NO. 100889-9

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN BOESPFLUG,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

RESPONDENT'S ANSWER TO AMICUS CURIAE MEMORANDUM BY WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION

Discretionary review of the Court of Appeals' unpublished decision is unwarranted under RAP 13.4(b)(4) for three reasons. First, the Court of Appeals did not even decide the issue that Amicus Washington Employment Lawyers Association (WELA) claims is of substantial public interest, i.e. whether whistleblower retaliation plaintiffs must show causation between their protected activities and adverse employment actions as part of their prima facie case to show "reprisal or retaliatory action." Rather, the Court of Appeals determined that the result of this case would be the same regardless of how that question is answered. Second, a split of authority amongst unpublished Court of Appeals decisions is not a basis for Supreme Court review, but even if it were, WELA fails to establish such a split exists or would be resolved by this case. Finally, like Petitioner Boespflug, WELA's statutory construction argument ignores the plain language of RCW 42.40.050 and fails to account for the entirety of the record relevant to legislative intent, to the extent

it is relevant at all. For any of these reasons, this Court should deny discretionary review.

II. ARUGMENT

A. The Court of Appeals Appropriately Did Not Decide the Issue that both WELA and Boespflug Urge this Court to Decide

WELA implores this Court to take review to resolve what it calls a "split of unpublished" Court of Appeals cases addressing the question of whether causation is part of a plaintiff's prima facie whistleblower retaliation case on summary judgment. Amicus Mem. 13-14.[1] However, the Court of Appeals expressly and correctly declined to answer that question, because the result in this case is the same regardless of whether causation is part of a plaintiff's prima facie case or strictly relevant to the employer's rebuttal. *Boespflug v. Dep't of Labor & Indus.*, 21 Wn. App. 2d 1007, 2022 WL 594288, at *1 (Feb. 28, 2022) (unpublished).

[1] In contrast, Boespflug correctly argues that the decision below is consistent with the three earlier unpublished decisions addressing RCW 42.40.050. Pet. for Review 8-10.

Even if a whistleblower is not required to demonstrate evidence of causation in his prima facie case, there can be no legitimate dispute that he must do so when the defendant agency rebuts the presumption of improper motive. *See* RCW 42.40.050(2). The Court of Appeals held that Boespflug failed to do so. WELA makes no claim that the decision of the Court of Appeals is in conflict with a decision of this Court. *See* RAP 13.4(b)(1). Nonetheless, it misconstrues the Court of Appeals' findings in order to further its position that the decision was "wrong." Amicus Mem. 1.

WELA's analysis of this case hinges on the erroneous assertion that the Court of Appeals "held that Boespflug failed to establish causation as to [the dismissed] adverse actions." *Id*. That is incorrect. The Court of Appeals explicitly found that *regardless* of where the burden lies for the production of evidence of causation, Boespflug's causes of action fail. *Boespflug*, 2022 WL 594288, at *7-10.

First, as to Boespflug's 2016 performance evaluation, the Court of Appeals did *not* simply determine that Boespflug had failed to present evidence of causation at the prima facie stage, as WELA asserts. Amicus Mem. 1. Rather, it found that Respondent had, pursuant to RCW 42.40.050(2), shown the agency action was justified and improper motive was not a factor: "there is no evidence [the person who wrote the evaluation] suspected Boespflug had made complaints against him when he submitted the evaluation." *Boespflug*, 2022 WL 594288, at *8. Then, in response, Boespflug produced no evidence that refuted this. None.

Even WELA appears to concede that, under such circumstances, "the employer can simply adduce that evidence and defeat the claim[.]" Amicus Mem. 8. Here, the Court of Appeals found that Respondent did just that. Retaliation under such circumstances would be impossible – regardless of where the burden of proving/disproving causation would rest at trial –

and the decision of the Court of Appeals was correct under any reading of the statute on this cause of action.

Next, despite WELA's mischaracterization, the Court of Appeals did *not* find that Boespflug failed to meet a burden on causation as to emails exchanged between him and his supervisor. Amicus Mem. 1. Instead, the Court of Appeals never reached the question of causation because it determined that the e-mails simply "do not amount to unwarranted or unsubstantiated reprimands." *Boespflug*, 2022 WL 594288, at *9. Again, regardless of where the burden of proving *causation* rests at trial, Boespflug's cause of action failed because he could not make out the requisite elements.

Lastly, in deciding whether the changing of Boespflug's inspection area was retaliatory, the Court of Appeals again specifically outlined that this cause of action failed regardless of where the burden resided. The Court of Appeals held, "the undisputed facts rebut any presumption of whistleblower retaliation by demonstrating that there were justified reasons for

the reassignment unrelated to his whistleblower status." *Boespflug,* 2022 WL 594288, at *10. The Court of Appeals' decision highlights that even if WELA's formulation of the test were to be applied – despite being contrary to the plain language chosen by the Legislature – Boespflug's cause of action for changing his inspection area would still fail.

At both the trial court and the Court of Appeals, Respondent 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.

Boespflug 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." *In re Estate of Jones*, 170 Wn. App. 594, 610, 287 P.3d 610 (2012). Even reading RCW 42.40.050 as only providing an affirmative defense as to causation, as WELA requests, Boespflug's arguments on each of the dismissed causes of action still fail. Like Boespflug, WELA fails to even acknowledge the rebuttable nature of the presumed cause of action that is specifically written in the statute. Here, regardless of where the burden would be at trial, the Court of Appeals was correct in identifying that the Respondent had provided *evidence*, which was completely uncontroverted, that successfully rebutted any such presumption.

B. This Case is not an Appropriate Vehicle to Resolve WELA's Claimed Split in Unpublished Court of Appeals Decisions, Even if that Were a Basis for Review

WELA urges this Court to take discretionary review to resolve a so-called "split" in four unpublished Court of Appeals decisions (including the one below). Amicus Mem. 4. However,

this is not a recognized basis for this Court to take discretionary review under RAP 13.4. And even if it were, there is no split that review of this case would resolve.

First, pursuant to GR 14.1, the Court of Appeals' unpublished decision has no precedential value and is not binding on any court. Because WELA cannot, pursuant to RAP 13.4(b), argue that the decision at issue here is in conflict with a published decision of the Court of Appeals, it argues that there is variance amongst the unpublished court of appeals decisions that would cause "[c]onfusion." *See* Amicus Mem. 14. That is not a basis for acceptance of review, and it is notable that the one case that WELA cites to as the outlier is specifically excluded as citable authority under GR 16.1, as it was decided *before* March 1, 2013. *See Rainey v. Wash. State Horse Racing Comm'n*, 134 Wn. App. 1023, 2006 WL 2131741 (Aug. 1, 2006) (unpublished); GR 14.1.

Moreover, even if *Rainey* could be cited, the analysis therein is similar to that outlined by the Court of Appeals here.

The *Rainey* court specifically did not determine what test to apply, and similarly upheld summary judgment when the plaintiff failed to rebut the non-retaliatory reasons provided by the employer. *Id.* at *5.

What is tellingly missing from WELA's briefing is a response to the appellate court's conclusion that Boespflug, too, failed to present any evidence to rebut the proffered reasons for the actions about which he complains and, likewise, affirming summary judgment dismissal of his causes of action was appropriate. *See* Section IIA, above. Much like the court in *Rainey*, Boespflug "ran the risk that [Defendant's] explanation would prove a nonretaliatory motive as a matter of law." *See id.* at *5. And, ultimately, here too the Court of Appeals found that the nonretaliatory motive was proven as a matter of law after Boespflug failed to provide *any* evidence to rebut that motive.

Additionally, the Court of Appeals' decision here specifically avoided setting precedent that would affect future cases. The Court of Appeals did 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 statute'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.

In short, the Court of Appeals' fact-bound, unpublished decision, which is consistent with all of the other unpublished Court of Appeals decisions, does not warrant review to address a question not even necessary to the resolution of this case. Review under RAP 13.4(b)(4) is not merited.

C. The Plain Meaning of the Statutory Language of RCW 42.40.050 is Clear

Finally, even though the Court of Appeals correctly declined to decide whether RCW 42.40.050 requires a whistleblower plaintiff to proffer evidence of causation as part of

his prima facie case, the statute's plain language, specifically the terms "reprisal or retaliatory action," and legislative history mandate such a construction.

1. RCW 46.40.050 does not redefine "reprisal" or "retaliatory" by providing a list of examples of such

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, "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). The statute goes on to provide a non-exhaustive list of examples that may support a case of whistleblower retaliation. RCW 42.40.050(1)(b). The terms "retaliation" and "reprisal" both involve conduct in response to actual or perceived injuries

or wrongs. *See* Resp't's Answer to Pet. for Review 19, 20 (regarding courts' use of dictionary).

WELA would have this Court substitute in the term "adverse actions" and ignore the Legislature's choice to use the words "reprisal" and "retaliatory." Amicus Mem. 6. Courts, however, "recognize that the Legislature intends to use the words it uses and intends not to use words it does not use." *State v. Nelson*, 195 Wn. App. 261, 266, 381 P.3d 84 (2016) (citing *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015) (en banc)).

If the Legislature had intended to use the words "adverse actions" instead of "reprisal" and "retaliatory" it would have. Because the plain meaning of the words the Legislature chose to use necessitate the existence of a causal link, WELA cannot simply ignore the requirement that this link be established.

2. WELA misconstrues the legislative history of RCW 42.40

Because the statutory language is clear, there is no need for this Court to examine legislative history[2]; however, contrary to WELA's contention, even the legislative history supports the requirement that a plaintiff prove causation.

WELA cites to a House Bill Report and a Senate Final Bill Report, relating to the 1999 amendment to the Whistleblower Statute. Amicus Mem., App. B, at B01-B05. WELA quotes these reports as purported evidence of legislative intent. Amicus Mem. 8-9. It is not. While courts at times look to bill reports as evidence of legislative history, as noted in the Senate Bill Report for S.B. 6776, the 2008 modifications to the Whistleblower statute, such documents are "prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is

[2] *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) ("The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent").

not a part of the legislation nor does it constitute a statement of legislative intent." Amicus Mem., App. A, at A01.

Further, contrary to WELA's claim, there is definitive evidence of the Legislature's intent to require plaintiffs to show that the employer's alleged wrongful act was in *response to* the whistleblowing activity. Statements by the legislators themselves directly explain the Legislature's intent. The prime sponsor of the 1999 amendment, Senator Adam Kline, in responding to questions about the requirement to show causation, had the following discussion with another member of the committee:

> McCaslin: Senator Kline, you know, on line 7, where you struck "as a result of being a whistleblower,[3]" would that damage your bill to leave that in there? That more specifically says *why* the individual's getting *retaliatory action*.
>
> Kline: Correct. I believe . . . in the definition of whistleblower in RCW 42.40.020 that's already there. *That that causation has to be shown*.

[3] WELA draws this Court's attention to this specific amendment. Amicus Mem. 9.

McCaslin: So it wouldn't hurt, it wouldn't hurt to leave it in?

Kline: It wouldn't hurt to leave it in, no. But this is, this is kind of redundant. . . .

McCaslin: Thanks.

Kline: . . . But I have no problem if you want to do a quickie amendment.

Senate State & Local Government Committee Meeting on S.B. 5672, 56th Leg., Reg. Sess., (Feb. 10, 1999, 1:28:42-29:14) (emphasis added)[4]; See *State v. Evans*, 177 Wn.2d 186, 199, 298 P.3d 724, 731 (2013) ("The legislative history also includes various relevant and probative committee hearings and floor debates concerning these enactments"); *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 304, 149 P.3d 666 (2006) (relying on relevant recordings of committee hearings and floor debates to discern legislative intent). It is clear the Legislature intended for plaintiffs in whistleblower retaliation actions to be required to establish the third element

[4] https://www.tvw.org/watch/?eventID=1999021263.

that exists in *all* other employment retaliation cases, i.e. "causation *has to be shown*."

The plain language of the statute and the Legislative intent support the Court of Appeals' decision in this matter, and further emphasizes the lack of necessity for review.

III. CONCLUSION

Amicus WELA has failed to demonstrate why review by this Court is appropriate under RAP 13.4(b)(4). This Court should deny Petitioner John Boespflug's petition for review.

This document contains 2,460 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 21st day of July, 2022.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that a copy of Respondent's Answer to Amicus Curiae Memorandum by Washington Employment Lawyers Association was filed by Electronic Filing process in Supreme Court of the State of Washington.

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DATED this 21st day of July, 2022 at Olympia, Washington.

s/ Heather Aschenbrenner
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Appendix

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SENATE BILL REPORT
SB 6776

As Reported By Senate Committee On:
Government Operations & Elections, February 07, 2008
Ways & Means, February 12, 2008

Title: An act relating to state employee whistleblower protection.

Brief Description: Modifying state whistleblower protections.

Sponsors: Senators Kline, Roach, Fraser, Fairley and Swecker.

Brief History:
Committee Activity: Government Operations & Elections: 1/29/08, 2/07/08 [DPS-WM].
Ways & Means: 2/11/08, 2/12/08 [DPS(GO)].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: That Substitute Senate Bill No. 6776 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Fairley, Chair; Oemig, Vice Chair; Roach, Ranking Minority Member; Benton, Kline, McDermott and Pridemore.

Staff: Sharon Swanson (786-7447)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Substitute Senate Bill No. 6776 as recommended by Committee on Government Operations & Elections be substituted therefor, and the substitute bill do pass.

Signed by Senators Prentice, Chair; Fraser, Vice Chair, Capital Budget Chair; Pridemore, Vice Chair, Operating Budget; Zarelli, Ranking Minority Member; Brandland, Carrell, Hatfield, Hewitt, Hobbs, Honeyford, Keiser, Kohl-Welles, Oemig, Parlette, Rasmussen, Regala, Roach, Rockefeller and Schoesler.

Staff: Steve Jones (786-7440)

Background: The state whistle blower protection program was established to encourage state employees to disclose improper governmental action and to provide protection to employees who report improper action.

The Washington Human Rights Commission (WSHRC) enforces the Washington Law Against Discrimination (WLAD). WLAD prohibits employment discrimination on the basis of race, color, national origin, sex, sexual orientation/gender identity, disability, age, creed/

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

religion, marital status, HIV/AIDS or Hepatitis C status, retaliation, and Whistleblower Retaliation. WSHRC has jurisdiction over most employers with eight or more employees.

A whistle blower is defined as any state employee who in good faith reports alleged improper governmental action to the auditor, initiating an investigation.

Currently, improper governmental action is defined as any action by an employee undertaken in the performance of the employee's official duties which is a gross waste of public funds, is in violation of federal or state law or rule, or which is of substantial and specific danger to the public health or safety.

Summary of Bill (Recommended Substitute): Definitions for abuse of authority, gross mismanagement, and public official are added to the whistle blower protection act.

The definition of improper governmental action is amended to include any action by an employee undertaken in the performance of the employee's official duties which prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification, unless disclosure is prohibited by state law or common law privilege.

The definition of reprisal or retaliatory action is expanded.

A public official means the employee's direct or secondary supervisors, other agency managers, and the attorney general.

The definition of whistle blower is expanded to include an individual who in good faith reports or is perceived by the employer as reporting or about to report alleged improper governmental action to the State Auditor or public official, initiating an investigation.

The auditor has the sole authority to investigate reports of improper governmental activities made by whistle blowers to any public official. Any public official receiving a report must submit a record of that to the auditor within 15 business days of receiving it.

The period of time that the auditor has to conduct a preliminary investigation is expanded from 30 days to 60 days.

Individuals are not authorized under the Whistleblower act to disclose information otherwise prohibited by law, except to the extent that information is necessary to substantiate the whistleblower complaint, in which case information may be disclosed to the auditor or public official by the whistleblower for the limited purpose of providing information related to the complaint.

The identity of any person who, in good faith, provides information in a whistleblower investigation is confidential at all times unless the person consents to disclosure in writing or by acknowledging his or her identity as a witness who provides information in an investigation.

Governmental employees must be provided annual notice of their rights under the whistle blower protection act. Such reminders may be in agency internal newsletters, notices included in paychecks, email notices, or other such means that are both cost effective and reach all employees of the agency, division, or subdivision.

An agency presumed to have taken retaliatory action may rebut the presumption by proving by clear and convincing evidence that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower and by showing that improper motive was not a substantial factor

.

If WSHRC has not issued a final decision on the alleged whistle blower retaliation within 180 days or within 90 days that WSHRC denied the requested relief in whole or in part, the complainant may seek injunctive or final relief for the complaint by filing an action in superior court seeking a review of the complaint.

In lieu of filing a complaint for retaliation with the Human Rights Commission, a complainant may pursue arbitration conducted by the American Arbitration Association or another arbitrator mutually agreed upon by the parties. The cost shall be shared equally by the parties.

On or before the third Monday in January of each year, the Human Rights Commission must report to the Governor and Legislature: 1) the number of retaliation reports it has received in the past year; 2) the number of such reports which were substantiated; 3) and the number of such cases still under consideration as well as how long each unresolved case has been under consideration.

EFFECT OF CHANGES MADE BY GOVERNMENT OPERATIONS & ELECTIONS COMMITTEE (Recommended Substitute): The substitute bill codifies the intent section of the bill. De minimus, technical disagreements over scientific opinion does not constitute improper governmental action.

Individuals are not authorized under the Whistleblower act to disclose information otherwise prohibited by law, except to the extent that information is necessary to substantiate the whistleblower complaint, in which case information may be disclosed to the auditor or public official by the whistleblower for the limited purpose of providing information related to the complaint.

The identity of any person who, in good faith, provides information in a whistleblower investigation is confidential at all times unless the person consents to disclosure in writing or by acknowledging his or her identity as a witness who provides information in an investigation.

An agency presumed to have taken retaliatory action may rebut the presumption by proving by clear and convincing evidence that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower and by showing that improper motive was not a substantial factor.

In lieu of filing a complaint for retaliation with the Human Rights Commission, a complainant may pursue arbitration conducted by the American Arbitration Association or another arbitrator mutually agreed upon by the parties. The cost shall be shared equally by the parties.

On or before the third Monday in January of each year, the Human Rights Commission must report to the Governor and Legislature: 1) the number of retaliation reports it has received in the past year; 2) the number of such reports which were substantiated; 3) and the number of such cases still under consideration as well as how long each unresolved case has been under consideration.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill (Government Operations & Elections): PRO: Employees need protection. Expansion of the whistleblower program is a good thing for public employees. This bill is about government accountability and transparency. An employee who finds corruption or illegal behavior should feel confident and protected as they come forward. This bill helps protect employees who may find themselves in this unfortunate position. Those who report wrong doing should be protected. The burden shifting in the bill only kicks in when the employee can show retaliation. The increased burden is on the employer, not the individual.

CON: This bill is a significant expansion of the whistleblower act. Whistleblowers are confidential and no one knows who is the whistleblower is. An expansion to a person who has reported, is about to report, or is perceived to report an act makes investigations difficult. This impacts the definition of who a whistleblower is. Some of the terms added to improper governmental action are subjective and may make it difficult for a supervisor to hold an employee accountable. The use of the term "hostile work environment" is vague. There is a difference as to how a represented employee and an unrepresented employee is treated by an administrative law judge.

Persons Testifying: PRO: Tom Carpenter, Government Account Project; Matt Zuvich, Washington Federation of State Employees; Drea Treaumer, Washington Federation of State Employees; Linda Long, State Auditor's Office; Polly Zehm, Department of Ecology.

CON: Lisa Sutton, Attorney General's Office.

Staff Summary of Public Testimony on Recommended Substitute (Ways & Means): Same as the Government Operations & Elections Committee testimony (see above).

Persons Testifying (Ways & Means): PRO: Tom Carpenter, Bob Cooper, Government Accountability Project; Matt Zuvich, Washington Federation of State Employees; Drea Treaumer, Washington Federation of State Employees; Linda Long, State Auditor's Office; Polly Zehm, Department of Ecology.

CON: Lisa Sutton, Attorney General's Office.

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

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