19, 973-79. The unproduced (and purportedly destroyed) records at issue were finally produced over a year after the County's last, incorrect response. CP 384-386, 417-419, 736, 745-956, 958-971, 1130, 1139, 1144-1390, 1639.

Division One's incorrect dismissal of the claim under Request 10-05383 is even more egregiously. This request sought journal entries made by the requestor's supervisor about the requestor. CP 2446-47. The requestor did not know the extent of the journal entries he requested as he did not have access to them; instead, he requested those records in accordance with the PRA. Id. In response, the agency produced some responsive entries, but conceded it also withheld other responsive entries, which the Petitioner did not discover until more than a year later through discovery. Id. The agency's exemption log claimed an exemption for only one document, an attorney-client privileged memo. Id.

By finding that the PRA's SOL barred Petitioner's claim, Division

One incorrectly shifted the responsibility for violating the PRA to the Petitioner: "Citizens have the responsibility not to sleep on those rights. Here Mahmoud knew or could have known the relevant facts related to his cause of actions within the one-year PRA statute of limitations." Mahmoud, 184 Wash. App. at *7. Division One found Petitioner should have known the responsive but undisclosed journal entries existed without any possible reliance or citation to the record. Division One thus overturned the trial court and dismissed the claim because Petitioner failed to file the claim within one year of when he received the exemption claim, even though the record establishes the unproduced responsive records were never claimed as exempt or produced in response to the PRA request – or that he even knew of their existence until a year later. Shifting the responsibility to the requestor to somehow divine that an agency has provided a false or misleading response, and, on the basis of such a divination file suit, contradicts the mandate to liberally construe the PRA (and runs afoul of CR 11). Moreover, the PRA explicitly states that it is the agency's responsibility to produce or identify all responsive records. RCW 42.56.070; see also, RCW 42.56.030; RHA, 165 Wn.2d at 537-38.

C. This Case Illustrates the PRA's Importance.

This case illustrates the importance of the PRA. Petitioner made the requests in an attempt to determine whether or not his employer was violating the rights bestowed upon him by the Washington Law Against Discrimination. The trial court found this to be an aggravating factor when determining the penalty amount. CP 2093. Contrary to Division One's characterization, Petitioner was not engaging in "gamesmanship;" the record establishes he was using the PRA for the purpose it was created, to uncover possible unlawful behavior by a governmental agency.

D. Even The County Believes Division One's Decision Addresses Unsettled Law.

The County moved to publish Division One's opinion for an analogous reason that Petitioner and Amici argue that review should be accepted: this case will clarify issues related to triggering the PRA's SOL when documents were not timely produced as well as the applicability of the discovery rule. See, Respondent's Motion for Publication.

III. CONCLUSION

As Amici asserts, this petition presents the Court with opportunity to resolve and harmonize the various conflicting and confusion low court decisions as it relates the PRA's SOL. Such a harmonizing resolution will help litigants, courts, and further the purpose of the PRA.

RESPECTFULLY SUBMITTED this 13th day of April, 2015.

REKHI & WOLK, P.S.

By: _____

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CERTIFICATE OF SERVICE

I, Ngan Tran, certify that a copy of the foregoing was caused to be electronically served (through the consent of counsel) on April 13, 2015, to the following counsel of record at the following email addresses:

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The foregoing statement is made under the penalty of perjury under the laws of the State of Washington and is true and correct.

DATED this 13th day of April, 2015.

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2014 WL 1413421
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Tacoma.

William F ANTHONY, Plaintiff,
v.
MASON COUNTY, Rebecca Hersha, Grace B Miller, Barbara A Adkins, Defendant.

No. C13–5473 RBL. | Signed April 11, 2014.

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Mark Robert Johnsen, Nathaniel S. Strauss, Karr Tuttle Campbell, Seattle, WA, for Defendant.

ORDER GRANTING MOTION TO AMEND AND STRIKE

RONALD B. LEIGHTON, District Judge.

I. INTRODUCTION

*1 THIS MATTER is before the Court on Plaintiff William F. Anthony's motion to amend and strike. Plaintiff Anthony is the owner of a parcel of land in the town of Grapeview, Mason County, Washington. Mason County, its employees Rebecca Hersha, Grace B. Miller, and County Department of Community Development Director, Barbara A. Adkins, are the defendants in this matter. Between 2008 and 2012 Mr. Anthony repeatedly sought a zoning variance in order to construct a new building on his property to serve as a garage and art studio. These efforts were allegedly unjustly denied by Mason County. During his attempts to obtain a building permit from Defendant Mason County, Mr. Anthony, individually and through his attorneys, submitted several requests to Mason County for public records related to his permit applications. In the course of the instant litigation, Mr. Anthony submitted discovery requests. In response, Mason County turned over several emails that were neither produced nor privileged from his prior public records requests. In light of these new documents, Mr. Anthony seeks to amend his complaint and add violations of the Public Records Act RCW 46.52; Mason County does not consent to the amendment and argues that the amendment is barred by futility. Because the amended claims are not barred by Rule 15, the motion is GRANTED.

II. BACKGROUND

Plaintiff Anthony is the owner of real property located at 1951 E. Mason Lake Drive E, Grapeview, Mason County, Washington. He purchased this property is 2003. The lot, situated on the shoreline of Mason Lake, is approximately .59 acres and 98–feet wide and is improved with a three-bedroom, two-bath home. The property is zoned as Rural Residential and, as such, is subject to a side and rear yard setback of 20 feet for residences and accessory buildings. Mason County Code 17.04.223(d). There is an exception to this rule for parcels that are less than 100–feet wide which provides a setback "equal to ten percent of the lot width but in no case shall be less than five feet from the property line." *Id.*

In 2004, Mr. Anthony applied to Mason County for a permit to construct a 720–square–foot structure on the southwest portion of his property. Because of the location of the septic system and associated drainfield, he placed the building within 8 feet of the western property line and five feet from the southern property line. This administrative variance was approved the same day that it was applied for. The permit expired in 2006 with no building having taken place.

In 2008, Mr. Anthony submitted a new administrative variance application that was essentially a re-submittal of his previously approved application. Following this application, Mason County Planning staff, including Defendant Rebecca Hersha allegedly met or spoke with Mr. Anthony's neighbors Forrest and Amy Cooper. The neighbors objected to the proposed structure and personally requested that the administrative variance application be denied. Mr. Anthony alleges that this led Ms. Hersha to become predisposed to denying the permit and that she sought out grounds to reject the application. The application was denied on September 22, 2008.

*2 On October 6, 2008, Mr. Anthony, through his attorney at the time, submitted a public records request for "all records contained in his legal parcel file." A number of records were returned. No privilege log or indication that records were being withheld accompanied the responsive documents.

On October 13, 2008 an additional request was issued for all records that pertained to the construction proposed in 2004 and 2008 including correspondence generated by or received by the planning or building departments. Again responsive documents were returned with no privilege log or indication that records were being withheld.

On April 29, 2011, Mr. Anthony, through his attorney at the time, submitted further public records requests for all records, documents, e-mails and communications of any type and in any form regarding this 2008 building application and variance request. Again responsive documents were returned with no privilege log or indication that records were being withheld.

In March 2012, Mr. Anthony tried again to get a permit to construct the accessory building, this time with greater setbacks. This updated application sought a non-administrative variance from the rear and side yard setbacks, rather than the administrative variance requested in his 2004 and 2008 applications. Again Ms. Hersha was assigned to the application. At a public hearing on July 10, 2012, she recommended denial of the variances. During this hearing, however, Ms. Hersha allegedly stated that Mr. Anthony's "flag shaped" lot qualified for the side yard setback exception of Mason County Code 17.04.223. This would allow him to build with 9.8 foot setbacks, ten percent of his lot width.

In response, Mr. Anthony withdrew the application and on July 24, 2012 submitted a modified application with 10 foot setbacks, which did not require a variance. On August 2, 2012 Ms. Hersha advised that she would not approve the request. After some correspondence with Defendants, Ms. Adkins notified Mr. Anthony that another planner in the department, Grace Miller, would process the permit application. Ms. Miller also refused to grant the permit and suggested that because Mr. Anthony's lot had two lot widths it did not qualify for the side yard setback exception.

Mr. Anthony's appeal of this decision included a hearing on November 8, 2012. At this hearing Ms. Miller allegedly made unsubstantiated statements to justify the "two widths" approach. She also allegedly argued that lot width was determined by building orientation, in contradiction to materials she had cited to in prior correspondence.

Eventually, on November 26, 2012 the hearing examiner, Phil Olbrechts, rejected the County's argument and reversed the County's denial of the building permit. Despite this, Defendant Adkins refused to release the building permit until the time for appealing the hearing examiner's decision had expired. After consulting with the Department of Commerce regarding the legality of withholding the permit, however, she relented and issued the permit.

*3 On June 14, 2013 Mr. Anthony filed this lawsuit against Mason County, Ms. Hersha, Ms. Miller and Ms. Adkins. He alleges that they singled him out for intentional, discriminatory treatment in violation of the Equal Protection Clause of the Fourteenth Amendment. In support of this argument he presents several examples of similarly situated properties that did not receive such treatment.

On November 15, 2013 Mr. Anthony submitted discovery requests to Mason County in the course of the civil rights action against the County. On January 16, 2014 Mason County provided documents in response to the discovery requests. These documents included several emails that were responsive to prior public records requests but never produced. Mr. Anthony alleges that at least two of these emails would have proven critical to his applications and appeals.

III. DISCUSSION

A. The Motion to Amend is Not Futile.

Under Federal Rule 15, a party may amend its pleading once within 21 days of service or 21 days after a responsive pleading or a motion under Rule 12(b), (e), or (f). Fed.R.Civ.P. 15(a)(1). Beyond that, a party may amend only with written consent from the opposing party or leave of the court.Fed.R.Civ.P. 15(a)(2). A court should grant leave "freely ... when justice so requires," and that policy is "to be applied with extreme liberality."*Id.;Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.2003) (citations omitted).

In determining whether to grant leave under Rule 15, courts consider five factors: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint."*United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir.2011). Among these factors, prejudice to the opposing party carries the greatest weight. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003). Here, there is no evidence of undue delay or bad faith; Mr. Anthony only recently discovered information supporting his new claims.

Once this information was discovered he acted in a reasonable time frame to amend his complaint.

Mason County opposes Mr. Anthony's motion to amend as futile because supplemental jurisdiction would be improper and that the statute of limitations would bar the claim. A strong showing of futility must exist in order for Mason County to overcome the presumption in favor of granting leave to amend. *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985 (9th Cir.2011), *cert. denied*,—— U.S. ——, 132 S.Ct. 1566, 182 L.Ed.2d 168 (U.S.2012) (citing *Eminence Capital*, 316 F.3d at 1051). A proposed "[a]mendment is futile if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense."*Gaskill v. Travelers Ins. Co.*, No. 11–cv–05847–RJB, 2012 WL 1605221, at *2 (W.D.Wash. May 8, 2012) (citing *Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1393 (9th Cir.1997)).

1. Supplemental jurisdiction is properly exercised here.

*4 28 U.S.C. § 1367(a) provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy...." Nonfederal claims are part of the same case or controversy as federal claims when they " 'derive from a common nucleus of operative fact' and are such that a plaintiff 'would ordinarily be expected to try them in one judicial proceeding.' " *Trustees of Construction Industry and Laborers Health and Welfare Trust v. Desert Valley Landscape & Maintenance, Inc.*, 333 F.3d 923, 925 (9th Cir.2003) (*citing Finley v. United States*, 490 U.S. 545, 549, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989)). Where a plaintiff brings a state law claim against one defendant and a federal claim against another, supplemental jurisdiction may be exercised over the state defendant so long as the state and federal claims arise from a common nucleus of facts. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1173–75 (9th Cir.2002) (holding that the district court could exercise supplemental jurisdiction over defendant employment agency, against which only a state law claim was brought, because the state claim arose from the same nucleus of facts as the federal RICO claim brought against employment agency's codefendant); *see also Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1164–65 (10th Cir.2004) (holding that the district court had supplemental jurisdiction over defendant Jackson Hole, against which only a state wrongful death claim was brought, because the court had original jurisdiction over the FTCA wrongful death claim brought against co-defendant United States, and both claims arose from a common nucleus of facts). "In practice, § 1367(a) requires only that the jurisdiction-invoking claim and the supplemental claim have some loose factual connection." 13D Wright & Miller, *Federal Practice and Procedure* § 3567.1 (3d ed.2008).

Because the factual underpinnings of Mr. Anthony's existing and amended claims are interwoven and related to the disparate treatment he alleges, it is proper for the Court to exercise supplemental jurisdiction. Mason County's arguments that the claim is a novel state issue; that Mr. Anthony's federal claim is likely to be dismissed; and that it is unfair to "pin" public-entity litigants between PRA liability and rule 34 are unpersuasive.

2. The statute of limitations is not likely to make this claim futile.

Mason County argues that the statute of limitations of the PRA will render this claim futile. The statute reads, "[A]ctions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis."RCW 42.56.550. They argue that because more than a year has elapsed since any public records request or record production, adding the claims is now barred. This is not a correct application of the law: Washington courts have addressed this in two different ways, both of which would allow the Plaintiff to bring the amended claim.

*5 The Plaintiff points to the Eastern District of Washington's decision in *Reed v. City of Asotin*. 917 F.Supp.2d 1156 (E.D.Wash.2013). This case squarely addressed whether PRA claims were barred when the Plaintiff could not have known about their existence until after the statute of limitations had run. [1] Applying the logical inconsistency presented, the Court applied an inherent discovery rule. Thus, the statute of limitations does not begin to run until after materials that were neither produced nor noted as exclusions are discovered. Under this approach, Mr. Anthony's amendment is timely and not barred.

The Washington Court of Appeals, Div. I takes different approach but reaches the same result. A similar factual scenario arose in *Tobin v. Worden*. 156 Wash.App. 507, 233 P.3d 906 (2010). The Court reasoned there that the limitations period is triggered by one of two events, "(1)

the agency's claim of an exemption or (2) the agency's last production of a record on a partial or installment basis."*Id.* at 513, 233 P.3d 906*citing*RCW 42.56.550(6). Finding the "partial" language to be ambiguous, the Court stated " 'partial' production as used in RCW 42.56.550(6) cannot be construed as simply withholding part of a record without explanation ... because such a 'partial,' i.e., incomplete, production is not authorized by the PRA."*Id.* at 514, 233 P.3d 906*citing*RCW 42.56.210(3). When the public entity turns over part of a record but withholds a responsive document without explanation, neither of the triggering events have taken place. Thus the limitations period relies on "two specific agency responses—a claim of exemption and the last partial production—not simply the agency's 'last' response."*Id.* at 515, 233 P.3d 906. Under this approach, like the approach used by the Eastern District, Mr. Anthony's amendment is timely.

B. Mason County Has Not Shown That They Will Be Unduly Prejudiced.

Mason County has also argued that the amendment would be unduly prejudicial. The party opposing amendment bears the burden of showing prejudice. *DCD Programs, Ltd. v. Leighton,* 833 F.2d 183, 187 (9th Cir.1987). Although Mason County argues the merits of the amended claim in an effort to establish futility, neither they nor the Court can identify substantial prejudice to their position. The witnesses, parties and most of the significant facts have not changed and the amendment is not anticipated to effect the trial date. There remains over a month until the May 19 discovery motion deadline. Accordingly, Mason County would suffer no substantial prejudice due to the amended claims.

C. Motion to Strike is Granted.

The parties agree that Exh. C to the Declaration of Nathaniel S. Strauss (Dkt. # 22) should be stricken from the record under Fed. R. Ev. 408. That document is therefore STRICKEN.

IV. CONCLUSION

Because Mason County has not shown futility or prejudice, and because the motion to strike is unopposed, Plaintiff's motions are GRANTED and his amended complaint is deemed filed.

*6 IT IS SO ORDERED.

Footnotes

1 At the time of this case the PRA statute of limitations was 2 years rather than the present 1 year, but the reasoning applies in the same manner.

End of Document

917 F.Supp.2d 1156
United States District Court,
E.D. Washington.

Lee REED and Lynelle Reed, Plaintiffs,
v.
CITY OF ASOTIN and James Miller, Defendants.

No. 11–CV–0469–TOR. | Jan. 11, 2013.

Synopsis
Background: Former police chief brought action against city and its mayor for violation of Washington's Minimum Wage Act (MWA), wrongful termination, and violations of Washington Public Records Act (PRA). Defendants moved for summary judgment.

Holdings: The District Court, Thomas O. Rice, J., held that:

[1] chief fell within administrative exemption to wage and hour provisions of MWA;

[2] chief fell within executive exemption to hour and wage provisions of MWA;

[3] chief was subject to city's civil service rules;

[4] there was no evidence that chief was constructively discharged;

[5] chief's PRA claims accrued under discovery rule when he discovered documents existed and that city had failed to produce them; and

[6] e-mails authored by mayor and city clerk fell within scope of chief's records request under the PRA.

Motion granted in part and denied in part.

West Headnotes (11)

[1] **Labor and Employment**
Definitions and tests of status in general

Although the precise amount of time an employee spends performing management-related work versus non-management-related work is a relevant consideration in determining whether he or she falls within the administrative exemption to the wage and hour provisions of Washington's Minimum Wage Act (MWA), it is not dispositive; the most important consideration is the relative importance of the employee's management-related responsibilities to the functioning of the employer as a whole. West's RCWA 49.46.010(3)(c); WAC 296–128–520.

1 Cases that cite this headnote

[2] **Labor and Employment**
Particular employments

Police chief fell within administrative exemption to wage and hour provisions of Washington's Minimum Wage Act (MWA); chief's management-related duties were central to successful management and operation of city's police department, as he had many responsibilities, including developing policies and procedures for department, organizing and assigning tasks to subordinates, evaluating department's training needs, and meeting with elected or appointed officials and other members of general public, and although these duties accounted for only 40% of chief's work hours, he was singularly responsible for managing and operating department. West's RCWA 49.46.010(3)(c); WAC 296–128–520.

1 Cases that cite this headnote

[3] **Labor and Employment**
Particular employments

Police chief fell within executive exemption to wage and hour provisions of Washington's Minimum Wage Act (MWA); chief's management-related duties were crucial to successful management and operation of city's police department, and although his management-related duties did not consume majority of his time, they were nevertheless his "primary duties" within meaning of exemption.

West's RCWA 49.46.010(3)(c); WAC 296–128–510.

1 Cases that cite this headnote

[4] **Municipal Corporations**
Chief or superintendent or other executive

Under Washington law, police chief was subject to city's civil service rules, and, by extension, required to exhaust his administrative remedies with respect to wrongful discharge claim against city and mayor, despite chief's contention that city attorney advised city council that chief would continue to be at-will employee following creation of civil service board; as full-time employee of police department with fewer than six commissioned officers, chief was member of classified civil service. West's RCWA 41.12.050(1).

Cases that cite this headnote

[5] **Labor and Employment**
Public policy considerations in general

To prevail on his wrongful discharge claim under Washington law, a plaintiff must prove (1) the existence of a clear public policy; (2) that discouraging the conduct in which he engaged would jeopardize the public policy; (3) that the public-policy-linked conduct caused the dismissal; and, finally, (4) that the defendant has not offered an overriding justification for the dismissal.

Cases that cite this headnote

[6] **Labor and Employment**
Constructive discharge

To prove constructive discharge under Washington law, a plaintiff must establish that (1) defendant engaged in deliberate conduct which made his working conditions intolerable; (2) a reasonable person in his position would have been forced to resign; (3) he resigned solely because of intolerable working conditions; and (4) he suffered damages.

Cases that cite this headnote

[7] **Civil Rights**
Constructive discharge

Labor and Employment
Constructive discharge

In the context of establishing constructive discharge under Washington law, intolerable working conditions may arise from aggravating circumstances or a continuous pattern of discriminatory treatment on the part of the employer.

Cases that cite this headnote

[8] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

In the context of analyzing constructive discharge under Washington law, whether working conditions are intolerable is a question of fact and is not subject to summary judgment unless there is no competent evidence to establish the claim.

Cases that cite this headnote

[9] **Municipal Corporations**
Chief or superintendent or other executive

There was no evidence that police chief's working conditions were rendered intolerable by mayor's alleged micromanaging of police department, and by chief having to be on call all of the time, as required to support finding that chief was constructively discharged in wrongful discharge action against city and mayor under Washington law; there was no evidence that treatment of chief was discriminatory in nature, and alleged circumstances were by no means aggravating, as being micromanaged by a top elected official and being on call were simply some of the unpleasant realities of service as chief of police in small community.

Cases that cite this headnote

[10] **Records**
Judicial enforcement in general

Police chief's claims against city for violation of the Washington Public Records Act (PRA) accrued under the discovery rule, triggering two-year limitations period for such claims, when chief discovered that documents at issue existed and that city had failed to produce them.

1 Cases that cite this headnote

[11] **Records**

Matters Subject to Disclosure; Exemptions

E-mails authored by mayor and city clerk fell within scope of police chief's document request under Washington Public Records Act (PRA) for copies of all complaints made against chief and any tangible inner office note made regarding chief; contrary to city's assertions, e-mails were not simply scheduling notes concerning meetings, and instead, e-mails memorialized fact that citizen who had previously complained to city about chief wished to either make additional allegations or expand scope of her existing complaint.

Cases that cite this headnote

Attorneys and Law Firms

*1158 Jay Patrick Manon, Manon Law Office, Grand Coulee, WA, for Plaintiffs.

Michael E. McFarland, Jr., Evans Craven & Lackie PS, Spokane, WA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THOMAS O. RICE, District Judge.

BEFORE THE COURT is Defendants' Motion for Summary Judgment (ECF No. *1159 28). This matter was heard with oral argument on January 11, 2013. Jay P. Manon appeared on behalf of the Plaintiffs. Michael E. McFarland, Jr. appeared on behalf of the Defendants. The Court has reviewed the motion, the response, and the reply, and is fully informed.

BACKGROUND

Plaintiff Lee Reed ("Plaintiff"), the former Chief of Police for the City of Asotin Police Department, has sued the City of Asotin and its Mayor, James Miller, for various causes of action arising from his separation from the police force in May 2009. Defendants have moved for summary judgment on each of Plaintiff's claims.

FACTS

Plaintiff served as the Chief of Police of the City of Asotin Police Department from January 1, 2005, to May 14, 2009. His duties in this position included making recommendations to the Mayor concerning the hiring, termination and discipline of police officers; assigning tasks and shifts to subordinates; evaluating the performance of subordinates; evaluating the department's training needs; ensuring departmental compliance with rules and regulations; developing departmental policies and procedures; assisting in the preparation of the department's budget; performing financial analysis and cost controls; evaluating complaints and grievances against officers; attending meetings of the City Council and Public Safety Committee; and meeting with public officials and members of the general public. ECF No. 42 at ¶ 4. In short, Plaintiff was "the face of the police department." ECF No. 42 at ¶ 5.

Due to the small size of his department, Plaintiff was also required to "perform[ ] all police functions" and "act[ ] as a glorified patrol officer." ECF No. 42 at ¶ 4. His duties in this capacity included conducting investigations, performing traffic enforcement, and performing community service and/or community policing. ECF No. 42. According to Plaintiff, these duties consumed 60% of his time.

From January 1, 2005 until September 10, 2008, the City of Asotin Police Department was staffed by Plaintiff and one other full-time officer. On September 10, 2008, the City hired a third full-time officer. ECF No. 42 at ¶ 7. The hiring of this additional officer prompted the City to create a Civil Service Commission pursuant to RCW Chapter 41.12. The Civil Service Commission was ratified by the City Council on October 27, 2008. ECF No. 42 at ¶ 8. On April 27, 2009, the City Council appointed three members of the public to serve as members of the Civil Service Commission. ECF No. 42 at ¶ 10.

On May 14, 2009, Plaintiff tendered his resignation to the City of Asotin's mayor, Defendant James Miller, in lieu of being terminated. The reasons for Plaintiff's resignation are not entirely clear; it appears, however that it was prompted, at least in part, by complaints which had been lodged against him by members of the public. Plaintiff's dissatisfaction with Defendant Miller's level of supervision may also have played a role in his decision to resign. In any event, the reasons why Plaintiff resigned are not directly at issue. What is at issue is whether Plaintiff was required to seek redress before the Civil Service Commission before filing this lawsuit. It is undisputed that he did not do so.

DISCUSSION

A court may grant summary judgment in favor of a moving party who demonstrates "that there is no genuine dispute as to any material fact and that the movant is *1160 entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A fact is "material" within the meaning of Rule 56(a) if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A "genuine dispute" over any such fact exists only where there is sufficient evidence from which a reasonable jury could find in favor of the nonmoving party. *Id.* at 248, 106 S.Ct. 2505.

The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the non-moving party has the burden of proof at trial, the moving party need only demonstrate an absence of evidence to support the non-moving party's claims. *Id.* at 325, 106 S.Ct. 2548. The burden then shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256, 106 S.Ct. 2505. In deciding whether this standard has been satisfied, a court must construe the facts, as well as all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

A. Minimum Wage Act Claim

Defendants seek summary judgment on Plaintiff's claim for violation of Washington's Minimum Wage Act ("MWA") on the ground that Plaintiff is statutorily exempt from the MWA's wage and hour provisions by virtue of having been employed in an administrative and/or executive capacity. Plaintiff, for his part, maintains that the administrative and executive exemptions do not apply because he spent 60% of his time performing routine police activities such as writing tickets, making arrests, and patrolling streets. Lee Aff., ECF No. 36, at ¶ 1.

The MWA excludes from its definition of an "employee" anyone who is "employed in a bona fide executive, administrative, or professional capacity ... as those terms are defined and delimited by rules of the director [of the Department of Labor and Industries]." RCW 49.46.010(3)(c). The Department of Labor and Industries, in turn, has promulgated regulations which specify when the administrative and executive exemptions apply. For the reasons discussed below, the Court finds that both exemptions apply.

1. *Administrative Exemption*

The administrative exemption is set forth in WAC 296–128–520. This regulation provides, in relevant part:

> The term "individual employed in a bona fide ... administrative ... capacity" in RCW 49.46.010[(3)(c)] shall mean any employee:
>
> (1) Whose primary duty consists of the performance of office or non-manual field work directly related to management policies or general business operations of his employer or his employer's customers; [and]
>
> * * * * * *
>
> (3) Who customarily and regularly exercises discretion and independent judgment; and
>
> (a) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in this regulation), or
>
> (b) Who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or
>
> *1161 (c) Who executes under only general supervision special assignments and tasks; and

(4) Who does not devote more than 20 percent ... of his hours worked in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (1) through (3) of this section; and

(a) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week exclusive of board, lodging, or other facilities; or

(b) Who, in the case of academic administrative personnel is compensated for his services as required by paragraph (4)(a) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which he is employed: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.

WAC 296–128–520.

The Department of Labor and Industries has also issued a policy statement which is intended to clarify the scope of this regulation. *See* Wash. Dep't of Labor and Industries, *Exemption from Minimum Wage and Overtime Requirements for Administrative Positions*, Administrative Policy ES.A.9.4 (June 24, 2005). This policy statement contains a "short test" for applying WAC 296–128–520:

> The administrative exemption contains a special proviso in the latter part of WAC 296–128–520(4)(b) after the word "Provided" for employees who are compensated on a salary or fee basis at a rate of at least $250 per week exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption will be deemed to be met by an employee who 1) receives the $250 per week on a salary or fee basis; **2) the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers;** and 3) duties include work requiring the exercise of discretion and independent judgment. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under the long test.

Administrative Policy ES.A.9.4 at ¶ 3, 5, 9 (emphasis added).

In this case, the parties disagree about whether Plaintiff satisfies the "primary duty" element of the test given that he spent 60% of his time performing "routine police work." Fortunately, the policy statement issued by the Department of Labor and Industries provides substantial guidance on this issue:

> **How to Determine Primary Duty.** Primary duty must be based on all facts in the particular case. Generally, 50% is a good rule of thumb[,] but is not the sole test. There may be situations where the employee does not spend over 50% of his or her time in administrative duties, but [will] still be exempt if other pertinent factors support such a conclusion. *Pertinent factors might include the relative importance of the administrative function* ***1162** *compared with other duties performed* in which the employee exercises discretionary powers, freedom from supervision, etc.
>
> * * * * * *
>
> **Directly Related to Management Policies or General Business Operations of the Employer or Employer's Customers.** This phrase describes those types of activities relating to the administrative operations of a business as distinguished from production or[ ] sales work in a retail or service establishment. In addition to describing the types of activities, the phrase limits the exemption to *persons who perform work of substantial importance to the management or operation of the business of his employer* or his employer's customers. This must be considered on a case-by-case basis to determine [whether] this applies.
>
> * * * * * *
>
> "Directly related to management policies or general business operations" *includes those who participate in the formulation of management policies*, or in the operation of

> the business as a whole, and *includes those whose work affects policy or whose work it is to execute and carry the policy out.*

Administrative Policy ES.A.9.4 at ¶ 5, 9 (underlined emphasis added).

[1] As illustrated by the excerpts above, the Department of Labor and Industries has interpreted WAC 296–128–520 to apply to employees who play a significant role in creating and/or enforcing management policies. Although the precise amount of time an employee spends performing management-related work versus non-management-related work is a relevant consideration, it is not dispositive. As articulated by the Department of Labor and Industries, the most important consideration is the relative importance of the employee's management-related responsibilities to the functioning of the employer as a whole. This construction of the regulation is entitled to substantial deference by this Court. *See Silverstreak, Inc. v. Washington State Dep't of Labor and Indus.*, 159 Wash.2d 868, 884–85, 154 P.3d 891 (2007) ("[W]e will give great deference to an agency's interpretation of its own properly promulgated regulations, 'absent compelling indication' that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority. We give this high level of deference ... because the agency has expertise and insight gained from administering the regulation that we, as the reviewing court, do not possess.").

[2] Here, Plaintiff's management-related duties were clearly central to the successful management and operation of the City of Asotin Police Department. As the Chief of Police, Plaintiff was responsible for, *inter alia*, developing policies and procedures for the police department; organizing and assigning tasks to subordinates; issuing oral and written directives to subordinates; evaluating the performance of subordinates; making recommendations to the mayor concerning the promotion and discipline of subordinates; evaluating the department's training needs; preparing periodic reports of the department's activities for the mayor; participating in the preparation of police department budgets; performing financial analysis regarding cost controls; attending meetings of the City Council and the public safety committee; and meeting with elected or appointed officials and other members of the general public. ECF No. 42 at 2–4. Although performing these duties accounted for only 40% of Plaintiff's work hours (presumably due to the small size of his department), *1163 there is no dispute that Plaintiff was singularly responsible for managing and operating the department. Accordingly, Plaintiff falls within the administrative exemption.

2. *Executive Exemption*

The executive exemption is set forth in WAC 296–128–510. This regulation provides, in relevant part:

> The term "individual employed in a bona fide executive ... capacity" in RCW 49.46.010[(3)(c)] shall mean any employee:
>
> (1) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
>
> (2) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (3) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (4) Who customarily and regularly exercises discretionary powers; and
>
> (5) Who does not devote more than 20 percent ... of his hours worked in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (1) through (4) of this section ...; and
>
> (6) Who is compensated for his services on a salary basis at a rate of not less than $155 per week exclusive of board, lodging, and other facilities: Provided, That an employee who is compensated on a salary rate of not less $250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section.

WAC 296–128–510.

As with the administrative exemption, the Department of Labor and Industries has issued a policy statement which is intended to clarify the scope of this regulation. *See* Wash.

Dep't of Labor and Industries, *Exemption from Minimum Wage and Overtime Requirements for Executive Positions*, Administrative Policy ES.A.9.3 (June 24, 2005). This policy statement contains a "short test" for applying WAC 296–128–510:

> The executive exemption contains a special proviso in the latter part of WAC 296–128–510(6) after the word "Provided" for employees who are compensated on a salary basis at a rate of at least $250 per week exclusive of board, lodging or other facilities. Under this proviso, the requirements for exemption will be deemed to be met by any employee who 1) receives the $250 per week in salary; 2) **his or her primary duty consists of the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision of the enterprise,** and 3) includes the customary and regular direction of the work of two or more employees. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under the long test.

Administrative Policy ES.A.9.3 at ¶ 3 (emphasis added).

[3] Plaintiff satisfies the second element of this test for many of the same *1164 reasons that he satisfied the second element of the administrative exemption test. As discussed above, Plaintiff's management-related duties were crucial to the successful management and operation of the Asotin Police Department. Although his management-related duties did not consume a majority of his time, they were nevertheless his "primary duties" within the meaning of WAC 296–128–510. *See* Administrative Policy ES.A.9.3 at ¶ 4 (explaining that "the relative importance of the [employee's] managerial duties as compared with other types of duties" is a pertinent factor when considering whether an employee who spends less than 50% of his or her time performing managerial duties qualifies for the executive exemption). Accordingly, the executive exemption applies.[1] Defendants' motion for summary judgment on Plaintiff's MWA claim is granted.

B. Violation of Civil Service Rules Claim (Wrongful Discharge)

Plaintiff's Amended Complaint lists a cause of action for "Wrongful Termination Violation of Civil Service Rules." ECF No. 8 at 4. The precise nature of this claim is unclear. On one hand, the Amended Complaint alleges that Defendant City of Asotin violated RCW Chapter 41.12 by failing to create a Civil Service Commission Committee within ninety days of hiring a third police officer to its police force. *See* ECF No. 8 at ¶¶ 23–24. On the other hand, the Amended Complaint alleges that Defendants violated the Civil Service Rules by failing to afford him a civil service hearing prior to his termination. *See* ECF No. 8 at ¶¶ 28, 32. Plaintiff's memorandum in opposition to the instant motion further obfuscates the nature of his claim by referencing a claim for wrongful termination in violation of public policy under Washington common law. *See* ECF No. 34 at 4. In light of this uncertainty, the Court will limit its analysis to the issues specifically raised by Plaintiff in opposition to Defendants' motion for summary judgment: (1) whether Plaintiff was subject to the Asotin Civil Service rules (including the requirement that he exhaust his administrative remedies prior to filing suit); and (2) if so, whether he has a viable claim for wrongful discharge in violation of public policy (a claim to which the administrative exhaustion requirement does not apply).

1. *Plaintiff Was Subject to the Civil Service Rules*

[4] Plaintiff asserts that there is a genuine issue of material fact as to whether he was subject to the Asotin Civil Service rules, and, by extension, required to exhaust his administrative remedies. His lone argument in support of this assertion is that the Asotin City Attorney, Scott Broyles, advised the Asotin City Council during a meeting on November 10, 2008, that Plaintiff would continue to be an at-will employee following the creation of the Asotin Civil Service Board. ECF No. 34 at 4; ECF No. 38 at 7, ¶ 5(b). Plaintiff acknowledges that Mr. Broyles' statement was "contrary to law," but maintains that it excuses his failure to exhaust his administrative remedies before the Civil Service Commission. ECF No. 34 at 4–5.

This argument is unavailing. As Defendants correctly note, the application of RCW Chapter 41.12 to Plaintiff is a question of law rather than a question of fact. Here, the applicable law is clear: as a full-time employee of a police department with *1165 fewer than six commissioned officers, Plaintiff was a member of the classified civil service.

RCW 41.12.050(1) ("For police departments with fewer than six commissioned officers, including the police chief, the classified civil service and provisions of this chapter includes all full paid employees of the department of the city, town, or municipality."). Accordingly, Plaintiff was required to exhaust his administrative remedies before the Asotin Civil Service Commission prior to filing this lawsuit. *Allstot v. Edwards*, 116 Wash.App. 424, 430–31, 65 P.3d 696 (2003). Given that he did not do so, Defendants are entitled to summary judgment.

2. Plaintiff Does Not Have a Viable Wrongful Discharge Claim

Plaintiff further asserts, apparently for the first time, that he was not required to exhaust his administrative remedies before the Asotin Civil Service Commission because he was wrongfully discharged in violation of public policy. *See* ECF No. 34 at 4 ("[W]hen a civil service commission has no mechanism for resolving claims for wrongful constructive discharges, a claimant will not be required to exhaust administrative remedies"). While it is true that Plaintiff was not required to exhaust his administrative remedies before filing a claim for wrongful discharge in violation of public policy, *see Allstot*, 116 Wash.App. at 433, 65 P.3d 696, there are no genuine issues of material fact to support such a claim in this case.

[5] To prevail on his wrongful discharge claim, Plaintiff must prove "(1) the existence of a clear public policy (the *clarity* element); (2) that discouraging the conduct in which he engaged would jeopardize the public policy (the *jeopardy* element); (3) that the public-policy-linked conduct caused the dismissal (the *causation* element); and, finally, (4) that the defendant has not offered an overriding justification for the dismissal (the *absence of justification* element)." *Cudney v. ALSCO, Inc.*, 172 Wash.2d 524, 529, 259 P.3d 244 (2011) (emphasis in original) (internal quotations, citations and modifications omitted).

[6] [7] [8] Further, because Plaintiff resigned his employment (as opposed to having been formally terminated), he must prove that he was constructively discharged. *See Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wash.App. 34, 43, 181 P.3d 864 (2008) ("A cause of action for wrongful discharge in violation of public policy may be based on either express or constructive discharge.") (internal quotation marks omitted). To prove constructive discharge, Plaintiff must establish that (1) Defendant engaged in deliberate conduct which made his working conditions intolerable; (2) a reasonable person in his position would have been forced to resign; (3) he resigned solely because of intolerable working conditions; and (4) he suffered damages. *Allstot*, 116 Wash.App. at 433, 65 P.3d 696; *Short v. Battle Ground Sch. Dist.*, 169 Wash.App. 188, 206, 279 P.3d 902 (2012). Intolerable working conditions may arise from "aggravating circumstances or a continuous pattern of discriminatory treatment" on the part of the employer. *Allstot*, 116 Wash.App. at 433, 65 P.3d 696. "Whether working conditions are intolerable is a question of fact and is not subject to summary judgment unless there is no competent evidence to establish the claim." *Id.*

[9] Here, Plaintiff contends that his working conditions were rendered intolerable by Defendant Miller's "micromanaging of the police department," and by his "having to be on call 24/7." ECF No. 34 at 4. Contrary to Plaintiff's assertions, these two circumstances do not amount to "aggravating circumstances or a continuous pattern of discriminatory treatment" *1166 for purposes of establishing intolerable working conditions. *See Allstot*, 116 Wash.App. at 433, 65 P.3d 696. First, there is no evidence that this treatment of Plaintiff was *discriminatory* in nature. Rather, from the evidence presented, it is reasonable to assume that a significant amount of oversight by the Mayor and/or burdensome on-call duties were simply attendant to Plaintiff's position as the Chief of Police. Similarly, these circumstances are by no means "aggravating." Again, being "micromanaged" by a top elected official and being "on call 24/7" are simply some of the unpleasant realities of serving as the Chief of Police in a small community. The Court finds that Plaintiff has failed to present competent evidence in support of his wrongful discharge claim and that no rational jury could find in his favor on the facts presented. *Allstot*, 116 Wash.App. at 433, 65 P.3d 696. Accordingly, Defendants are entitled to summary judgment.

C. Washington Public Records Act Claim

Defendants seek summary judgment on Plaintiff's claim under the Washington Public Records Act ("PRA") on two separate grounds. First, Defendants assert that Plaintiff failed to file the claim within the two year "catchall" statute of limitations applicable to such a claim. Second, Defendants argue that the documents at issue were beyond the scope of the materials described in Plaintiff's original public records request. For the reasons discussed below, both arguments fail.

1. *Statute of Limitations*

The statute of limitations on a PRA claim in Washington is either one or two years, depending upon the nature of the claim. A one-year statute of limitations applies to claims which are based upon (1) a state agency's claim of exemption from the PRA's disclosure requirements; or (2) an agency's "last production of a record on a partial or installment basis." RCW 42.56.550(6). A two-year statute of limitations applies to all other PRA claims. *Tobin v. Worden*, 156 Wash.App. 507, 514, 233 P.3d 906 (2010); *Johnson v. State Dep't of Corr.*, 164 Wash.App. 769, 777, 265 P.3d 216 (2011). Defendants concede that the two-year statute of limitations applies in this case. ECF No. 29 at 19.

[10] Here, there is no dispute that Plaintiff failed to file the instant lawsuit within two years of Defendant's June 16, 2009 response to his PRA request. However, Plaintiff maintains that the two-year statute of limitations on his claim was effectively tolled until approximately March or April of 2011,[2] when he discovered that Defendant had failed to produce the documents at issue. The Court agrees. Although there do not appear to be any reported cases directly applying the so-called "discovery rule" to PRA claims, applying the rule to the circumstances presented here is entirely reasonable. Plaintiff had no reason to suspect that any documents had been omitted from Defendant's June 16th disclosure until he stumbled upon *additional* documents obtained from Defendant by a third party. By logical extension, Plaintiff could not have filed the instant PRA claim until he discovered that these additional documents existed and that they had not been produced. Accordingly, the Court concludes that the two-year statute of limitations began to *1167 run sometime after March 18, 2011. Plaintiff's PRA claim, which was filed on March 9, 2012, is therefore timely.

2. *Scope of PRA Request*

Plaintiff submitted the following PRA request to the City of Asotin on May 20, 2009:

> We ask that you provide copies of all complaints made against office[r] Reed, all internal investigation reports, all training records, all evaluations and any other report or tangible inner office notes made regarding Officer Reed including but not limited to the Investigative report of the outside investigator from Walla Walla.

ECF No. 32–6.

The City responded to Plaintiff's request on June 16, 2009, by submitting 115 pages of responsive documents. ECF No. 42 at ¶ 14. The City's response, however, did not include two email messages dated May 11, 2009, and May 20, 2009. ECF No. 42 at ¶ 20. The May 11th email is a message authored by City of Asotin Mayor Defendant Jim Miller. It reads, in pertinent part:

> I met with [Shannon] Grow to hear her concerns [about Plaintiff][3] a few weeks ago. Ms. Grow apparently wishes to add to her complaint. I wish to avoid the appearance [of] special access and would like one of the committee members (Vikki or Mervin) to meet with myself and Ms. Grow. We can discuss this matter further this evening. This may be one for executive session ... [City Attorney] Scott [Broyles] can advise.

ECF No. 40–1.

The May 20th email is a follow-up message from City of Asotin Clerk/ Treasurer Ellen Boatman to Defendant Miller. It reads:

> Jim—Vikki is ill and cannot make the 4:00 pm meeting today with Shannon Grow. Would you like me to contact Mervin and see if he can make it or would you like me to reschedule?

Defendant Miller responded:

> Please reschedule ... ? Tuesday. You may inform her of [Plaintiff's] departure if she still sees a need of meeting.

ECF No. 40–1.

[11] Defendants contend that these two emails are beyond the scope of Plaintiff's public records request. The Court disagrees. Contrary to Defendants' assertions, these emails are not "simply scheduling notes concerning meetings." ECF No. 39 at 15. Rather, these emails memorialize the fact

that a citizen who had previously complained to the City about Plaintiff wished to either make additional allegations or expand the scope of her existing complaint. Although the email is not a complaint against Plaintiff in and of itself, it does memorialize the fact that an additional or new complaint had been or was about to be lodged. It also qualifies as a "tangible inner office note[ ] made regarding Officer Reed." As such, the email falls within the scope of Plaintiff's records request and should have been produced. Defendants' motion for summary judgment on this claim is denied.

***1168 D. FLSA, FOIA, Breach of Contract, and IIED Claims**

Plaintiff indicated in his briefing that he is no longer pursuing claims under the Fair Labor Standards Act or the Freedom of Information Act. ECF No. 34 at 2. His counsel further indicated at oral argument that Plaintiff has abandoned his claims for breach of contract and intentional infliction of emotional distress. Accordingly, these claims will be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED:

Defendants' Motion for Summary Judgment (ECF No. 28) is **GRANTED in part and DENIED in part.** Plaintiff's claim under the Washington Public Records Act will proceed to trial. The following claims are dismissed with prejudice:

1. Minimum Wage Act;
2. Violation of Civil Service Rules (Wrongful Discharge);
3. Fair Labor Standards Act;
4. Freedom of Information Act;
5. Breach of Contract; and
6. Intentional Infliction of Emotional Distress.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

Footnotes

1 Although neither party has raised the issue, it appears that the executive exemption would only apply *after* September 10, 2008, the date on which the Asotin Police Department hired Officer Mike McGowan, raising the number of Plaintiff's subordinates from one to two.

2 The record does not establish the precise date on which Plaintiff discovered the existence of the two documents in question. Plaintiff testified during his deposition that he discovered the documents in approximately March or April of 2011 after Defendant produced them to a third party on March 18, 2011. *See* ECF No. 38 at Tr. 172–78.

3 Although this message does not specifically reference Plaintiff, it was written in response (*i.e.*, was a "reply" to) an email from Ellen Boatman to Mayor Miller which reads: "When you get a chance, give me a call concerning Shannon Grow, the lady you met with *concerning Lee.*" ECF No. 40–1 (emphasis added). When read in this context, Defendant Miller's response can be understood to reference Plaintiff.

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 13, 2015 1:51 PM
To: 'Williams, Mary A.'
Cc: 'matt@impactlawgroup.com'; 'carolyn.bilanko@bgllp.com'; 'jbilanko@gordonrees.com'; Reimers, Milt A.; Rothrock, Averil; Costich, Larry
Subject: RE: Supreme Court No. 91247-5/Reply in Support of Motion to Expedite

Received 4-13-2015.

From: Williams, Mary A. [mailto:MAWilliams@SCHWABE.com]
Sent: Monday, April 13, 2015 1:37 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'matt@impactlawgroup.com'; 'carolyn.bilanko@bgllp.com'; 'jbilanko@gordonrees.com'; Reimers, Milt A.; Rothrock, Averil; Costich, Larry
Subject: Supreme Court No. 91247-5/Reply in Support of Motion to Expedite

Dear Clerk:

Attached please find *Barclay Court's Reply Supporting Motion to Expedite Direct Review, including Consideration Whether to Accept Direct Review* to be filed with the Court.

Thank you,

Mary

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