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No. 71328-1

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of

MITCH MICHKOWSKI

MITCH MICHKOWSKI, a single man,

Plaintiff - Appellant,

v.

SNOHOMISH COUNTY,

Defendant - Defendant.

PETITION FOR REVIEW

Rodney R. Moody, WSBA # 17416
Attorney for Appellant
2825 Colby Ave., Ste. 302
Everett, WA 98201
(425) 740-2940

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A. Identity of Petitioner

COMES NOW the Petitioner, Mitch Michkowski, by and through his attorney, Rodney R. Moody, and hereby request this Court accept review of the decision designated in Part B of this motion.

B. Court of Appeals Decision

The Petitioner seeks review of the Court of Appeal's ruling upholding the Trial Court's granting of summary judgment as to the wrongful termination cause of action, dated February 17, 2015.

C. Issues Presented for Review

1. Did the Court of Appeals apply the correct legal standard under CR 56(c).
2. When one of several decision makers who possess direct knowledge of the employees protected activities is both present and participates in the decision to terminate the employee is that decision-makers knowledge imputed under agency principles to the group of decision-makers as a whole.

D. Statement of the Case

The Appellant, Mitch Michkowski was hired as the Court Administrator for the Snohomish County District Court in January 2012. CP 453. Immediately after being hired he attended a meeting

attended by all eight Judges of the Snohomish County District Court. CP 458-461. During this meeting a discussion was held regarding the idea of arming the court room bailiffs because of safety concerns. CP 458-459. This put Michkowski on notice that safety was an ongoing issue within the court system and as the court administrator it was his responsibility to address this issue. CP 136-139.

Michkowski's immediate supervisor was then Presiding Judge Tam Bui. The Presiding Judge and the Court Administrator established regularly scheduled meeting on Tuesdays of each week at which time all issues regarding the court were discussed. CP 76. Safety-related issues were the subject of discussion with Presiding Judge Bui over numerous weekly meetings during his employment. CP 76

In August 2012, two separate safety-related issues occurred within the court system in which an individual ordered to be placed under arrest and held for law enforcement physically escaped from custody from the District Court's Evergreen Courthouse. CP 152-158. Because of the safety related issues, Michkowski authored a memorandum on August 23, 2012, which he presented to Presiding Judge Bui. CP 141-142. Presiding Judge Bui was asked to initial for receipt of a copy of this memorandum, which she declined to do. CP 77. Michkowski then forwarded the memorandum to her by email. CP

144. Presiding Judge Bui responded by sending a terse email to Michkowski on August 22, 2012, which in a very brusque manner directed him to find an alternative method of filing such documents in the future. CP 144. Presiding Judge Bui's email directly addressed the safety memorandum. A copy of this email without the memorandum attached was forwarded to Judge Ryan on August 24th. CP 449.

The protocol established by the Snohomish County District Court was that Michkowski as the Court Administrator was directed to first present issues he felt needed to be raised, courtroom safety being a clear example, with the Presiding Judge who at the time happened to be Judge Bui. It is undisputed by all parties that Michkowski specifically followed this protocol as directed. He raised the safety related issues directly with his immediate supervisor, Presiding Judge Bui. It is also acknowledged by all parties that he did not specifically discuss the safety-related issues with any other Judge because he was not authorized to do so by Presiding Judge Bui. It was Presiding Judge Bui's responsibility to bring the safety-related issues to the attention of the other sitting Judges.

Presiding Judge Bui was specifically questioned regarding the August 23, 2012, memo regarding safety issues. On receipt of the memorandum she testified at her deposition, "My impression was at

that time I was very irritated, not only because I'm being asked to initial memo, and I was thinking at the time, to assure that I received it." TB Dep., pg. 160-161, ln. 24-2. Presiding Judge Bui acknowledged that courtroom safety was an area that fell in her, as well as every other District Court Judge's area of responsibility. TB Dep., pg. 162, ln. 13-17. As it relates to Michkowski's memorandum she also testified, "He is presenting me with an issue of bailiff security that's been an ongoing discussion for years, and I would not disagree with you that it is as a serious issue. People's safety and security is a very serious issue." TB Dep., pg. 162-163, ln. 23-2. Presiding Judge Bui also testified at being frustrated and angry when Michkowski forwarded her the August 23rd memorandum by e-mail as well. TB Dep., pg. 165, ln. 11-23.

Presiding Judge Bui acknowledged forwarding a copy of her responsive e-mail dated August 24, 2012, to Michkowski to Judge Ryan as well. She also acknowledged having multiple discussions with Judge Ryan regarding Michkowski during the course of his employment.

On December 5, 2012, seven of the Judges of the District Court held a meeting to discuss the continued employment of Michkowski as the Court Administrator. CP 450. Only Judge Fisher was not present. Michkowski was approaching his one-year anniversary and the Judges

wished to address their concerns prior to this anniversary. Both Presiding Judge Bui and Judge Ryan were present at this meeting. Following a discussion in which all Judges participated six of the seven present Judges voted to terminate Michkowski's employment. Presiding Judge Bui herself abstained from voting. CP 450.

The Appellant filed this Complaint alleging a wrongful termination cause of action. CP 554-561. On November 20, 2013, the Defendants filed a motion for summary judgment. CP 525-542. This motion was untimely as discovery had not yet been completed and Michkowski filed a motion for a continuance of motion for summary judgment. CP 281-285, 311-315. This motion was heard on December 6, 2013 and a continuance of only two days was granted from the original date of December 18th to December 20th. CP 180. Michkowski then filed a timely response to Defendants motion for summary judgment. CP 162-178. On December 20, 2013, Judge Dingledy of the Snohomish County Superior Court without comment or explanation granted summary judgment. CP 9-11. On February 17, 2015, the Court of Appeals issued their finding in an Unpublished Opinion affirming the Trial Court's granting of summary judgment for the Defendant Snohomish County. The Appellant filed a Motion for

Reconsideration, which was denied on March 30, 2015. This Petition follows.

CR 56(c) STANDARD

In ruling on a motion for summary judgment, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom in the manner most favorable to the nonmoving party. Meissner v. Simpson Timber Co., 69 Wn.2d 949, 951, 421 P.2d 674 (1966). It is not the function of the trial court to weigh the evidence presented, and summary judgment must be denied if a right of recovery is indicated under any provable set of facts. Smith v. Acme Paving Co., 16 Wn.App. 389, 392, 559 P.2d 811 (1976); Fleming v. Smith, 61 Wn.2d 181, 390 P.2d 990 (1964). The court must also consider that the beneficial effect of summary judgments to dismiss unfounded claims must be employed with caution lest worthwhile causes be dismissed short of a determination of the true merit. Smith, supra at 392; Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960).

E. Argument

Acceptance of review is appropriate pursuant to RAP 13.4 (2) if a decision of the Court of Appeals is in conflict with another decision of the Court of Appeals.

ACTUAL KNOWLEDGE

All parties agree that to establish a retaliation claim the claimant must establish that he engaged in protected activity, he was discharged from employment, and there is a causal connection between the protected activity and the discharge. Kaiser Aluminum v. Washington Fruit and Produce, 118 Wn.2d 46, 68, 821 P.2d 18 (1991). Snohomish County concedes the first two elements. The only issue in dispute is whether the Judges present on December 5, 2012, when the decision was made to terminate Michkowski's employment had actual knowledge of his protected activity. The evidence submitted in response to the motion for summary judgment shows the answer to this question is yes, they did have actual knowledge.

Actual knowledge is established in this case because Presiding Judge Bui had direct personal knowledge of Michkowski's protected activities and was both present and a participant in the conversation regarding his termination on December 5th. The Court of Appeals in their Unpublished Opinion stated:

> While Michkowski is correct that he may rely upon circumstantial evidence and reasonable inferences, he cannot rely on mere speculation or a hunch that the decision-maker's new of his exercise a protected conduct. It is pure speculation to infer that a person having knowledge of an employee's protected activity actually told the decision maker about the protected activity.

Opinion, Pg. 10.

The legal error committed by the Court of Appeals is the refusal to acknowledge the undisputed fact that Presiding Judge Bui *is herself one of the decision makers*. The fact that she chose to abstain is legally irrelevant and no authority has been presented to the contrary. No authority in the State of Washington or any federal decision has been located which holds that when one of several decision-makers with equal authority regarding an employee's continued employment is physically present and a participant in the decision to terminate employee's employment that the plaintiff must demonstrate that this decision maker told the other decision makers of his/her relevant knowledge.

The Court of Appeals cited Mulhall v. Ashcroft, 287 F3d 543 (6th Cir. 2002) for the proposition that "specific facts" are required to establish actual knowledge. As pointed out in the Motion for Reconsideration the Mulhall Court stated the following language which the Court of Appeals chose to ignore:

> In most Title VII retaliation cases, the plaintiff will be able to produce direct evidence that the decision-making officials knew of the plaintiff's protected activity. In many cases, for example, the adverse action will be taken by the same supervisor to whom the plaintiff has made complaints in the past.
> Id. at 552

The adverse action taken in this case, the termination of Michkowski's employment, was decided at the meeting on December 5th at which Presiding Judge Bui was both present and a participant. The very authority cited by Division One actually supports the argument made by Michkowski.

Michkowski followed the protocol which he was directed to follow by his employers, he brought his safety related concerns directly to his immediate supervisor, Presiding Judge Bui. Presiding Judge Bui if her fellow Judges are to be believed then failed in her responsibility to notify the remaining Judges of their Court Administrator's legitimate safety concerns. Concerns for which it must be noted the Department of Labor and Industries ultimately fined Snohomish County. Now Snohomish County seeks the protection of its failure to comply with their own internal policies to support the argument that these Judges lacked knowledge of Michkowski's protected activities so this case should be dismissed.

The Court of Appeals also mistakenly relies upon Cordoba v. Dillards Inc., 419 F3d 1169 (11th Cir. 2005) to support its decision Michkowski failed to establish actual knowledge. A careful review of this case demonstrates that it actually supports Michkowski's argument. In the Motion for Reconsideration this case was discussed in some detail and it was pointed out to the Court the error of their reliance upon this case.

Cordoba does not support the Appellate Court's decision because in Cordoba the decision-maker who terminated Cordoba, Kathy Groo, did not possess knowledge of Cordoba's disability prior to terminating her employment. As was pointed out in the Motion for Reconsideration Presiding Judge Bui as a decision-maker was legally in exactly the same position as Ms. Groo. The salient difference is that Groo lacked direct knowledge of the employee's disability while Presiding Judge Bui *did* possess direct knowledge of Michkowski's safety related activities.

In virtually every case cited by either the Respondent or the Court of Appeals in support of the proposition that the decision-maker must possess actual knowledge the relevant decision-maker lacked direct knowledge of the employees protected activity. This is directly at odds with the facts of the present case because the relevant decision-maker did have direct personal knowledge of Michkowski's safety related activities.

AGENCY

This Court's rejection of Kimbro v. Richfield, 889 Fed.2d 869 (9th circuit 1989) to establish the agency argument is legally misplaced. In Cordoba that Court stated Kimbro was "not on point" for two reasons. First, Cordoba noted that Kimbro addressed a question of reasonable accommodations, not discriminatory discharge and therefore did not apply. Id. at 1184. The Court in Cordoba made this broad statement, but

failed to cite to any authority supporting this distinction. Similarly, Division One after acknowledging that well settled agency principles exist in Washington State that a principal is charged with notice to an agent when the agent receives the notice while acting the scope of his or her authority as an agent, then states, "but this does not apply in a retaliatory discharge." As in Cordoba, Division One fails to cite to any authority to support this position.

The second reason given by the Court in Cordoba for disregarding the ruling in Kimbro was because it was determined that management in the Cordoba case lacked knowledge of Cordoba's disability. Once again, this is factually distinguishable because management of the Snohomish County District Court, i.e. Presiding Judge Bui did in fact have direct knowledge of Michkowski's safety related activities. Knowledge possessed by Presiding Judge Bui is as a matter of fact knowledge possessed by management of the Snohomish County District Court.

The Cordoba Court noted that "Arco was essentially arguing that it could avoid liability because his own internal policies had broken down." Cordoba supra at 1184. That is exactly the argument made in this case. As was pointed out in the Motion for Reconsideration Michkowski followed the protocol of the Snohomish County District Court as directed and reported safety concerns to his immediate supervisor, Presiding Judge

Bui. It was her responsibility to bring this to the attention of his or her fellow judges. Essentially Respondent's argue that because Presiding Judge Bui failed in her responsibility to forward Michkowski's clearly legitimate safety concerns they are isolated from liability because of this circumstance.

Michkowski is entitled to have the Snohomish County Superior Court and Division One apply the same CR 56 standard the same as every other litigant in this State is entitled. The fact that the Defendants in this case happen to be a group of District Court Judges does not alter this standard. When Division One cites the fact that six members of the Snohomish County District Court all signed a declaration stating that they did not have knowledge of Michkowski's safety related concerns and placed considerable weight on these declarations what that Court is in effect doing is weighing the evidence against Michkowski. In a motion for summary judgment the court is not permitted to "weigh" the evidence. By doing so Division One has committed legal error. Smith v. Acme, supra at 392.

Summary judgment is to be denied if there is any provable set of facts present. In this case it is undisputed that Presiding Judge Bui was angry when she received the August 23rd memorandum from Michkowski. It similarly cannot be credibly denied that there were significant

conflicting instructions given to Michkowski by the Judges regarding the budget directions. Significant inconsistencies have been established. A reasonable jury could conclude that given the inconsistencies of these judges regarding the directions communicated to Michkowski regarding the budget and the acknowledged anger expressed by Presiding Judge Bui after being presented with the August 23rd safety memorandum that the motivating factor for his termination was in fact retaliation for his safety related activities. To defeat a motion for Summary Judgment a respondent is simply required to produce a provable set of facts. Smith v. Acme, supra at 392. The response to a motion for summary judgment is a burden of production, not persuasion.

Judge Dingledy after stating she was going to grant the motion for summary judgment initially did not give one single word of explanation for her decision. When pressed as to the basis for her decision to grant the motion she simply uttered "I think it's speculative." Division One failed to acknowledge the fact that Presiding Judge Bui was both physically present and a participant in the December 5th meeting when the decision was made to terminate Michkowski's employment. The Unpublished Opinion of Division One virtually ignores this fact. Yet this is the central and clearly distinguishing fact in this case. Instead of acknowledging this fact a legally unsupported argument in made virtually without citation to

any credible authority that even when one of several decision making authorities who has direct knowledge of an employees protected activities and is both present and a participant in the decision to terminate an employee's employment this knowledge is not legally imputed to the remaining decision makers.

Respectfully, the Court of Appeals has misapplied the CR 56 standard. The Court is not permitted to "weigh" the evidence. Smith v. Acme, Supra at 392; Fleming, Supra. By noting and placing emphasis that the six Judges signed a sworn statement that they had no prior actual knowledge the Court in effect weighed their evidence and assumed the role of the jury; this is legal error. Further, summary judgment is to be denied if there are *any* provable set of facts present. Smith v. Acme, supra at 392. A reasonable jury could conclude that when Presiding Judge Bui received the safety related memorandum from Michkowski then immediately forwarded a terse response to Michkowski, and was sufficiently upset that she immediately forwarded this email to Judge Ryan; that Presiding Judge Bui's actions, and that of her fellow judges, were retaliatory in nature. CP 141-142, CP 518

F. Conclusion

Regardless of whether these six judges claim to have no actual knowledge; their claims cannot dismiss the specific fact that their

Presiding Judge who they designated to receive the exact type of information Michkowski conveyed and which all parties agree is protected activity was both present and a participant in the discussion regarding the termination of his employment. Whether she conveyed this information is a material fact that is in dispute and for a jury to decide, not the trial court or the Court of Appeals on a motion for summary judgment. The Court is *not* permitted to weigh the evidence presented. The Court is required to consider the evidence in the light most favorable to Michkowski, the non-moving party. The Court is required to deny summary judgment if there is *any* provable set of facts.

Respectfully, to ignore the fact that Presiding Judge Bui was both present *and* participated in the December 5th meeting while possessing direct actual knowledge of Michkowski's stated safety concerns for over two months prior to this meeting is to willfully disregard the specific facts presented. A prima facie case is clearly established under these specific facts and the granting of summary judgment is legal error.

Plaintiff specifically requests that the Court accept review of the decision of the Court of Appeals and reverse the decision to uphold the granting of summary judgment for the wrongful termination cause of action.

RESPECTFULLY SUBMITTED this 27 day of April, 2015.

Rodney R. Moody, WSBA #17416
Attorney for Appellant

APPENDIX A

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

MITCH MICHKOWSKI, Appellant, v. SNOHOMISH COUNTY, Respondent.	)	No. 71328-1-I
	)	UNPUBLISHED OPINION
	)	FILED: February 17, 2015

VERELLEN, J. — Mitch Michkowski, who was fired from his job at Snohomish County District Court (District Court), appeals the trial court's order of summary judgment dismissing his Washington Industrial Safety and Health Act (WISHA)[1] retaliatory discharge claim against the county. He contends that there were disputed issues of fact about whether the judges who voted to fire him knew that he had raised issues about bailiff safety before they decided to fire him. Because he fails to produce any evidence that the judges had such actual knowledge, he cannot establish a prima facie case of retaliatory discharge. Summary judgment was proper. We affirm.

FACTS

On January 9, 2012, Michkowski began work in his new position as director of administration for Snohomish County District Court. Michkowski was hired by the eight judges who serve in the four divisions of Snohomish County District Court. The

[1] Ch. 49.17 RCW.

director's duties include preparing the District Court budget, managing the nonjudicial operations of the court, attending judges' meetings and otherwise acting under the direction of the District Court judges. The director serves at the pleasure of all of the District Court judges and is an at-will position.

On January 13, 2012, Michkowski attended his first judges' meeting. The judges discussed an advisory memorandum from the civil division of the Snohomish County Prosecuting Attorney's Office discussing safety and risk issues involving District Court bailiffs carrying firearms while performing their duties. That memorandum was issued on January 4, 2012, before Michkowski was hired, and was the result of an ongoing conversation between the judges and the civil division about the issue. The memorandum recommended that the District Court either discontinue the practice of allowing bailiffs to carry firearms or require them to obtain firearm certification and training. At the meeting, the judges adopted the recommendation to prohibit bailiffs from carrying firearms. Michkowski did not participate.

As director, Michkowski was responsible for submitting budget recommendations to the judges, preparing budget proposals as directed by the judges, preparing and presenting the budget approved by the judges to the county executive and county council, and informing the judges of the budget status throughout the year. As part of this process, the budget committee requires the director to draft "priority packages," which are requests to fund additional positions or programs for the coming fiscal year. The director is expected to prepare priority packages that reflect the bench's budgetary requests.

On June 19, 2012, the budget committee met and Michkowski presented his recommendation that the District Court request funding for a payroll, purchasing and accounting coordinator, and a trainer position for the 2013 fiscal year. The judges on the committee rejected his proposal and directed him instead to submit a budget priority package requesting funding for two legal process assistant positions.

On June 20, 2012, Michkowski e-mailed the budget committee and indicated that he was going to submit a priority package for an accounting coordinator position, as he had proposed. In a reply e-mail, Judge Ryan instructed him not to submit a priority package with this request because the committee had already rejected that proposal.

On July 3, 2012, Michkowski submitted the District Court budget to the county executive and included a priority package requesting an accounting coordinator in place of one of the legal process assistant positions requested by the judges. On July 5, 2012, after discovering what he had submitted, the judges immediately directed Michkowski to amend the submission to accurately reflect the decisions of the budget committee. He resubmitted a revised priority package for the two legal process assistant positions.

On July 13, 2012, Judges Ryan and Bui met with Michkowski to discuss his submission of the priority package with a request for an accounting coordinator when the budget committee had rejected this proposal. They also asked him if he misunderstood the judges' instructions. He said that he had not misunderstood, but offered no explanation for his actions. On July 27, 2012, Judge Bui issued a written reprimand to Michkowski about his performance on the budget submission. Michkowski

acknowledged receipt of the reprimand and stated he "wish[ed] to remain voiceless" about the content.[2]

Also in July 2012, Michkowski pursued a pilot project to bring an outside vendor, AllianceOne, into the south division of the District Court to act as a collection agent for fines imposed by the court. AllianceOne is a for-profit corporation that collects for other entities and acts on their behalf by filing contested matters in the District Court and appearing before the District Court judges. Judges Ryan and McRae objected to the AllianceOne project because they believed having a for-profit collection agency in the courthouse would affect the appearance of judicial impartiality. Judge McRae also had concerns that allowing on-site collections would violate a judicial ethics opinion relating to the lease of space by a for-profit entity on the same premises as a court. For these reasons, the judges of the south division voted against the proposal and told Michkowski not to pursue it.

On August 20, 2012, Judge Ryan and Judge Bui met with Michkowski to review a list of performance expectations. The judges reminded Michkowski that he needed to update presiding Judge Bui about his projects and activities. The judges also made clear that although Judge Bui supervised Michkowski, he worked for all of the judges and was responsible for following all of their directives. They further discussed Michkowski's budget duties, monitoring of court operations, and interactions with outside entities.

On August 21, 2012, Michkowski met with an AllianceOne representative and Lyndsey Downs, the deputy prosecuting attorney assigned to advise the District Court,

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[2] Clerk's Papers (CP) at 504.

to discuss the collections project. Michkowski had not told Downs that the south division judges had already rejected the collections proposal. After the meeting, Downs contacted Judge Ryan and expressed concerns about the project. Judge Ryan was surprised to hear that Michkowski was still pursuing the project after the south division judges rejected his proposal, especially without first obtaining permission from Judge Bui to meet with Downs. Judge Ryan informed Judge Bui of what transpired, and on August 22, 2012, Judge Bui e-mailed Michkowski and instructed him to stop pursuing the collections project.

The next day, Michkowski presented Judge Bui with a memorandum addressing safety concerns related to bailiff duties to maintain order and security in the courtroom, lack of training for bailiffs to perform those duties, and potential liability for the court. Michkowski asked Judge Bui to initial a copy of the memorandum to acknowledge her receipt of it. Judge Bui declined to do so. Michkowski then sent Judge Bui the following e-mail and included the memorandum as an e-mail attachment:

> Judge Bui,
>
> Reflecting on our discussion earlier this afternoon regarding this topic (with regard to the document already being a public document by its very creation), I thought then that it might then make sense just to go ahead and send so that you'll have it electronically.
>
> In any case, I look forward to bringing you potential solutions that you can consider implementing.
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> Thanks again,
>
> Mitch[3]

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[3] CP at 516.

Judge Bui e-mailed back a terse response, stating:

> Perhaps you did not hear nor understand: I don't sign memos authored by you so that you can keep a record of it. That does not mean that you automatically place the document . . . in an email. Find your own record keeping procedure rather than relying on my signature.[4]

Judge Bui then forwarded to Judge Ryan the e-mail chain without the memorandum attachment.

In October 2012, Robert Veliz became the assistant director of District Court. Tensions arose between Veliz and Michkowski, and the judges became concerned with what they felt was an inappropriate amount of time Michkowski spent micromanaging Veliz. On October 17, 2012, Judges Goodwin and Bui met with Michkowski and Veliz about finding a way to work together.

Due to ongoing concerns about Michkowski's performance, the judges decided to discuss whether to continue his employment. In addition to the budget and collection project issues, the judges expressed their own frustrations with Michkowski's job performance, such as failing to deliver materials to judges meetings, exhibiting an arrogant and condescending manner toward judges, a controlling management style with the court staff, and pursuing projects they viewed as a waste of time (e.g., a photo gallery at the court) or that were not authorized (e.g., tracking affidavits of prejudice filed against the judges).

The judges set a special meeting for December 5, 2012. At that meeting, Judges Ryan, McRae, Goodwin, Lyon, Wisman and Clough voted to terminate Michkowski from his position. The two other judges, Judges Fisher and Bui, did not vote. Judge Fisher

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[4] Id.

was absent and Judge Bui abstained from the vote. On December 7, 2012, Judge Goodwin informed Michkowski of his termination.

On December 13, 2012, Michkowski filed a complaint with the Department of Labor and Industries (L&I), alleging he had been terminated for raising workplace safety issues involving bailiffs. After an investigation, L&I issued a citation to the county for two safety-related violations for lack of training for bailiff duties involving safety risks. But L&I dismissed Michkowski's complaint, concluding that there was insufficient evidence to substantiate the allegations that he suffered discriminatory action as defined by WISHA. The L&I investigation concluded:

> Complainant alleged becoming the recipient of discriminatory action after reporting safety and health issues to the Employer.
>
> The Employer denied allegations of discrimination while insisting Complainant's termination stemmed from a variety of reasons, none relative to his engagement into a safety-protected activity.
>
> Investigation failed to produce sufficient evidence to support the allegation that the Complainant was the recipient of discriminatory action. Investigation also determined the non-discriminatory reason for the action taken appeared consistent with the Employer's business operations.
>
> Based on the above facts and pursuant to RCW 49.17.160, this investigation failed to demonstrate a violation and was closed.[5]

Michkowski appealed the decision to the director of L&I. The director affirmed the decision, finding that the record did not establish discrimination under RCW 49.17.160.

On July 5, 2013, Michkowski filed his retaliatory discharge claim against the county. The county moved for summary judgment. The trial court granted summary judgment and dismissed the claims. Michkowski appeals.

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[5] CP at 323.

ANALYSIS

Michkowski contends that summary judgment was improper because there were issues of fact about whether the voting judges had knowledge of his complaint about bailiff safety, a fact material to establishing his retaliatory discharge claim. The record does not support this contention.

Summary judgment is proper when there is no genuine issue about any material fact and the moving party is entitled to judgment as a matter of law.[6] We construe the evidence in the light most favorable to the nonmoving party and review the ruling based solely on the record before the trial court at the time of the summary judgment motion.[7] A party challenging summary judgment may not rely upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial.[8]

RCW 49.17.160(1) prohibits the discharge of an employee "because such employee has filed any complaint . . . under or related to this chapter." Michkowski brought this WISHA retaliatory discharge action claiming that he was discharged for raising workplace safety issues relating to bailiff security in the courtroom. To establish a prima facie case for retaliatory discharge in this context, Michkowski must show

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[6] CR 56(c).

[7] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); RAP 9.12, Washington Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt., 121 Wn.2d 152, 163, 849 P.2d 1201 (1993).

[8] CR 56(e); McBride v. Walla Walla County, 95 Wn. App. 33, 36, 975 P.2d 1029, 990 P.2d 967 (1999).

(1) that he filed a complaint related to WISHA, (2) that he was discharged, and (3) that there is a causal connection between the complaint and the discharge.[9]

The parties concede that the first two elements have been established and only dispute causation. Michkowski contends that there are issues of material fact on the causation element, specifically whether the judges who voted to discharge him had actual knowledge that he made the complaint. We disagree.

To show the requisite causal link, the plaintiff must present sufficient evidence that the protected activity was the likely reason for the adverse employment action.[10] "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity."[11]

As the county contends, the undisputed evidence in the record does not establish such actual knowledge. The record establishes only that Judge Bui was aware of Michkowski's complaint about bailiff safety and that she abstained from the vote to discharge him. All of the voting judges submitted declarations stating they were not aware Michkowski had raised this issue until after he filed his complaint with L&I about a week after they voted to terminate him. Indeed, in his L&I complaint, Michkowski admitted that he did not raise the issue with any other judge, stating, "I reported my concerns to my reporting authority, the Presiding Judge (not the court at large, the county, or any other authority . . .)."[12]

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[9] See Wilmot v. Kaiser Aluminum, 118 Wn.2d 46, 68, 821 P.2d 18 (1991); Frisino v. Seattle School Dist, No. 1, 160 Wn. App. 765, 785, 249 P.3d 1044 (2011).

[10] Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982).

[11] Id.

[12] CP at 328.

While Michkowski is correct that he may rely upon circumstantial evidence and reasonable inferences, he cannot rely on mere speculation or a hunch that the decision makers knew of his exercise of protected conduct. It is pure speculation to infer that a person having knowledge of an employee's protected activity actually told the decision maker about the protected activity.[13] Michkowski offers no evidence to rebut the voting judges' sworn declarations that Judge Bui did not tell them about the memo before they voted to terminate him. Without such evidence, summary judgment was proper.[14]

Michkowski contends the record raises an issue of fact about whether the judges had actual knowledge. He first points to the first judges' meeting he attended when the issue of bailiff safety was addressed and the court voted to adopt the prosecuting attorney's recommendation to restrict the bailiffs' ability to carry firearms. But the record shows that he did not participate at all in that decision or otherwise voice his concerns about the issue. He also points to the fact that he and Judge Bui discussed his concerns during weekly meetings and that he raised the issue in his August 23, 2012 memorandum. But again, this evidence shows only that he raised the issue with Judge Bui, who did not vote.

Michkowski also points to the fact that Judge Bui forwarded the Bui-Michkowski e-mail exchange to Judge Ryan. But there is no evidence or inference that the safety memorandum was sent to Judge Ryan. The record does not show that any information about Michkowski's bailiff concerns were conveyed to Judge Ryan. Rather, the record

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[13] See Clover v. Total Systems Services, 176 F.3d 1346, 1355 (11th Cir. 1999) (concluding that "'could have told' is not the same as 'did tell.'")

[14] See Mulhall v. Adhcroft, 287 F.3d 543, 552 (6th Cir. 2002) (where employee failed to take depositions to rebut denials of knowledge of employee's protected activity, summary judgment was proper).

shows only that Judge Bui forwarded Michkowski's e-mail and her response without the memorandum attachment. Neither of the e-mails refers to the content of the memo or mentions Michkowski's safety concerns.[15] Rather, the e-mail exchange reflects only Judge Bui's frustration with Michkowski's methods of keeping track of her receipt of his memos.

Michkowski next refers to two incidents in August 2012 involving bailiff security that were the subject of his memorandum. These both involved bailiff Larry Skinner, who reported that he was assaulted by a defendant on August 1, 2012, and was required to call 911 for assistance with a defendant on August 21, 2012. Michkowski asserts that "[c]ertainly all of the Judges on the Snohomish County District Court were aware that these two safety-related issues occurred."[16] But Michkowski puts forth no evidence that *he* in fact complained to the judges about these incidents. The record shows only that Skinner made the report on his own behalf.

Michkowski also points to L&I's notes from an interview with bailiff Bill Hawkins as documentation that Michkowski "has voiced safety concerns on several occasions, and has made recommendations."[17] But it appears that the notes refer to Hawkins, not Michkowski, stating:

> He was not well acquainted with the Complainant [Michkowski], and asserted that Complainant did not acknowledge him. He further asserted he never had a conversation with the Complainant about anything, he never asked about his job duties, job description, or any safety issues.

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[15] His e-mail refers only to "our discussion earlier this afternoon regarding this topic." CP at 516.

[16] Br. of Appellant at 18.

[17] CP at 74.

> *He* reportedly has voiced safety concerns on several occasions, and has made recommendations. He stated in general he feels safe in performing his duties. Additionally, he suffered no adverse employment action for voicing his concerns.[18]

In any event, the notes do not establish actual knowledge of the voting judges. Absent any evidence of actual knowledge, Michkowski fails to establish a prima facie case of retaliatory discharge. Accordingly, summary judgment was proper.[19]

Michkowski further argues that even if the evidence does not establish that the voting judges had actual knowledge of his complaint about bailiff safety, they should be bound by Judge Bui's knowledge under agency principles. This argument is without legal basis. As the county correctly notes, Michkowski confuses knowledge of workplace safety issues in the context of the county's duty to its employees with the burden of proof in a retaliatory discharge claim based on a complaint of workplace safety.

Under well-settled agency principles, a principle is charged with notice to an agent when the agent receives the notice while acting in the scope of his or her authority of an agent.[20] But this does not apply in a retaliatory discharge. Michkowski relies on Kimbro v. Atlantic Richfield Company, where an employee was ultimately fired for absenteeism caused primarily by a disability, of which management claimed it was unaware despite the immediate supervisor's actual knowledge of the condition.[21]

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[18] Id. (emphasis added).

[19] See Mulhall, 287 F.3d at 552 (failure to produce any evidence to rebut denials of knowledge of employee's protected activity cannot defeat summary judgment); Newton v. Meijer Stores Ltd. P'ship, 347 F. Supp. 2d 516, 524 (N.D. Ohio 2004) (absent "specifics facts" establishing actual knowledge, summary judgment was proper).

[20] Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 876 (9th Cir. 1989).

[21] 889 F.2d 869, 874 (9th Cir. 1989).

The court held that because the immediate supervisor had a duty to report this information to management, this created a duty of the employer to accommodate the employee's disability.[22] Thus, for purposes of liability in this context, the supervisor's knowledge was imputed to management.[23] But in Kimbro, there was no claim of retaliatory discharge; rather, the issue of the employer's imputed knowledge was relevant only to the claim of the employer's failure to make reasonable accommodations for an employee's disability. Kimbro did not hold that such knowledge is imputed to the employer for purposes of establishing a retaliatory discharge claim.[24]

Here, the county is not claiming that it had no duty to respond to bailiff safety issues once raised by Michkowski. In fact, the county concedes it has such a duty as evidenced by the L&I citations for workplace safety violations. But it does not follow that this duty imputes knowledge to the judges who voted to discharge him for purposes of establishing a retaliatory discharge claim when there is no evidence those judges had actual knowledge of his complaint. This is precisely why L&I found the county in violation of workplace safety standards, but dismissed Michkowski's retaliatory discharge claim based on his complaint about these safety violations. As one court has recognized, "It simply defies logic to argue that [an employer's] 'real intention' was to fire [an employee]

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[22] Id.

[23] Id. at 872-73.

[24] See Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1184 (11th Cir. 2005) (distinguishing Kimbro in a discriminatory discharge case: "Kimbro plainly is not on point here . . . . [T]hat case was about reasonable accommodations, not discriminatory discharge.").

'because of' a disability [the employer] knew nothing about."[25] The knowledge of Judge Bui is not imputed to the judges who voted to terminate Michkowski.

Without evidence of actual knowledge, Michkowski fails to establish the causal connection necessary to make out a prima facie case of retaliatory discharge. Accordingly, we need not reach his further contention that there was sufficient evidence that the judges' stated reasons for his discharge were a pretext. As discussed above, the employer's motivation for the discharge only becomes an issue after a prima facie case is established.

We affirm.

WE CONCUR:

[25] Id.