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DIVISION II

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STATE OF WASHINGTON

Case No. 45087-9-II

DEPUTY

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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MARGARITA MENDOZA de SUGIYAMA,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON,

Defendant/Respondent,

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ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT

(Hon. William T. McPhee)

(Hon. Gary R. Tabor)

Case No. 11-2-01374-7

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**REPLY BRIEF OF APPELLANT**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ARGUMENT .....	3
A.	The State Mischaracterizes and Omits Key Facts, Which Are Taken in the Light Most Favorable to Plaintiff at Summary Judgment.....	3
a.	Plaintiff Reported Improper Governmental Action, Discrimination, and Retaliation in Her Whistleblower Letters.....	4
b.	The Proposed Move of the ICRB to HR Was Not “In Response to State-wide Budget Cuts”.....	7
c.	The State Mischaracterizes Plaintiff’s “Extinction List” and “Big Head” Comment.....	8
d.	Plaintiff Did Not Interfere with the Cordon Investigation .....	10
B.	Reinmuth Cut Plaintiff’s Direct Supervisor, Brenda Nnambi, Also a Woman of Color, Completely Out of the Loop with Regard to Murinko’s Complaints about Plaintiff, the Decision to Place Plaintiff on Administrative Reassignment and Then to Terminate Her .....	12
C.	Plaintiff Need Not Show that the Auditor Initiated An Investigation in Order to Properly Assert a State Employee Whistleblower Retaliation Claim .....	15
D.	The Trial Court Abused Its Discretion When It Denied Plaintiff’s Motion to Compel Emails To and From Twelve Key Witnesses .....	19
III.	CONCLUSION .....	21

## TABLE OF AUTHORITIES

### State Cases

<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000).....	5
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 23 P.3d 440 (2001).....	9
<i>King v. Rice</i> , 146 Wn. App. 662, 191 P.3d 946 (2008).....	9

### Federal Cases

<i>Chen v. City of Medina</i> , C11-2119 TSZ, 2013 WL 392707 (W.D. Wash. Jan. 31, 2013).....	18
<i>Marable v. Nitchman</i> , 262 Fed.Appx. 17 (9th Cir. 2007).....	19
<i>Staub v. Proctor Hosp.</i> , 131 S.Ct. 1186 (2011).....	14
<i>Zubulake v. UBS Warburg LLC</i> , 217 F.R.D. 309 (S.D.N.Y. 2003).....	20, 21

### State Statutes

RCW 42.40 .....	7, 17, 18
RCW 42.40.010 .....	17
RCW 42.40.020 .....	5, 15, 17, 18
RCW 42.40.040(1)(a) .....	11, 16
RCW 42.40.050 .....	3
RCW 49.60.210 .....	6

**I. INTRODUCTION**

Plaintiff Margarita Mendoza de Sugiyama is the kind of civil rights leader any public agency is lucky to have, despite the State's gross mischaracterization of her last year of employment with WSDOT. She stood up for what she believed in and fought hard to maintain the independent, unbiased, neutral role of the Internal Civil Rights Branch she oversaw. OEO Director Brenda Nnambi agreed with Mendoza de Sugiyama that the ICRB should not be moved under the Human Resources Office, headed by Kermit Wooden, an individual Nnambi and Plaintiff saw as hostile to women, including themselves, and unconcerned with OEO's Affirmative Action and diversity goals.

The State's responsive brief misstates or omits numerous key facts and attempts to draw inferences in its own favor, which is not the standard at summary judgment. Plaintiff complained about Wooden's hostile and demeaning treatment of her for years. Chief of Staff Steve Reinmuth knew of Plaintiff's concerns about Wooden, yet he actively sought to take away the ICRB's independence and place it under HR. Plaintiff and Nnambi believed the move was not only bad policy, but that it was a violation of federal regulations and prior Washington precedent mandating that OEO be independent and maintain a direct reporting relationship to

the WSDOT Secretary. Reinmuth did not consult Nnambi or Plaintiff prior to proposing the move, but when they were notified, they worked within their chain of command to try to convince Reinmuth that ICRB should not be placed under HR.

After Reinmuth ignored their concerns, Plaintiff wrote letters to the Governor, the Governor's Chief of Staff, and finally to the Federal Highway Administration. She articulately and earnestly expressed her objection to the proposed move and to Reinmuth and Wooden's mistreatment of her. The independent investigator WSDOT hired to investigate Plaintiff's complaints, and Murinko's complaints against Plaintiff, relied on information from biased supervisors Wooden and Reinmuth. Reinmuth then relied on the investigator's report in recommending Plaintiff's termination to Secretary Hammond. He cut Nnambi, Plaintiff's direct supervisor, completely out of the loop in deciding to terminate Plaintiff. Two weeks after Plaintiff's termination, Hammond terminated Wooden after three Caucasian female HR managers complained of the same mistreatment Plaintiff had complained of for years. In crafting its defense against Wooden's lawsuit, *the State used Plaintiff as an example of Wooden's hostile and discriminatory treatment of women.*

Plaintiff established a *prima facie* case for her race and gender discrimination, hostile work environment, and WLAD retaliation<sup>1</sup> claims at summary judgment. She also established a rebuttal presumption under RCW 42.40.050 that the State engaged in whistleblower retaliation when it terminated her after she made good faith complaints of improper governmental action to the appropriate State authorities. Plaintiff rebutted each and every pretextual reason the State asserted for her termination. The trial court erred when it granted summary judgment in favor of the State. Upon *de novo* review, this Court must remand the case for trial on all of Plaintiff's WLAD and whistleblower retaliation claims. Lastly, the trial court abused its discretion when it denied Plaintiff's limited discovery requests for emails to and from twelve key witnesses because the emails were already compiled by the State and could have easily been reviewed for privilege by employing key word search terms.

## II. ARGUMENT

### A. **The State Mischaracterizes and Omits Key Facts, Which Are Taken in the Light Most Favorable to Plaintiff at Summary Judgment**

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<sup>1</sup> On appeal, the State notes that Plaintiff did not assert WLAD retaliation claims in her original or first amended complaint, but that the "implied" claims were considered at summary judgment. Resp. Br. at 44, n.14. Prior to the Court's summary judgment ruling, Plaintiff moved to amend her complaint to more explicitly state a WLAD retaliation claim. Dkt. No. 175. The State did not oppose Plaintiff's motion to amend, but the trial court never issued a ruling. Dkt. No. 176. Plaintiff is filing a supplemental designation of clerk's papers along with this reply brief to designate the motion to amend and response.

**a. Plaintiff Reported Improper Governmental Action, Discrimination, and Retaliation in Her Whistleblower Letters**

Mendoza de Sugiyama's letters to the Governor, the Governor's Chief of Staff, Jay Manning, the Federal Highway Administration, and the State Auditor's Office concerned reports of improper governmental action and were made in good faith. The State does not contest Plaintiff's good faith basis for believing that moving the ICRB to HR would be a violation of federal law. The fact that Plaintiff's letters may have also contained personnel issues and complaints of gender discrimination does not negate the improper governmental actions she reported.

The first paragraph of Plaintiff's letter to the Governor states that the proposed move of the ICRB to HR is "contrary to the Code of Federal Regulations." CP 1245. Plaintiff wrote:

In my role as the Washington State Department of Transportation (WSDOT) Diversity Programs Administrator (DPA) reporting to the Office of Equal Opportunity (OEO) Director Brenda Nnambi, it saddens me that after 25 years of service as a manager in state government I find myself in a situation that requires your assistance. I write this letter in hopes of bringing transparency and accountability to decisions being made at the WSDOT to decentralize the civil rights functions of the OEO, *which is contrary to the Code of Federal Regulations required of state transportation agencies and the Federal Highways Administration (FHWA) Office of Civil Rights National Baseline Assessment (Attachment #1).*

CP 1245 (emphasis added). "Attachment #1" to Plaintiff's letter was the

Final Report for the National Civil Rights Program Baseline Assessment.

CP 1250. That report states, in part:

A “civil rights unit” high enough in the organization with direct access to the chief administrative officer (CAO) and with sufficient authority to ensure nondiscrimination in all program areas is required by the regulations. The basis for this requirement is to assure that personnel in a State civil rights office do not encounter conflicts of interest or intimidation while implementing and overseeing civil rights programs and investigating complaints across the State and in State programs.

CP 1250-51. As Mendoza de Sugiyama noted in her letter, moving the ICRB under HR would remove this “direct access to the chief administrative officer” because OEO would report to HR, not directly to the WSDOT Secretary. Even if Plaintiff were mistaken about this violation, her report was made in good faith. RCW

42.40.020(10)(a)(i)(defining a “whistleblower” as “An employee who in good faith reports alleged improper governmental action to the auditor or other public official...”); RCW 42.40.020(6)(a)(improper governmental action includes a violation of federal law). Good faith “means the individual providing the information or report of improper governmental activity has a reasonable basis in fact for reporting or providing the information.” RCW 42.40.020(3), *Ellis v. City of Seattle*, 142 Wn.2d 450, 461-62, 13 P.3d 1065 (2000) (citing RCW 42.40.020’s good faith



requirement). Plaintiff's letter to the Governor was copied to the Attorney General and read by WSDOT Secretary Hammond. CP 1037, 1249.

In her letter to the Governor, Plaintiff also *clearly* put the State on notice of Wooden's gender discrimination and hostile work environment towards Mendoza de Sugiyama and other women. CP 1246. Plaintiff was actively opposing her own discrimination and that of other women. RCW 49.60.210. She wrote:

Chief of Staff Reinmuth was informed by me prior to his notice of the proposed move of ICRB to HRO that Mr. Wooden was openly hostile toward me. I have enclosed my email exchange with Wooden that I forwarded to Mr. Reinmuth as a sample of the hostility directed toward me and to show the obstacle Mr. Wooden posed in my efforts to address the significant underutilization of protected class groups represented in the WSDOT workforce (Attachment #3). *I am one of many female managers that Mr. Wooden has had varying degrees of success intimidating and bullying in addition to refusing to acknowledge requests to meet to discuss these issues.* Many of the women have left the agency but they are available if needed to corroborate my statements regarding Mr. Wooden. Only a few women have written statements of concern describing the discriminatory treatment they received from Mr. Wooden...

CP 1246 (emphasis added).

Plaintiff's response letter to Manning, the Governor's Chief of Staff, reiterated her concern over the planned ICRB move and Wooden's discriminatory behavior, noting that the two "issues are inextricably linked" because they both concerned discriminatory acts. CP 1365-66. Plaintiff also expressed her fear of retaliation for speaking out on these

issues. *Id.* Finally, Mendoza de Sugiyama's letter to the FHWA clearly stated that the purpose of her letter was to "formally file a Title VI complaint based on [her] belief that WSDOT is not in compliance with the Code of Federal Regulations mandated of state transportation agencies to be in compliance with civil rights requirements." CP 1368. This letter was copied to OEO Director Nnambi and read by Hammond. CP 1037, 1370. Mendoza de Sugiyama was making a good faith report of improper governmental action protected by RCW 42.40.

**b. The Proposed Move of the ICRB to HR Was Not "In Response to State-wide Budget Cuts"**

The State's brief falsely claims that the proposed move of the ICRB was done "in response to state-wide budget cuts." Resp. Br. at 6. Yet, this allegation is not supported by any citation to the record. The State cites to Reinmuth's January 22, 2010 email to Nnambi and Wooden where he tries to pitch the ICRB move to HR. Resp. Br. at 6; CP 649. In that email, Reinmuth notes that positions could be eliminated by the move, which would save money, but the email does not indicate in any way that the planned move was in response to any sort of budget cuts. CP 649-50. The State goes on to falsely claim that "[i]n December 2009, OEO Director Brenda Nnambi advised Mendoza that, in an attempt to fulfill the Legislature's mandate," WSDOT was considering moving the ICRB to HR. Resp. Br. at 6. The State cites to Plaintiff's deposition testimony, CP 535,

but nowhere in the portion cited does Mendoza de Sugiyama state that Nnambi told her the move was in response to Legislative budget cuts or a Legislative mandate. CP 535-36. The “budget cut” argument is a complete fabrication made up during the litigation to justify Reinmuth’s plan to strip the ICRB of its independence, and therefore its authority, autonomy, and legitimacy amongst employees claiming discrimination. The ICRB, headed by two women of color, was seen by Reinmuth “notoriously insular in the way that they did their work.” CP 1068. He saw their independence as a risk, rather than an asset, despite knowing that the ICRB was intentionally separate and independent of HR in order to avoid conflicts of interest, or the appearance of conflicts of interest, that arise when an office is required to investigate itself. CP 649, 1069-70, 1282. Reinmuth’s attempt to reduce Nnambi and Plaintiff’s authority and autonomy was remarkably similar to his treatment of WSDOT Tribal Liaison Colleen Jollie. App. Br. at 19; CP 908-10.

**c. The State Mischaracterizes Plaintiff’s “Extinction List” and “Big Head” Comment**

Plaintiff supervised Murinko and recommended his reclassification to a Washington Management Service Band I management position. CP 1222. The allegation that Mendoza de Sugiyama would both support promotion of a disabled person, and then suddenly begin to harass that disabled person, is fanciful, and at summary judgment, must be ignored. *See*

*Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 189, 23 P.3d 440 (2001)(when employer hires person in protected class, strong inference that adverse action not because of any attribute the decision makers were aware of at the time of hiring).

The State mischaracterizes and sensationalizes both Plaintiff's use of an "extinction list" and her comment to Murinko regarding the size of his head. In any case, at summary judgment, the facts are taken in the light most favorable to Plaintiff and all inferences are drawn in her favor. *King v. Rice*, 146 Wn. App. 662, 668, 191 P.3d 946 (2008). The context and meaning of these incidents must be weighed by the jury upon consideration of the evidence, including live testimony of the witnesses, not by the court at summary judgment.

Plaintiff's use of what she deemed an "extinction list" was a way to cope with a difficult situation or a difficult individual so that it did not negatively affect her work and she was not weighed down with constant stress over the issue. CP 562, 1237-38. Plaintiff testified that she "would not let the negativism or the tension associated with that person affect [her] ability to continue to do [her] work." CP 562.

The comment related to Murinko having a "big head" was not said in a mean-spirited way. Plaintiff testified that she had no indication at the time the comment was made, in a group setting, that it was anything other than a

positive exchange. CP 564-65, 1237. She testified that “the tone of it is we were there joking around, and there was a interaction between Jim [Sexton] and Shawn [Murinko], and Jim has a very small head compared to Shawn’s large head, and we were just joking around about the difference, and how - how Shawn had a lot more space for his knowledge than Jim, something like that.” CP 564. In the light most favorable to Plaintiff, this comment was not offensive or retaliatory.

**d. Plaintiff Did Not Interfere with the Cordon Investigation**

The State falsely accuses Plaintiff of interfering with the Cordon investigation by talking to potential witnesses while the investigation was pending. Resp. Br. at 1, 10-11. After Plaintiff identified certain Ferries co-workers as potential witnesses for Cordon to interview, she did not approach them. Instead, they approached her and wanted to meet to discuss possibly filing a hostile work environment claim against Wooden. CP 1238-39, 1397. On April 3, 2010, Mendoza de Sugiyama received an email from Ferries employee Lea Schmidt stating, in part:

The meeting with Kermit on Wednesday was a nightmare to get through. However, he definitely showed his yelling, arrogance, and bullying tactics. It ended with Kermit storming out, Jenny crying and leaving the room, and me following Jenny because it breaks my heart to see her cry....  
Jenny wants to know if Margo, she and I can meet with you. She’d like some insight on how she might handle this— if she and Margo had a basis for filing a claim with

OEO for this behavior, perhaps hostile work environment.  
It wasn't quid pro quo, but it was definitely hostile.

CP 1397. During the subsequent meeting, Plaintiff informed the women that hostile work environment claims were handled by HR and referred them to the HR chain of command, or the Secretary, for resolution. CP 1239. At the meeting, Plaintiff was informed that her letter to the Governor was given to Wooden and was being shared by HR staff, which would have also interfered with the investigation and would be a violation of the State's whistleblower policy. CP 1239; RCW 42.40.040(2). Contrary to the State's contention, Plaintiff did not attempt to interfere with the investigation; she was performing her job duties in advising the women on how to report a hostile work environment claim.

The State also maintains that Mendoza de Sugiyama "knew" that communicating with Dan Mathis of the FHWA while the Cordon investigation was pending violated investigation protocols. Resp. Br. at 10. The "communication" the State cites is Plaintiff's Title VI complaint to the FHWA. CP 664-66. Plaintiff had a good faith, reasonable belief that WSDOT was not complying with federal regulations applicable to state transportation agencies and she had the right to report this violation regardless of whether the State was conducting its own investigation. The FHWA has oversight responsibilities with regard to actions being taken by WSDOT.

**B. Reinmuth Cut Plaintiff's Direct Supervisor, Brenda Nnambi, Also a Woman of Color, Completely Out of the Loop with Regard to Murinko's Complaints about Plaintiff, the Decision to Place Plaintiff on Administrative Reassignment and Then to Terminate Her**

Plaintiff's immediate supervisor, Brenda Nnambi, an African-American woman, did not have any significant complaints about Mendoza de Sugiyama's performance. CP 934-35. She found her to be a competent, hard-working manager. *Id.* Although the two did not socialize as friends, they had a positive working relationship. *Id.* When Murinko first began meeting privately with Reinmuth and Todorovich to complain about Plaintiff, no one passed these concerns on to Nnambi. CP 951-53. Murinko went behind her back with his complaints. *Id.* Without knowing of Murinko's concerns, neither Nnambi nor Plaintiff could address them. In fact, when Plaintiff first learned that Murinko complained that she was "micro-managing" him after his move to the first floor, Plaintiff was shocked because earlier that same day she had had a positive, congenial meeting with Murinko. CP 1225. Once Nnambi and Plaintiff learned of Murinko's concerns, they offered to mediate with him, but Murinko refused. CP 648-49.

Reinmuth refused to meet one-on-one with Plaintiff, but frequently met alone with Murinko and Todorovich to discuss their concerns. CP 1082-83, 1091-92, 1115-16, 1119-21, 1188, 1194, 1196-97.

Nnambi also believed Wooden created a hostile work environment for Plaintiff and other women. CP 1031. She acknowledged that Wooden refused to meet with Plaintiff, frequently cancelled meetings with her, and barely participated when he did attend. *Id.* In their defense of Wooden's lawsuit against the State, Reinmuth, Hammond, and Nnambi each included Plaintiff as an individual who Wooden refused to work with and who created a hostile work environment for Plaintiff. CP 1012-19, 1020-28, 1030-32. The State claims that Wooden was an "equal-opportunity harasser," but only women complained about him. *Id.* In contrast, Murinko testified that he liked working for HR and had no complaints about Wooden. CP 1183, 1188.

When Hammond decided to place Mendoza de Sugiyama on administrative reassignment, requiring her to work from home, again no one consulted with or informed Nnambi of this decision. CP 982-84. In fact, Reinmuth delivered the news to Plaintiff when he knew Nnambi was out of town. CP 1241. Nnambi was also not consulted in the decision to terminate Plaintiff. CP 982-84, 1241. After Nnambi came out in support of Plaintiff, her supervisor, Reinmuth, gave her a negative performance evaluation. CP 984-87.

Reinmuth intentionally cut Nnambi out of the loop with regard to Murinko's complaints about Plaintiff and the decision to terminate Plaintiff



because he knew that Nnambi was a supporter of Plaintiff and that Nnambi agreed with Plaintiff that it would be violation of the Code of Federal Regulations to move the ICRB under HR. When Reinmuth first proposed the ICRB move, he did not consult with Nnambi, the OEO Director, but only spoke with individuals in HR. CP 1279. After learning of the proposed move, Nnambi drafted a six-page statement explaining her reasons for opposing the move and gave it Reinmuth. CP 1274-79.

Reinmuth sought to remove authority, autonomy, and control from women of color by subjugating them in male-dominated departments. He knew Plaintiff believed Wooden created a hostile work environment for her and other women, yet he sought to move the ICRB under HR for no legitimate reason. He also knew that Wooden, and Wooden's supervisor, Ford, had previously engaged in sexual misconduct with female subordinates and had sexual harassment charges filed against them, paid money to settle the claims, and were not demoted or disciplined. CP 1040-41, 1146-48. Yet, he jumped on Murinko's unsubstantiated complaints about Plaintiff and recommended her termination after the investigator he hired adopted his views. The State cannot use Cordon's report to absolve itself of liability because Cordon relied on information given to her by Reinmuth and Wooden. *Staub v. Proctor Hosp.*, 131 S.Ct. 1186, 1193, 179 L.Ed.2d 144 (2011).

**C. Plaintiff Need Not Show that the Auditor Initiated An Investigation in Order to Properly Assert a State Employee Whistleblower Retaliation Claim**

The State argues that Plaintiff does not meet the statutory definition of “whistleblower” because evidence is required that the SAO initiated an investigation in response to a complaint. Resp. Br. at 22-24; RCW 42.40.020(10). The State argues this is a “required element.” Resp. Br. at 22. It also argues that plaintiff suffered no adverse employment action as a result of her September 24, 2010 complaint to the SAO because Plaintiff was already aware of her impending termination at that time. Resp. Br. at 23. The State reads the “initiating an investigation by the auditor” language of RCW 42.40.020(10)(a)(i) and (ii) too narrowly. The cases it cites in support are distinguishable and not Washington authority.

A whistleblower is entitled to make his or her complaint to “the auditor or other public official, as defined in subsection (7)” of the statute.

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

RCW 42.40.020(7). The essence of Mendoza de Sugiyama’s whistleblower complaint was contained in her letter to the Governor and in her letter to the FHWA – that moving the ICRB to HR was a violation of the CFRs and a conflict of interest, and that Murinko was unqualified to

fill the position to which Reinmuth promoted him. Reinmuth's action removed the WSDOT disability lead designation held by the agency's civil rights designated lead, OEO Director Nnambi, and removed Murinko from supervision of experienced civil rights senior managers. WSDOT Secretary Hammond received and read both letters. CP 1037. OEO Director Nnambi also received and read both letters. CP 978-79, 1370. Nnambi agreed that moving the ICRB was "not consistent with the Code of Federal Regulations." CP 980. She also considered it to be like the "fox guarding the hen house." CP 981.

If the whistleblower makes a report to a public official *and that public official fails to pass the information on to the auditor, the whistleblower's rights are not affected.* RCW 42.40.040(1)(a) ("...A failure of the public official to report the assertion to the auditor within fifteen days does not impair the rights of the whistleblower"). In reading the statute too narrowly, the State also ignores the policy behind whistleblower protection:

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

It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly

prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures. It is also the policy of the legislature that employees should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these employees.

This act shall be broadly construed in order to effectuate the purpose of this act.

2008 c 266 § 1, RCW 42.40.010. Here, the statute must be broadly construed to protect the rights of whistleblowers when the public officials to whom they report fail to pass on that report to the SAO. Additionally, the statute protects “perceived” whistleblowers, i.e. those who do not actually make a report to the Auditor or other public official, but are perceived as having made such a report. RCW 42.40.020(10)(a)(ii). If an Auditor’s investigation were a prerequisite to a RCW 42.40 whistleblower retaliation claim, it would render meaningless the provisions that protect “perceived” whistleblowers. If one is perceived to have made a whistleblower complaint, but did not actually make one, the Auditor’s office would be unable to initiate an investigation.

The State ignores that Mendoza de Sugiyama made several whistleblower complaints. On February 2, 2010, prior to her termination and the Cordon investigation, Plaintiff wrote a letter to Governor Gregoire complaining about the planned move of the ICBR to HR and her good faith reasons for feeling this move was improper. Plaintiff copied

Attorney General McKenna on this letter. Gregoire and McKenna were proper public officials for plaintiff to address her complaints. RCW 42.40.020(7). On March 25, 2010, plaintiff wrote a letter to Gregoire's Chief of Staff in response to his letter, further explaining her position. Several days later, on March 29, 2010, Plaintiff explained per position in a complaint letter to the FHWA, copying Jodi Peterson and Nnambi on this letter. Thus, the whistleblower complaints were perfected in February and March 2010 under RCW 42.40. Her complaint to the SAO simply reconfirmed her earlier reports to various public officials. Mendoza de Sugiyama meets the definition of a "whistleblower" in RCW 42.40.020 and was entitled to protection against retaliation under the statute.

The State cites the federal court case *Chen v. City of Medina*, C11-2119 TSZ, 2013 WL 392707 (W.D. Wash. Jan. 31, 2013), for the proposition that the "initiating an investigation" language of RCW 42.40.020(10) is a required element. First, *Chen* is not a Washington case; it is an unreported, district court opinion. Second, the *Chen* court found that the plaintiff there did not make a report to a public official or the auditor, was not perceived to have done so, and that the complaint did not concern "improper governmental action" as required by the statute, in addition to the fact that the auditor failed to conduct an investigation. *Id.* at 13. It is impossible to tell from the context whether all three of these

factors influenced the court or whether the failure of just the last factor was sufficient to dismiss the claim. *Marable v. Nitchman*, 262 Fed.Appx. 17, 22 (9th Cir. 2007), also not reported, cited in *Chen*, simply notes that the plaintiff did not contact the Auditor and was not perceived to have done so. The State failed to provide any authority that an Auditor's investigation is a required element of the claim and its argument must be rejected.

**D. The Trial Court Abused Its Discretion When It Denied Plaintiff's Motion to Compel Emails To and From Twelve Key Witnesses**

The electronically stored information at issue in this case was compiled by the State after Plaintiff agreed to significantly narrow her discovery requests to include emails to and from twelve key witnesses, and before the Court denied Plaintiff's Motion to Compel. CP 34-44. The State's Senior Information Technology Specialist, Joanna Jones, explained that pulling the emails requested took approximately 32 hours of hands-on work. CP 41. The documents could have been placed on an external hard drive in approximately 30 minutes to one hour. CP 308, 316. All that was needed to be done was a privilege review. The State insisted that Plaintiff further narrow her request by employing key word search terms, but it refused to employ key word search terms to conduct its privilege review.

At the early stages of the litigation, the parties entered into a Protective Order significantly limiting the number and type of people who could review documents designated as confidential. The Protective Order states, in part:

2. The documents described in the parties Stipulation shall *not* be disclosed to any person except to the parties and their attorneys, the attorneys' staff, experts retained by a party's attorney, individuals otherwise entitled to obtain said information pursuant to statutory exemptions from confidentiality and other individuals as herein provided;

3. Any information obtained from the documents described in the parties' Stipulation shall *not* be used as the sole and exclusive basis for conducting further investigation or discovery of other witnesses or evidence without further court order authorizing such specific use of this confidential and privileged information...

Dkt. No. 16.<sup>2</sup> The State should have designated the emails as confidential and the parties could have worked to determine what, if any, emails would be used at depositions or in court filings.

In *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), cited by the State, the plaintiff also asserted claims of gender discrimination against her former employer. She requested emails in discovery that were located on backup tapes. *Id.* at 314. The employer maintained it was too costly to retrieve the information. *Id.* at 313. The court stated:

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<sup>2</sup> Docket No. 16 is included in Plaintiff's First Supplemental Designation of Clerk's Papers, filed herewith, and in the trial court on March 14, 2014.

Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the “strong public policy favor[ing] resolving disputes on their merits,” and may ultimately deter the filing of potentially meritorious claims.

Thus, cost-shifting should be considered *only* when electronic discovery imposes an “undue burden or expense” on the responding party. The burden or expense of discovery is, in turn, “undue” when it “outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”

Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. *Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying.*

*Id.* at 317-18 (internal citations and footnotes omitted). The trial court abused its discretion when it denied Plaintiff’s motion to compel the emails requested in their entirety without requiring the State to employ key word searches for privileged documents. The Protective Order in place would have limited unnecessary disclosure of the emails requested.

### III. CONCLUSION

Appellant Margarita Mendoza de Sugiyama respectfully requests



that this Court reverse the trial court's summary judgment ruling and remand her gender and race discrimination, hostile work environment, WLAD retaliation, and whistleblower retaliation claims for trial. The Court should also find that the trial court abused its discretion in refusing to allow for discovery of emails sent to and from twelve key individuals in this case.

RESPECTFULLY SUBMITTED this 14th day of March, 2014.

MACDONALD HOAGUE & BAYLESS

By:  <sup>WSBA #41062</sup>  
for

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