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NO. 100889-9

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN BOESPFLUG,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF LABOR & INDUSTRIES,

Respondents.

RESPONDENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW 2

III. COUNTERSTATEMENT OF THE CASE 3

A. In January and February 2015, L&I Began Receiving Complaints About Boespflug's Failure to Call before Visiting Sites for Inspections 3

B. Boespflug Complained to Human Resources Nearly a Year after Ault "Cancelled" Tickets Boespflug Issued in May 2015 for Insufficient Evidence 4

C. The Department Received More Complaints About Boespflug 6

D. Boespflug Received His Annual Performance Evaluation Report 7

E. All Inspectors' Inspection Areas are Rotated 8

F. The Department Provided Boespflug a Newer Car 10

G. February 7, 2017, Meeting....................................... 11

H. Boespflug's Other Reports to the State Auditor 11

I. State Auditor's Office Investigation Finds No Improper Governmental Action 12

IV. PROCEDURAL HISTORY 12

V. WHY REVIEW SHOULD BE DENIED 14

A. The Court of Appeals' Decision Adheres to Precedent 15

1. A causation element is firmly established in Washington common law as to cases involving retaliation 15

2. The plain language of RCW 42.40.050(1)(a) supplies a cause of action only when there has been a negative employment action in response to whistleblowing activity 17

3. RCW 42.40's list of whistleblower-linked prohibited conduct does not negate the requirement of causation 22

4. Even if causation was not required as part of a prima facie case, evidence of causation must exist to survive summary judgment when the employer proffers evidence of non-retaliatory reasons 24

B. Given the Singular Nature of this Case, This is Not an Issue of Public Importance............................ 28

VI. CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Allison v. Hous. Auth. of City of Seattle,
118 Wn.2d 79, 821 P.2d 34 (1991)................................ 15, 16

Bd. of Trade v. Hayden,
4 Wn. 263, 30 P. 87 (1892).. 24

Boespflug v. Dep't of Labor & Indus.,
No. 83301-4-I, 2022 WL 594288 (Feb. 28, 2022 Wash. App. Div. 1) (unpublished).................................. 14, 17, 28, 29

Briley v. Nat'l Archives & Records Admin.,
236 F.3d 1373 (Fed. Cir. 2001) 21

Cornwell v. Microsoft Corp.,
192 Wn.2d 403, 430 P.3d 229 (2018).................................. 21

Estate of Jones,
170 Wn. App. 594, 287 P.3d 610 (2012)............................. 27

Gardner v. Loomis Armored Inc.,
128 Wn.2d 931, 913 P.2d 377 (1996).................................. 16

G-P Gypsum Corp. v. State, Dep't of Revenue,
169 Wn.2d 304, 237 P.3d 256 (2010).................................. 19

In re Indian Trail Trunk Sewer,
35 Wn. App. 840, 670 P.2d 675 (1983)................................ 26

Kitsap Bank v. Denley,
177 Wn. App. 559, 312 P.3d 711 (2013)............................. 25

Kitsap Cnty. v. Allstate Ins. Co.,
136 Wn.2d 567, 964 P.2d 1173 (1998)................................ 19

Lambert v. Ackerley,
180 F.3d 997 (9th Cir. 1999) 21

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) 26

McDonnell Douglas v. Green,
411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) . 14, 15

Reynaga v. Roseburg Forest Prods.,
847 F.3d 678 (9th Cir. 2017) 21

Rose v. Anderson Hay & Grain Co.,
184 Wn.2d 268, 358 P.3d 1139 (2015)................................ 16

State ex rel. Bond v. State,
62 Wn.2d 487, 383 P.2d 288 (1963)..................................... 26

State v. Engel,
166 Wn.2d 572, 210 P.3d 1007 (2009).......................... 18, 24

State v. Nelson,
195 Wn. App. 261, 381 P.3d 84 (2016).......................... 19, 24

State v. Sullivan,
143 Wn.2d 162, 19 P.3d 1012 (2001).................................. 19

State v. Weatherwax,
188 Wn.2d 139, 392 P.3d 1054 (2017)................................ 24

White v. State,
131 Wn.2d 1, 929 P.2d 396 (1997)................................ 21, 26

Wilmot v. Kaiser Aluminum & Chem. Corp.,
118 Wn.2d 46, 821 P.2d 18 (1991)....................................... 21

Young v. Key Pharm., Inc.,
112 Wn.2d 216, 770 P.2d 182 (1989) 26

Statutes

RCW 42.40 .... 1, 22

RCW 42.40.050 .... 1, 2, 17, 25

RCW 42.40.050(1)(a) 18

RCW 42.40.050(1)(b) 18

RCW 42.40.050(2) 1, 15, 24, 28

RCW 42.50.050 17

RCW 49.40.050(2) 25

RCW 49.60.210 15

RCW 49.60.210(2) 16

Rules

CR 56 28

GR 14.1 28

RAP 7.2(e) 13

RAP 13.4 2

RAP 13.4(b) 30

RAP 13.4(b)(1) 17, 28, 29

RAP 13.4(b)(2) 17

RAP 13.4(b)(4) 29

Other Authorities

Reprisal, *Merriam-Webster's Unabridged Dictionary*, Merriam-Webster, https://unabridged.merriam-webster.com/unabridged/reprisal 20

Retaliation, *Black's Law Dictionary* (11th ed. 2019) 19, 20

I. INTRODUCTION

Under RCW 42.40, the Whistleblower Retaliation Statute, an employer may not subject an employee to demotion, dismissal, or other adverse action, in response to the whistleblower disclosing improper governmental actions. The Court of Appeals found that Petitioner Boespflug had not made out a case applying the rebuttable presumption standard in RCW 42.40.050(2) to all but one of his claims, and explicitly declined to decide whether the *McDonnell Douglas* burden-shifting framework applied. However, Boespflug stakes his petition for review on the idea that the words “retaliatory” and “reprisal” found in RCW 42.40.050 require *no* causal link between an alleged protected activity and an adverse action, i.e. that retaliation need not be a *response* to the whistleblower disclosing improper governmental actions. This argument is neither logical nor linguistically sound, and does not comport with case law.

The Court of Appeals' opinion does not conflict with any decision of this Court on Washington's Whistleblower Retaliation Statute, nor any decisions related to statutory construction. In fact, the ruling follows every other legal precedent interpreting the word "retaliation" in an employment context. Furthermore, the Court of Appeals specifically avoided pronouncing a precedential standard on whistleblower retaliation cases, finding that – regardless of the standard applied – the outcome on these specific facts would be the same. Because of this, the Court of Appeals' unpublished opinion does not involve an issue of substantial public interest. Boespflug has failed to establish that review is appropriate under RAP 13.4 and this Court should decline review.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

Was the Court of Appeals correct in determining that the words "retaliatory" and "reprisal" in RCW 42.40.050 require some causal link between an alleged protected activity and the alleged action that is claimed to be "retaliatory"?

III. COUNTERSTATEMENT OF THE CASE

Petitioner/Plaintiff John Boespflug, at the relevant time, was an electrical inspector for the Department of Labor and Industries. Department electrical inspectors ensure contractors and homeowners are correctly installing electrical components to houses, buildings, and other structures. L&I requires inspectors to follow what it calls a "standard work" process, a set of specific steps electrical department inspectors are to follow for each inspection to ensure uniformity and quality of work. CP 102. Calling before inspecting is one such step and is done to ensure access to the site in question, and reduces inefficiency within the electrical program of L&I. CP 120.

A. In January and February 2015, L&I Began Receiving Complaints About Boespflug's Failure to Call before Visiting Sites for Inspections

In January and February of 2015, the Department received multiple complaints from electrical contractors about Electrical Inspector John Boespflug. On February 2, 2015, Rian Gorden, an owner of ERS Electrical (ERS), emailed Region 3 Regional

Administrator Janet Morris regarding Boespflug. CP 106. Gorden complained that Boespflug "came out unannounced" on January 26, and came out "again without a call prior to inspection as requested" on January 30. *Id*. As this pattern emerged, on May 11, 2015, Boespflug's supervisor, Jeff Ault, sent an e-mail to Boespflug requesting that Boespflug follow procedures requiring inspectors to call before visiting job sites as well as noting his failure to follow "standard work" process. CP 108.

B. Boespflug Complained to Human Resources Nearly a Year after Ault "Cancelled" Tickets Boespflug Issued in May 2015 for Insufficient Evidence

On March 9, 2015, Boespflug issued four citations to electrical contractor Kraft Electric. CP 72-74. On May 15, 2015, Ault "cancelled" each of the four tickets issued within the system used by the department to track citations. *Id*. Tickets are required to include evidence that the inspector is relying on in issuing the citation. Ault explained that he did not believe the citations were supported by sufficient evidence and intended to "return them to the inspector for further evidence." *Id*.

Nearly a year later, on April 8, 2016, Boespflug contacted Nancy Kellogg, an Assistant Attorney General in the L&I Division of the State Attorney General's Office, and Faith Jeffrey, the Electrical Program Audit Manager about Ault's cancelling of his tickets. CP 193. Boespflug did not contact the State Auditor's Office. These complaints, including additional complaints by Boespflug about Ault's alleged favoritism toward certain businesses, were forwarded to the Human Resources (HR) Department, where they were investigated by HR Liability Prevention Manager, Dixie Shaw. Shaw investigated at the request of Jose Rodriguez, the Assistant Director of Field Services and Public Safety. CP 191.

When Shaw completed the HR investigation into Ault's alleged favoritism in October 2016, she noted that her investigation "produced conflicting information." CP 199. While she found a perception among some inspectors that Ault showed favoritism, there was not enough evidence to support the allegations. *Id*.

C. The Department Received More Complaints About Boespflug

On August 31, 2016, the Department received further complaints from contractors regarding Boespflug's failure to call before arriving at an inspection site. CP 110. The next day, Ault sent an e-mail to Janet Morris regarding Boespflug's failure to follow standard work and to call before an inspection. CP 112. In that e-mail, Ault also advised Morris that Boespflug's response to him on the issue was that inspectors "never used to have to make any calls, you just went out and did your job." *Id*.

On September 7, 2016, seven days after this e-mail, Boespflug filed his first complaint with the internal auditor, Cindy Baxley-Raves. CP 186-87. Boespflug alleged that Ault showed favoritism, specifically identifying ERS, a company that had complained in the past about Boespflug's failure to call before showing up to a job site. *Id*.

When Baxley-Raves interviewed Boespflug, his dislike for Ault and Morris was apparent, alluding to Ms. Morris's "difficult

management style" and suggesting Morris promoted Ault "even though he is unqualified and has little experience because he is her lackey and will go along with whatever she says." CP 187 He claimed his complaint was about a safety concern, but later conceded that the issues complained about were *not* imminently dangerous and did not require Baxley-Raves to contact anyone to have them fixed. *Id*. Ault was unaware of Boespflug's complaint to the internal auditor at this point in time. CP 103.

D. Boespflug Received His Annual Performance Evaluation Report

Boespflug received his performance evaluation (Evaluation Report) covering September 30, 2015, to September 30, 2016 in October 2016. CP 117-26. The standardized form provides spaces to document performance and areas of future growth and development. Most of the feedback was positive, containing general statistics and data from throughout the reporting period; e.g.,

> During the period of review, you worked 181 days, completing 2,482 inspection stops or an average of

> 13.7 stops per day. This is above the office average of 11.2, and above the statewide average of 11. You completed 84.3% of your inspections within 48 hours, which is above the office average of 81.6%, but below our program goal of 94%. This is to be expected when our office has been experiencing increased workload.

CP 120. Feedback was also provided about calling ahead: "you do not follow standard work by going directly to the jobsite without first making access calls and ensuring that you will have access to perform your inspection . . . . This creates unnecessary delay and confusion for the customer, and causes extra work for those of us in the office that answer the customer calls." *Id.* Although the form provides a space for the employee to comment, Boespflug did not include any response. CP 123. Instead, he acknowledged and signed off on the development and growth plan. CP 125.

E. All Inspectors' Inspection Areas are Rotated

Regional Administrator Janet Morris advised supervisors to move inspectors around, in general, because "it's always valuable if the inspectors move to different areas because different areas have different kind of electrical problems. So it increases their

knowledge, their experience, those kinds of things." CP 80-81. On November 29, 2017, Ault sent an e-mail to Morris confirming that, based on her request, he intended to move Boespflug's inspection area, for "business needs regarding available manpower, workloads, and inspection requests[.]" CP 128.

Additionally, "everyone in [Ault's] office ha[d] been assigned closer to their home to improve the quality of life" which was consistent with the goals articulated by the Chief Electrical Specialist for L&I Electrical Program. CP 70-71, 214-15. Every other inspector had been moved or re-assigned at least once since 2014. *Id*. Boespflug was also moved to a different inspection area because he had "[d]ocumented complaints and issues from the geographical location that he was inspecting previously." CP 71.

Boespflug conceded the reassignment closer to his home was for business reasons:

> [T]hat was more for – to make motor pool happy . . . because we do drive [our state vehicles] home. . . . In other words, that justifies the use of the vehicle for being close to where they start as opposed to starting way over on one side of the county and going to

inspect the other side of the county.

CP 87. Boespflug raised no objection to the change in his assigned area to anyone in the Department until this lawsuit. CP 88.

F. The Department Provided Boespflug a Newer Car

In January, 2017, Boespflug's 2012-model vehicle had 105,444 miles on it and needed new tires. Vehicles are required to be swapped out at 115,000 miles, but it made more fiscal sense to replace Boespflug's vehicle early to provide him with a newer vehicle that already had newer tires than to replace the tires on the old car. CP 203-04. On January 11, 2017, Ault sent an e-mail to Boespflug indicating that he was being provided a much newer vehicle with new snow tires that was the same make and model (Ford Escape). CP 130. When Boespflug asked "why?" L&I Administrative Assistant Vivian Montes, who was involved in the car replacement, confirmed by email that the newer vehicle had "better tires." *Id*. Boespflug did not complain about his old car being "removed from him" or request an ergonomic evaluation related to the replacement vehicle until this lawsuit. CP 90.

G. February 7, 2017, Meeting

On February 7, 2017, Ault, Boespflug, their union representatives, Morris, and Chief Electrical Specialist Steve Thornton met. The purpose of the meeting was to address issues with Boespflug's performance that had persisted for many months: specifically, his continued failure to follow the standard work process and to call in order to arrange access to inspection sites. CP 103-04. Though there was discussion about discipline if the problems persisted, Boespflug was *not* disciplined at that meeting and has not been disciplined in any way since. *Id*.

H. Boespflug's Other Reports to the State Auditor

Boespflug submitted two additional whistleblower claims that were rejected by the State Auditor's Office. In rejecting complaint number 177161, the Auditor's Office stated, "Because our Office has not initiated an investigation you are not a whistleblower and do not have the protections afforded by state law (RCW 42.40.020(10)(i))." CP 93 (letter dated Feb. 23, 2017). Boespflug received a similar rejection referencing complaint

number 177125 (letter dated Jan. 13, 2017). CP 95. There is no evidence that anyone within the Department had any knowledge of these reports until this lawsuit was filed.

I. State Auditor's Office Investigation Finds No Improper Governmental Action

On September 5, 2017, the Auditor's Office concluded its investigation into Boespflug's complaints made to Baxley-Raves, alleging that Ault showed favoritism to certain businesses – i.e. provided them "special privilege." It found, "Regarding the assertion of special privilege, we found *no evidence* to substantiate the assertion. Therefore, we found no reasonable cause to believe an improper governmental action occurred." CP 180 (emphasis added).

IV. PROCEDURAL HISTORY

Boespflug filed suit on October 17, 2017. CP 13. On June 12, 2020, the superior court heard oral argument on the Department's motion for summary judgment and orally granted the motion. CP 2826.

Boespflug filed a motion for reconsideration, which the

Department opposed. CP 2761, 2776. On June 29, 2020, the trial court issued its order granting the Department's motion for summary judgment and dismissed all of Boespflug's claims. CP 2764. On July 7, Boespflug filed a Notice of Appeal. CP 2766.

On August 11, without oral argument, the trial court granted reconsideration in part, ruling that the issue of whether the reassignment of a newer vehicle without an ergonomic evaluation constituted reprisal was an issue for the jury. CP 2785. The Department moved to vacate the trial court's order on reconsideration, arguing that Boespflug's appeal was already pending and, under RAP 7.2(e), the trial court did not have authority to enter the order absent the Court of Appeals' permission. CP 2786-94. The trial court agreed, and on September 3, 2020, vacated its order on reconsideration. CP 2853.

The Court of Appeals, after briefing and oral argument, affirmed in part and reversed in part. It reversed on the singular issue of whether Boespflug's receipt of a newer car of the same make and model with which to do his job – without first receiving

an ergonomic evaluation – was retaliation per the statute, finding a question of fact as to that particular action. *Boespflug v. Dep't of Labor & Indus.*, No. 83301-4-I, 2022 WL 594288, at *10-11 (Feb. 28, 2022 Wash. App. Div. 1) (unpublished).

The Court of Appeals affirmed on the remaining issues, declining to decide whether the *McDonnell Douglas* burden-shifting analysis applied,[1] as it determined that whether that analysis applied or the Court simply applied the plain language of the statute the outcome was the same. *Id.* at *11. On February 28, 2022, Boespflug filed motions with the Court of Appeals for reconsideration and to publish its opinion. Pet. for Review, A028-A029. The Court of Appeals denied both requests. *Id*. This petition followed.

V. WHY REVIEW SHOULD BE DENIED

The Court of Appeals' decision is not in conflict with a decision of this Court or a published decision of the Court of

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

Appeals, and does not involve an issue of substantial public interest. Instead, Division One followed the precedent of this Court and interpreted the plain language of the statute in accordance with that precedent as well as other published opinions by the Courts of Appeals. Second, in examining the unique set of facts, the Court of Appeals explicitly declined to decide whether the *McDonnell Douglas* burden-shifting framework applied. Instead, it found that Boespflug had not made out a case applying the rebuttable presumption standard in RCW 42.40.050(2).

A. The Court of Appeals' Decision Adheres to Precedent

1. A causation element is firmly established in Washington common law as to cases involving retaliation

The opinion of the Court of Appeals is in full accord with this Court's precedent on cases involving retaliation. In *Allison v. Hous. Auth. of City of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1991), the Court instructed that where a plaintiff has alleged retaliation under RCW 49.60.210, which includes whistleblower

retaliation[2], the plaintiff "must prove *causation* by showing that retaliation was a substantial factor motivating the adverse employment decision." 118 Wn.2d at 96 (emphasis added). *See also Rose v. Anderson Hay & Grain Co.,* 184 Wn.2d 268, 277, 358 P.3d 1139 (2015) (en banc) (requiring plaintiff to establish "public-policy-linked conduct," including whistleblowing, *caused* the dismissal). Further, in *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996), this Court held, "Perritt's test[3] serves as an excellent guide for analyzing *all* public policy wrongful discharge torts . . . [and] [t]he causation element is also firmly established in Washington common law." *Id.* at 941-42 (explicitly including whistleblower complaints) (emphasis added). While, Boespflug was not discharged, he does allege retaliatory conduct and demands that he not be required to

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[2] RCW 49.60.210(2)

[3] Perritt's test requires four elements to establish a public policy tort, including that a plaintiff "prove that the public-policy-linked conduct caused the dismissal (the *causation* element.)" *Gardner*, 128 Wn.2d at 941 (alteration in original).

show that his alleged whistleblower activity caused the adverse employment action. As the Court of Appeals noted, "Without a causal relationship, an action for retaliation would take the form of strict liability." *Boespflug*, 2022 WL 594288 at *4 n.14 (citing RCW 42.40.050).

Boespflug attempts to argue that the Court of Appeals created a causation requirement where none exists in the statute. However, as explained next, that argument ignores the plain language of the statute. Because the decision below does not conflict with prior precedent of the Supreme Court or the Courts of Appeals, review is not appropriate under RAP 13.4(b)(1) or (b)(2).

2. The plain language of RCW 42.40.050(1)(a) supplies a cause of action only when there has been a negative employment action in response to whistleblowing activity

Under any reasonable construction of RCW 42.50.050, a whistleblower retaliation claim depends on there being a causal link between the whistleblowing activity and the adverse employment action. RCW 42.40.050 provides that "any person

who is a whistleblower, as defined in RCW 42.40.020, and who has been subject to workplace *reprisal or retaliatory action* is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW." RCW 42.40.050(1)(a) (emphasis added). The statute goes on to provide a non-exhaustive list of examples that may be used as an adverse employment action to support a case of whistleblower retaliation. RCW 42.40.050(1)(b) ("For the purposes of this section, 'reprisal or retaliatory action' means, *but is not limited to*, any of the following . . . .") (emphasis added). The Legislature's choice of the words "reprisal" and "retaliatory" have significance and cannot be ignored.

"The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009) (citing Webster's Third New International Dictionary for the definition of

"fence"). *See also G-P Gypsum Corp. v. State, Dep't of Revenue*, 169 Wn.2d 304, 312, 237 P.3d 256 (2010) (citing Webster's Third New International Dictionary for the definition of "use"); *State v. Nelson*, 195 Wn. App. 261, 268, 381 P.3d 84 (2016) (citing Merriam–Webster's Unabridged Dictionary for definition of "gift card"); *State v. Sullivan*, 143 Wn.2d 162, 176, 19 P.3d 1012 (2001) (citing both Webster's Third New International Dictionary and Black's Law Dictionary for definition of "judicial"); *Kitsap Cnty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 587, 964 P.2d 1173 (1998) (citing Black's Law Dictionary to "determine the plain, ordinary, and popular meanings of the terms").

The ordinary meaning of the words "retaliatory" and "reprisal" requires *some* causal link to be established between the adverse employment action and the protected activity for which it is alleged to be retaliation. The word "retaliation" means "[t]he act of doing someone harm *in return for* actual or perceived injuries or wrongs." Retaliation, *Black's Law Dictionary*

(11th ed. 2019) (emphasis added). The word "reprisal" similarly means an act done in response to another. *See, e.g.*, Reprisal, *Merriam-Webster's Unabridged Dictionary*, Merriam-Webster, https://unabridged.merriam-webster.com/unabridged/reprisal (defining "reprisal" as "an action of retaliation").

If, as Boespflug argues, the Legislature had intended to impose strict liability for any adverse employment action taken against a whistleblower, despite any causal relationship, it would not have used the words "reprisal" or "retaliatory," and instead would have simply used "negative" or "adverse." The use of the words "reprisal" and "retaliatory" *requires* a causal link between the adverse employment action and the whistleblowing activity.

Further, this Court has defined what is required to show a prima facie case of "retaliation" in a number of statutory contexts: "(1) the employee took a statutorily protected action, (2) the employee suffered an adverse employment action, and (3) a causal link between the employee's protected activity and the

adverse employment action." *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 411, 430 P.3d 229 (2018). While *Cornwell* was concerned with retaliation under the Washington Law Against Discrimination, the definition utilized for "retaliation" – and the requiring of some causal link – has been used for retaliation causes of action arising under other state and federal statutes. *See, e.g., Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991) (workers compensation claims); *White v. State*, 131 Wn.2d 1, 10, 929 P.2d 396 (1997) (retaliation against an employee for protected speech); *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999) (federal Fair Labor Standards Act); *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 693 (9th Cir. 2017) (Federal Title VII); *Briley v. Nat'l Archives & Records Admin.*, 236 F.3d 1373, 1378 (Fed. Cir. 2001) (federal whistleblower retaliation).

This makes sense in light of the very nature of a whistleblower "retaliation" action, which necessarily requires a causal link between protected activity and an adverse action.

3. RCW 42.40's list of whistleblower-linked prohibited conduct does not negate the requirement of causation

Contrary to Boespflug's argument, RCW 42.40's explicitly non-exhaustive lists of acts that could constitute reprisal or retaliatory action does not suggest that those actions need not be *in response to* a whistleblower's reporting alleged improper governmental action. Indeed, as just explained, the ordinary meaning of the terms "retaliatory" and "reprisal" require some form of retribution *in return for* an actual or perceived harm. Or in a whistleblower case: an adverse employment action *because of* reporting alleged improper governmental action.

Despite acknowledging that courts must give effect to a statute's plain language, Boespflug asks this Court to ignore the ordinary meaning of the words "reprisal" and "retaliatory action." *See* Pet. for Review 10. Boespflug interprets this provision of a non-exhaustive list of examples as an attempt by the legislature to divorce the words "retaliatory" and "reprisal"

from their ordinary and logical meaning, and to allow a case to move to trial with no evidence of a causal link between an act of alleged retaliation and the protected activity for which it is alleged to be "retaliatory."

Boespflug's assertion that there need be no evidence of a causal link in whistleblower retaliation causes of action would create bizarre and illogical outcomes, some of which apply to the facts of this case. For example, a plaintiff would be guaranteed a jury trial in circumstances where "retaliation" was impossible, such as when plaintiff files a whistleblower report *after* the alleged adverse employment action, or when no one in the agency had any knowledge of a plaintiff's report. Such outcomes would be antithetical to the meaning of the word retaliation. Boespflug argues for this despite the existence of no support within the text of the statute, or the record, that the legislature intended to stray completely from the plain meaning of the words contained therein. Such would be contrary to the decisions of this Court and well-settled maxims of statutory construction. *See*

Engel, 166 Wn.2d 578; *see also Bd. of Trade v. Hayden*, 4 Wn. 263, 281, 30 P. 87 (1892) (non-technical language in statutes "must be given its ordinary and popular meaning"); *State v. Weatherwax*, 188 Wn.2d 139, 148, 392 P.3d 1054 (2017) ("In interpreting statutes, 'we presume the legislature did not intend absurd results' and thus avoid them where possible."); *Nelson*, 195 Wn. App. at 266 ("We recognize that the legislature intends to use the words it uses and intends not to use words it does not use.") (citing *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015) (en banc)).

4. Even if causation was not required as part of a prima facie case, evidence of causation must exist to survive summary judgment when the employer proffers evidence of non-retaliatory reasons

Boespflug would have this Court ignore that the presumption under RCW 42.40.050(2) is rebuttable, and declare that he is entitled to a trial simply by virtue of his having filed a whistleblower report and establishing that something he was

displeased with occurred.[4] However, " '[p]resumptions must give way in light of evidence.' " *Kitsap Bank v. Denley*, 177 Wn. App. 559, 579, 312 P.3d 711 (2013) (affirming summary judgment granted to the defendant "[b]ecause the evidence presented was contrary to the presumption" relied on by the plaintiff).

So, even if this Court were to ignore the plain meaning of the words "retaliation" and "reprisal" as Boespflug demands, RCW 42.40.050 specifically provides that a defendant can "rebut that presumption by proving by a preponderance of the evidence that there have been a series of documented personnel problems or a single, egregious event, or that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower and that improper motive was not a substantial factor." RCW 49.40.050(2). It is well-settled that "[a]

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[4] Because to refer to something as "retaliation" or "reprisal" again infers that the action was *in response to* protected activity.

presumption is not evidence and its efficacy is lost when the other party produces credible evidence to the contrary." *In re Indian Trail Trunk Sewer,* 35 Wn. App. 840, 843, 670 P.2d 675 (1983).

A motion for summary judgment must be considered within the framework of any affirmative defenses. *State ex rel. Bond v. State*, 62 Wn.2d 487, 490, 383 P.2d 288 (1963). Any argument by Boespflug about where the burden lies at trial is unpersuasive. At summary judgment, the burden of production lies always with the moving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). However, in resisting summary judgment, the non-moving party may not rely on either speculation or argumentative assertions that factual issues remain. *White*, 131 Wn.2d at 9. Furthermore, the non-moving party cannot simply present some metaphysical doubt. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

At both the trial court and the Court of Appeals, the Department offered evidence of non-retaliatory reasons for each action of which Boespflug complains. CP 70-71, 80-81, 87, 128, 214-15 (changing of inspection area); CP 103-04, 106, 108, 110, 112 (counselling Boespflug on standard work and calling before he arrived at an inspection site); CP 130, 203-04 (replacing his vehicle because it needed new snow tires and was close to replacement mileage). Boespflug in turn provided *no* evidence that those reasons were not, in fact, the true reasons for the actions. None.

Further, he failed to offer any evidence that tends to create any issue of fact as to whether the improper motive of retaliation was a "substantial factor" in taking them. "While summary judgment may be granted on the basis of a presumption, the presumption also may be defeated by evidence." *Estate of Jones*, 170 Wn. App. 594, 610, 287 P.3d 610 (2012). Because of this, even reading this subsection as outlining an affirmative defense, Boespflug's argument fails.

In response to the Department's motion for summary judgment, Boespflug was required to present facts through evidence on the existence of a material issue of fact as to whether improper motives were a "substantial factor" in taking any of the actions that he characterizes as retaliation. CR 56; RCW 42.40.050(2). Throughout both the trial court and Court of Appeals briefings, he provided no such facts. Boespflug's failure to *produce* any evidence that creates an issue of material fact as to this affirmative defense – any evidence of causation – makes summary judgment appropriate.

B. Given the Singular Nature of this Case, This is Not an Issue of Public Importance

As provided above, Boespflug has not shown that the Court of Appeals' decision here conflicts with precedent, as would merit review under RAP 13.4(b)(1). Likewise, he has not shown that his petition presents an issue of substantial public importance that should be determined by this Court.

First, the Court of Appeals' decision is unpublished. *Boespflug*, 2022 WL 594288. Pursuant to GR 14.1, it has no

precedential value and is not binding on any court. Consistent with the appellate court's decision not to publish, it does not present an issue of substantial public importance under RAP 13.4(b)(4).

Additionally, the Court of Appeals' decision specifically avoided setting precedent that would affect future cases. The Court of Appeals did, in fact, identify that the question before it was one of first impression: "whether…[it] should apply the *McDonnell Douglas* burden shifting scheme to a summary judgment of a claim of whistleblower retaliation under RCW 42.40.050(1)(a) or whether [it] should apply the statue's rebuttable presumption standard under .050(2)." *Boespflug*, 2022 WL 594288, at *1. However, it determined that "because the outcome is the same under either standard, we need not decide this issue." *Id*. This determination creates a very fact-specific ruling that is unpublished. Because of this, there is no issue of substantial public importance presented by this petition and review under RAP 13.4(b)(1) is inappropriate.

VI. CONCLUSION

Because Petitioner cannot show that review is appropriate under RAP 13.4(b), this Court should deny Petitioner John Boespflug's petition for review.

This document contains 4752 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 27th day of May, 2022.

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the **RESPONDENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW** with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

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

DATED this 27th day of May, 2022 at Olympia, Washington.

/s/ *Beverly Cox*
Paralegal

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

May 27, 2022 - 10:04 AM

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