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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN BOESPFLUG,

Plaintiff/Appellant/Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR AND INDUSTRIES

Defendant/Respondent.

**AMICUS CURIAE MEMORANDUM
BY WASHINGTON EMPLOYMENT LAWYERS
ASSOCIATION**

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I. INTRODUCTION AND INTEREST OF AMICUS

In *Boespflug v. Department of Labor & Industries*, employee John Boespflug alleged that his employer (“L&I”) subjected him to six adverse actions in retaliation for four safety complaints he made to management. Boespflug filed suit alleging retaliation in violation of RCW 42.40.050. The trial court granted L&I’s summary judgment motion and Boespflug appealed. The Court of Appeals affirmed summary judgment based on five of the six adverse actions and reversed and remanded based on only one of the adverse actions.

The Court of Appeals held that an RCW 42.40.050 whistleblower must establish his case with three elements: employee engaged in a protected activity, employer took an adverse action, and the protected activity caused the adverse action. *Boespflug v. Dep’t of Labor & Industries*, No. 83301-4-I, 2022 WL 594288 at *1, *4, *6 (Wash. Ct. App. Feb. 28, 2022). It further held that Boespflug failed to establish causation as to five adverse actions. *Id.* at *7–*10. The Court of Appeals was wrong. RCW 42.40.050 does not require a plaintiff to establish

causation. The clear language of the statute requires that the state has the burden of *disproving* causation.

Mr. Boespflug filed a Petition for Review. The Washington Employment Lawyers Association (“WELA”) urges this Court to grant the Petition for Review.

WELA is a chapter of the National Employment Lawyers Association. WELA consists of more than 190 attorneys admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. RCW 42.40.050 claims are fundamental to the enforcement of employee rights and respect for the rule of law.

II. SUMMARY OF ARGUMENT

RCW 42.40.050 prohibits retaliation against state employee whistleblowers. *See* Appx. A (RCW 42.40) at A07-08. The plain language of RCW 42.40.050(1) states a plaintiff must prove only that he was a “whistleblower” and that the employer engaged in adverse actions against him. RCW 42.40.050(2)

requires that the employer bears the burden of disproving causation when rebutting the claim.

The Court of Appeals in *Boespflug* borrowed the plaintiff's causation burden from Washington Law Against Discrimination ("WLAD") retaliation claims. RCW 49.60.210; *Boespflug*, 2022 WL 594288 at *6. The WLAD is a different statute, with different language, with a different legislative intent, and borrowing from it was improper. RCW 42.40.050 is *sui generis* and the causation requirements of traditional retaliation claims do not apply.

The legislative history confirms that the burden of proof on causation is borne not by the whistleblower but by the agency. The 1999 amendment "[c]hanges the burden of proof under the state Whistleblower Act so that a state agency must demonstrate that a retaliatory action did not occur." Appx. B (1999 Legislative History) at B01 (H. B. Rep. SSB 5672, 56th Leg., 1999 Reg. Sess., at 1 (Wash. 1999)). The amendment struck language requiring whistleblowers to prove they suffered adverse action "as a result of being a whistleblower." Appx. B at

B07 (Laws of 1999, ch. 283, §1). The failure of the Court of Appeals to adhere to the legislative intent creates an issue of substantial public interest mandating review. RAP 13.4(b)(4).

There are four unpublished Court of Appeals opinions addressing the causation burden under RCW 42.40.050 and no published opinions. The unpublished opinions split three-to-one in favor of requiring the employee to establish causation for their prima facie case. Compare *Boespflug*, 2022 WL 594288 at *6, and *Budsberg v. Trause*, No. 46653–8–II, 2015 WL 7259958 at *3 (Wash. Ct. App. Nov. 17, 2015), and *Mendoza de Sugiyama v. Wash. State Dep't of Transp.*, No. 45087–9–II, 2015 WL 563960 at *8 (Wash. Ct. App. Feb. 10, 2015), with *Rainey v. Wash. State Horse Racing Comm'n*, No. 33688–0–II, 2006 WL 2131741 at *5 (Wash. Ct. App. Aug. 1, 2006). Although unpublished opinions have no precedential value, in the absence of any published opinions the unpublished opinions will very likely be accorded significant persuasive value. See GR 14.1. Especially insofar as the majority of unpublished opinions are wrong, the split creates confusion about the legal standard and

risks continued errors on causation by Courts of Appeals. This split and the resulting confusion creates an issue of substantial public interest justifying review. RAP 13.4(b)(4). The Petition for Review should be granted.

III. ARGUMENT

A. *Boespflug* Flouted Legislative Intent by Requiring RCW 42.40.050 Plaintiffs to Prove Causation to Establish Their Claims.

When interpreting a statute, a court’s “fundamental objective is to ascertain and carry out the Legislature’s intent.” *See Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The legislative intent is clear that RCW 42.40.050 plaintiffs do not need to prove causation to establish their claims.

1. The Plain Language Demonstrates that Plaintiff Does not Bear the Initial Burden of Proving Causation. Instead, the Defendant Must Demonstrate a Lack of Causation.

RCW 42.40.050 prohibits retaliation against state employee whistleblowers. The starting point for determining legislative intent is the statutory language. *See Dep’t of Ecology*, 146 Wn.2d at 11. If the language is plain on its face, the Court

goes no further. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

RCW 42.40.050(1) sets forth the method for plaintiffs to establish their claim. A whistleblower “who has been subjected 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). Even if the ordinary meaning of “reprisal or retaliatory action” incorporates an element of causation, the statute defines “reprisal or retaliatory action” as any one of a non-exhaustive list “adverse actions” without resort to causation. Appx. A at A07, RCW 42.40.050(1)(b). “Legislative definitions provided in a statute are controlling” and courts only look to ordinary meanings where a term is undefined in the statute. *See Fraternal Ord. of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Ord. of Eagles*, 148 Wn. 2d 224, 239, 59 P.3d 655 (2002). Here, the legislature rejected the ordinary meaning of “reprisal or retaliatory action,” and adopted a meaning consistent with “adverse actions.” Courts are therefore bound by the definition provided in RCW

42.40.050(1)(b). A plaintiff, therefore, only needs to demonstrate that she is a “whistleblower” as defined by RCW 42.40.020(10), and that she suffered an adverse action. She does not need to demonstrate causation.

RCW 42.40.050(2), in setting forth the defendant’s burden to rebut the claim, confirms that plaintiffs do not bear the causation burden:

(2) The agency presumed to have taken retaliatory action under subsection (1) of this section *may 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 42.40.050(2) (Emphasis added). Once the claim is presumed under Subsection (1), it is the *employer* who must prove by a preponderance of evidence “that improper motive was not a substantial factor.” This is fully consistent with RCW 42.40.050(1) not requiring a whistleblower to establish causation. The text is therefore plain that it is defendant who bears the burden to disprove causation rather than plaintiff.

The causation burdens required by the plain text will not create “bizarre and illogical” outcomes. *See Resp.’s Br.* at 23-24. For example, if the adverse action predated the protected activity, the employer can simply adduce that evidence and defeat the claim under RCW 42.40.050(2).

2. The Legislative History States That the Legislature Intended to “Change the Burden of Proof” on Causation and Shift It to Defendants.

Even if additional construction were required, legislative history leaves no doubt RCW 42.40.050 whistleblowers do not bear the burden of proving causation. If a statute remains ambiguous after reviewing the plain text a court may “resort to aids to construction, including legislative history.” *Dep’t of Ecology*, 146 Wn.2d at 12.

RCW 42.40.050 was amended in 1999 and 2008. The 1999 Bill Reports state an intent to strengthen whistleblower protections because “the whistleblower is at a disadvantage in having to prove that the reason why an agency took retaliatory action against him or her is because the person was a whistleblower.” Appx. B at B04 (Final B. Rep. SSB 5672, 56th

Leg., 1999 Reg. Sess., at 1 (Wash. 1999)). The last House Report states the amendment “[c]hanges the burden of proof under the state Whistleblower Act so that a state agency must demonstrate that a retaliatory action did not occur and adds examples of what constitutes retaliatory action.” Appx. B at B01 (H. B. Rep. SSB 5672 at 1) (Emphasis added). This amendment struck language requiring employees to prove causation and inserted language requiring agencies to rebut causation:

(1) Any person who is a whistleblower, as defined in RCW 42.40.020, and who ((as a result of being a whistleblower)) has been subjected to workplace reprisal or retaliatory action ((has)) is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW. For the purpose of this section “reprisal or retaliatory action” means but is not limited to any of the following:

~~((1))~~(a) Denial of adequate staff to perform duties;
~~((2))~~(b) Frequent staff changes;...

(2) The agency presumed to have taken retaliatory action under subsection (1) of this section may rebut that presumption by proving by a preponderance of the evidence that the agency action or actions were justified by reasons unrelated to the employee’s status as a whistleblower.

Appx. B at B07 (Laws of 1999, ch. 283, §1). The redline could not be clearer. Whistleblowers no longer need to establish that the adverse actions were “as a result of [their] being a whistleblower.” Employers instead needed to prove their “actions were justified.”

The 2008 legislative history also shows intent to expand whistleblower protections. That amendment added adverse actions under RCW 42.40.050(1)(b) and adjusted the employer’s rebuttal burden:

(2) The agency presumed to have taken retaliatory action under subsection (1) of this section may 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.

Appx. C (2008 Legislative History) at C11-12 (Laws of 2008, ch. 266, §6). Instead of showing only a legitimate reason for adverse action, the employer must now prove an “improper motive was not a substantial factor”—a more difficult bar for an employer.

3. *Boespflug* Improperly Grafted a Causation Requirement From an Unrelated Claim.

Contrary to legislative intent, *Boespflug* requires RCW 42.40.050 plaintiffs to establish causation as an element of the claim “by showing that retaliation was a substantial factor motivating the adverse employment decision.” *Boespflug*, 2022 WL 594288 at *6. The reasoning contains two significant errors.

First, the Court assumes the concept of causation “inherent to a retaliation claim take[s] the form of [an] element[] required for a plaintiff to establish.” *Id.* at *4. *Boespflug* does not explain why causation cannot be the defendant’s burden to disprove. It conflates defendant bearing the causation burden with a lack of causation and strict liability. *Id.* at *4 n.14.¹ This concern is misplaced because RCW 42.40.050 does not *remove* all causation analysis, only shifts it to the defendant. This is not strict liability. *See Floeting v. Group Health Cooperative*, 192 Wn.2d 848, 434 P.3d 39 (2019) (explaining strict liability is

¹ There is also nothing inherently wrong with a strict liability tort if the legislature had so intended.

where employer cannot “escape liability by asserting a lack of fault”).

Second, *Boespflug* does not find a requirement for plaintiff to establish causation in RCW 42.40.050’s plain text. Nor does it examine the legislative intent. *Boespflug* instead relies on cases analyzing varying claims it calls “whistleblower retaliation claims”—those pursued under the WLAD (RCW 49.60.210), common law wrongful discharge in violation of public policy, and California law. *Boespflug*, 2022 WL 594288 at *4-*6. The Court ultimately borrows the plaintiff’s burden to establish “substantial factor” causation from a WLAD retaliation case. *Id.* at *6 (quoting *Allison v. Hous. Auth. Of City of Seattle*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991)).

RCW 42.40 *et seq.* contains no language borrowing legal standards for determining agency liability from RCW 49.60.210 or any other claims. *Boespflug* assumes incorrectly that because RCW 49.60 *remedies* are available under RCW 42.40.050(1)(a), the two statutes must share liability standards. *Boespflug*, 2022 WL 594288 at *4 n.25. It also cites erroneous unpublished case

law stating that a RCW 42.40 claim is “derived from” RCW 49.60. *Id.* (citing *Budsberg*, 2015 WL 7259958 at *3 n.1). *This is incorrect.* RCW 42.40.050’s plain text and legislative intent are specific and unique and do not import RCW 49.60 liability standards. The legislature could have specified that plaintiffs under both statutes share more than remedies but did not do so. “[A] court must not add words where the legislature has chosen not to include them.” *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

B. Court of Appeals Decisions Are Split as to Whether RCW 42.40.050 Plaintiffs Must Prove Causation.

There are zero published and four unpublished Court of Appeals opinions addressing RCW 42.40.050 causation. Three including *Boespflug* incorrectly impose a causation requirement on plaintiffs. *See Budsberg v. Trause*, 2015 WL 7259958 at *3; *Mendoza de Sugiyama*, 2015 WL 563960 at *8. All three state inaccurately that the RCW 42.40.050 claim is “derived from” RCW 49.60.210 because the successful plaintiff has “a cause of action for the remedies provided under chapter 49.60 RCW.” RCW 49.40.050(1)(a).

In the fourth unpublished opinion, Division II agreed that the plaintiff does not need to prove causation. *Rainey*, 2006 WL 2131741 at *5. It ultimately held that the agency met its burden and proved “nonretaliatory motive as a matter of law” under the 1999 version of the statute.

Confusion caused by the three-to-one decision split and increased likelihood that Courts of Appeals will perpetuate an inaccurate construction of RCW 42.40.050 militate in favor of granting review. RAP 13.4(b)(4).

IV. CONCLUSION

Boespflug fails to adhere to the plain and ordinary meaning of the statute which creates a basis for review. RAP 13.4(b)(4). The split of unpublished cases results in substantial confusion for both trial courts and state whistleblowers and creates an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). The Petition for Review should be granted.

This document contains 2460 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 27th day of June 2022.

**WASHINGTON EMPLOYMENT LAWYERS
ASSOCIATION**

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APPENDIX A

Chapter 42.40 RCW

STATE EMPLOYEE WHISTLEBLOWER PROTECTION

Sections

- 42.40.010** Policy.
- 42.40.020** Definitions.
- 42.40.030** Right to disclose improper governmental actions—Interference prohibited.
- 42.40.035** Duty of correctness—Penalties for false information.
- 42.40.040** Report of improper governmental action—Investigations and reports by auditor, agency.
- 42.40.050** Retaliatory action against whistleblower—Remedies.
- 42.40.070** Summary of chapter available to employees.
- 42.40.080** Contracting for assistance.
- 42.40.090** Administrative costs.
- 42.40.100** Assertions against auditor.
- 42.40.110** Performance audit.
- 42.40.910** Application of chapter.

RCW 42.40.010

Policy.

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, regardless of whether an investigation is initiated under RCW **42.40.040**. 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.

[**2017 c 44 § 1**; **1995 c 403 § 508**; **1982 c 208 § 1**.]

NOTES:

Findings—Short title—Intent—1995 c 403: See note following RCW **34.05.328**.

RCW 42.40.020

Definitions.

As used in this chapter, the terms defined in this section shall have the meanings indicated unless the context clearly requires otherwise.

(1) "Auditor" means the office of the state auditor.

(2) "Employee" means any individual employed or holding office in any department or agency of state government.

(3) "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. An individual who knowingly provides or reports, or who reasonably ought to know he or she is providing or reporting, malicious, false, or frivolous information, or information that is provided with reckless disregard for the truth, or who knowingly omits relevant information is not acting in good faith.

(4) "Gross mismanagement" means the exercise of management responsibilities in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(5) "Gross waste of funds" means to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(6)(a) "Improper governmental action" means any action by an employee undertaken in the performance of the employee's official duties:

(i) Which is a gross waste of public funds or resources as defined in this section;

(ii) Which is in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature;

(iii) Which is of substantial and specific danger to the public health or safety;

(iv) Which is gross mismanagement;

(v) Which prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification, unless state law or a common law privilege prohibits disclosure. This provision is not meant to preclude the discretion of agency management to adopt a particular scientific opinion or technical finding from among differing opinions or technical findings to the exclusion of other scientific opinions or technical findings. Nothing in this subsection prevents or impairs a state agency's or public official's ability to manage its public resources or its employees in the performance of their official job duties. This subsection does not apply to de minimis, technical disagreements that are not relevant for otherwise improper governmental activity. Nothing in this provision requires the auditor to contract or consult with external experts regarding the scientific validity, invalidity, or justification of a finding or opinion; or

(vi) Which violates the administrative procedure act or analogous provisions of law that prohibit ex parte communication regarding cases or matters pending in which an agency is party between the agency's employee and a presiding officer, hearing officer, or an administrative law judge. The availability of other avenues for addressing ex parte communication by agency employees does not bar an investigation by the auditor.

(b) "Improper governmental action" does not include personnel actions, for which other remedies exist, including but not limited to employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of the state civil service law, alleged labor agreement violations, reprimands, claims of discriminatory treatment, or any action which may be taken under chapter 41.06 RCW, or other disciplinary action except as provided in RCW 42.40.030.

(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.

(8) "Substantial and specific danger" means a risk of serious injury, illness, peril, or loss, to which the exposure of the public is a gross deviation from the standard of care or competence which a reasonable person would observe in the same situation.

(9) "Use of official authority or influence" includes threatening, taking, directing others to take, recommending, processing, or approving any personnel action such as an appointment, promotion, transfer, assignment including but not limited to duties and office location, reassignment, reinstatement, restoration, reemployment, performance evaluation, determining any material changes in pay, provision

of training or benefits, tolerance of a hostile work environment, or any adverse action under chapter **41.06** RCW, or other disciplinary action.

(10)(a) "Whistleblower" means:

(i) An employee who in good faith reports alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section; or

(ii) An employee who is perceived by the employer as reporting, whether they did or not, alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section.

(b) For purposes of the provisions of this chapter and chapter **49.60** RCW relating to reprisals and retaliatory action, the term "whistleblower" also means:

(i) An employee who in good faith provides information to the auditor or other public official, as defined in subsection (7) of this section, and an employee who is believed to have reported asserted improper governmental action to the auditor or other public official, as defined in subsection (7) of this section, or to have provided information to the auditor or other public official, as defined in subsection (7) of this section, but who, in fact, has not reported such action or provided such information; or

(ii) An employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.

[**2017 c 44 § 2**; **2008 c 266 § 2**; **1999 c 361 § 1**; **1995 c 403 § 509**; **1992 c 118 § 1**; **1989 c 284 § 1**; **1982 c 208 § 2**.]

NOTES:

Findings—Intent—2008 c 266: "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**.]

Findings—Short title—Intent—1995 c 403: See note following RCW **34.05.328**.

RCW **42.40.030**

Right to disclose improper governmental actions—Interference prohibited.

(1) An employee shall not directly or indirectly use or attempt to use the employee's official authority or influence for the purpose of intimidating, threatening, coercing, commanding, influencing, or attempting to intimidate, threaten, coerce, command, or influence any individual for the purpose of interfering with the right of the individual to: (a) Disclose to the auditor (or representative thereof) or other

public official, as defined in RCW **42.40.020**, information concerning improper governmental action; or (b) identify rules warranting review or provide information to the rules review committee.

(2) Nothing in this section authorizes an individual 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, as defined in RCW **42.40.020**, by the whistleblower for the limited purpose of providing information related to the complaint. Any information provided to the auditor or public official under the authority of this subsection may not be further disclosed.

[**2008 c 266 § 3**; **1995 c 403 § 510**; **1989 c 284 § 2**; **1982 c 208 § 3**.]

NOTES:

Findings—Intent—2008 c 266: See note following RCW **42.40.020**.

Findings—Short title—Intent—1995 c 403: See note following RCW **34.05.328**.

RCW **42.40.035**

Duty of correctness—Penalties for false information.

An employee must make a reasonable attempt to ascertain the correctness of the information furnished and may be subject to disciplinary actions, including, but not limited to, suspension or termination, for knowingly furnishing false information as determined by the employee's appointing authority.

[**1999 c 361 § 2**.]

RCW **42.40.040**

Report of improper governmental action—Investigations and reports by auditor, agency.

(1)(a) In order to be investigated, an assertion of improper governmental action must be provided to the auditor or other public official within one year after the occurrence of the asserted improper governmental action. The public official, as defined in RCW **42.40.020**, receiving an assertion of improper governmental action must report the assertion to the auditor within fifteen calendar days of receipt of the assertion. The auditor retains sole authority to investigate an assertion of improper governmental action including those made to a public official. A failure of the public official to report the assertion to the auditor within fifteen days does not impair the rights of the whistleblower.

(b) Except as provided under RCW **42.40.910** for legislative and judicial branches of government, the auditor has the authority to determine whether to investigate any assertions received. In determining whether to conduct either a preliminary or further investigation, the auditor shall consider factors including, but not limited to: The nature and quality of evidence and the existence of relevant laws and rules; whether the action was isolated or systematic; the history of previous assertions regarding the same subject or subjects or subject matter; whether other avenues are available for addressing the

matter; whether the matter has already been investigated or is in litigation; the seriousness or significance of the asserted improper governmental action; and the cost and benefit of the investigation. The auditor has the sole discretion to determine the priority and weight given to these and other relevant factors and to decide whether a matter is to be investigated. The auditor shall document the factors considered and the analysis applied.

(c) The auditor also has the authority to investigate assertions of improper governmental actions as part of an audit conducted under chapter 43.09 RCW. The auditor shall document the reasons for handling the matter as part of such an audit.

(2) Subject to subsection (5)(c) of this section, the identity or identifying characteristics of a whistleblower is confidential at all times unless the whistleblower consents to disclosure by written waiver or by acknowledging his or her identity in a claim against the state for retaliation. In addition, the identity or identifying characteristics of any person who in good faith provides information in an investigation under this section is confidential at all times, unless the person consents to disclosure by written waiver or by acknowledging his or her identity as a witness who provides information in an investigation.

(3) Upon receiving specific information that an employee has engaged in improper governmental action, the auditor shall, within fifteen working days of receipt of the information, mail written acknowledgment to the whistleblower at the address provided stating whether a preliminary investigation will be conducted. For a period not to exceed sixty working days from receipt of the assertion, the auditor shall conduct such preliminary investigation of the matter as the auditor deems appropriate.

(4) In addition to the authority under subsection (3) of this section, the auditor may, on its own initiative, investigate incidents of improper state governmental action.

(5)(a) If it appears to the auditor, upon completion of the preliminary investigation, that the matter is so unsubstantiated that no further investigation, prosecution, or administrative action is warranted, the auditor shall so notify the whistleblower summarizing where the allegations are deficient, and provide a reasonable opportunity to reply. Such notification may be by electronic means.

(b) The written notification shall contain a summary of the information received and of the results of the preliminary investigation with regard to each assertion of improper governmental action.

(c) In any case to which this section applies, the identity or identifying characteristics of the whistleblower shall be kept confidential unless the auditor determines that the information has been provided other than in good faith. If the auditor makes such a determination, the auditor shall provide reasonable advance notice to the employee.

(d) With the agency's consent, the auditor may forward the assertions to an appropriate agency to investigate and report back to the auditor no later than sixty working days after the assertions are received from the auditor. The auditor is entitled to all investigative records resulting from such a referral. All procedural and confidentiality provisions of this chapter apply to investigations conducted under this subsection. The auditor shall document the reasons the assertions were referred.

(6) During the preliminary investigation, the auditor shall provide written notification of the nature of the assertions to the subject or subjects of the investigation and the agency head. The notification shall include the relevant facts and laws known at the time and the procedure for the subject or subjects of the investigation and the agency head to respond to the assertions and information obtained during the investigation. This notification does not limit the auditor from considering additional facts or laws which become known during further investigation.

(a) If it appears to the auditor after completion of the preliminary investigation that further investigation, prosecution, or administrative action is warranted, the auditor shall so notify the whistleblower, the subject or subjects of the investigation, and the agency head and either conduct a further investigation or issue a report under subsection (9) of this section.

(b) If the preliminary investigation resulted from an anonymous assertion, a decision to conduct further investigation shall be subject to review by a three-person panel convened as necessary by the auditor prior to the commencement of any additional investigation. The panel shall include a state auditor representative knowledgeable of the subject agency operations, a citizen volunteer, and a representative

of the attorney general's office. This group shall be briefed on the preliminary investigation and shall recommend whether the auditor should proceed with further investigation.

(c) If further investigation is to occur, the auditor shall provide written notification of the nature of the assertions to the subject or subjects of the investigation and the agency head. The notification shall include the relevant facts known at the time and the procedure to be used by the subject or subjects of the investigation and the agency head to respond to the assertions and information obtained during the investigation.

(7) Within sixty working days after the preliminary investigation period in subsection (3) of this section, the auditor shall complete the investigation and report its findings to the whistleblower unless written justification for the delay is furnished to the whistleblower, agency head, and subject or subjects of the investigation. In all such cases, the report of the auditor's investigation and findings shall be sent to the whistleblower within one year after the information was filed under subsection (3) of this section.

(8)(a) At any stage of an investigation under this section the auditor may require by subpoena the attendance and testimony of witnesses and the production of documentary or other evidence relating to the investigation at any designated place in the state. The auditor may issue subpoenas, administer oaths, examine witnesses, and receive evidence. In the case of contumacy or failure to obey a subpoena, the superior court for the county in which the person to whom the subpoena is addressed resides or is served may issue an order requiring the person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(b) The auditor may order the taking of depositions at any stage of a proceeding or investigation under this chapter. Depositions shall be taken before an individual designated by the auditor and having the power to administer oaths. Testimony shall be reduced to writing by or under the direction of the individual taking the deposition and shall be subscribed by the deponent.

(c) Agencies shall cooperate fully in the investigation and shall take appropriate action to preclude the destruction of any evidence during the course of the investigation.

(d) During the investigation the auditor shall interview each subject of the investigation. If it is determined there is reasonable cause to believe improper governmental action has occurred, the subject or subjects and the agency head shall be given fifteen working days to respond to the assertions prior to the issuance of the final report.

(9)(a) If the auditor determines there is reasonable cause to believe an employee has engaged in improper governmental action, the auditor shall report, to the extent allowable under existing public disclosure laws, the nature and details of the activity to:

- (i) The subject or subjects of the investigation and the head of the employing agency;
- (ii) If appropriate, the attorney general or such other authority as the auditor determines appropriate;
- (iii) Electronically to the governor, secretary of the senate, and chief clerk of the house of representatives; and

(iv) Except for information whose release is specifically prohibited by statute or executive order, the public through the public file of whistleblower reports maintained by the auditor.

(b) The auditor has no enforcement power except that in any case in which the auditor submits an investigative report containing reasonable cause determinations to the agency, the agency shall send its plan for resolution to the auditor within fifteen working days of having received the report. The agency is encouraged to consult with the subject or subjects of the investigation in establishing the resolution plan. The auditor may require periodic reports of agency action until all resolution has occurred. If the auditor determines that appropriate action has not been taken, the auditor shall report the determination to the governor and to the legislature and may include this determination in the agency audit under chapter **43.09** RCW.

(10) Once the auditor concludes that appropriate action has been taken to resolve the matter, the auditor shall so notify the whistleblower, the agency head, and the subject or subjects of the

investigation. If the resolution takes more than one year, the auditor shall provide annual notification of its status to the whistleblower, agency head, and subject or subjects of the investigation.

(11) Failure to cooperate with such audit or investigation, or retaliation against anyone who assists the auditor by engaging in activity protected by this chapter shall be reported as a separate finding with recommendations for corrective action in the associated report whenever it occurs.

(12) This section does not limit any authority conferred upon the attorney general or any other agency of government to investigate any matter.

[2008 c 266 § 4; 1999 c 361 § 3; 1992 c 118 § 2; 1989 c 284 § 3; 1982 c 208 § 4.]

NOTES:

Findings—Intent—2008 c 266: See note following RCW [42.40.020](#).

RCW [42.40.050](#)

Retaliatory action against whistleblower—Remedies.

(1)(a) Any person who is a whistleblower, as defined in RCW [42.40.020](#), and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter [49.60](#) RCW.

(b) For the purpose of this section, "reprisal or retaliatory action" means, but is not limited to, any of the following:

- (i) Denial of adequate staff to perform duties;
- (ii) Frequent staff changes;
- (iii) Frequent and undesirable office changes;
- (iv) Refusal to assign meaningful work;
- (v) Unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations;
- (vi) Demotion;
- (vii) Reduction in pay;
- (viii) Denial of promotion;
- (ix) Suspension;
- (x) Dismissal;
- (xi) Denial of employment;
- (xii) A supervisor or superior behaving in or encouraging coworkers to behave in a hostile manner toward the whistleblower;
- (xiii) A change in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish;
- (xiv) Issuance of or attempt to enforce any nondisclosure policy or agreement in a manner inconsistent with prior practice; or
- (xv) Any other action that is inconsistent compared to actions taken before the employee engaged in conduct protected by this chapter, or compared to other employees who have not engaged in conduct protected by this chapter.

(2) The agency presumed to have taken retaliatory action under subsection (1) of this section may 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.

(3) Nothing in this section prohibits an agency from making any decision exercising its authority to terminate, suspend, or discipline an employee who engages in workplace reprisal or retaliatory action against a whistleblower. However, the agency also shall implement any order under chapter 49.60 RCW (other than an order of suspension if the agency has terminated the retaliator).

[2008 c 266 § 6; 1999 c 283 § 1; 1992 c 118 § 3; 1989 c 284 § 4; 1982 c 208 § 5.]

NOTES:

Findings—Intent—2008 c 266: See note following RCW 42.40.020.

RCW 42.40.070

Summary of chapter available to employees.

A written summary of this chapter and procedures for reporting improper governmental actions established by the auditor's office shall be made available by each department or agency of state government to each employee upon entering public employment. Such notices may be in agency internal newsletters, included with paychecks or stubs, sent via electronic mail to all employees, or sent by other means that are cost-effective and reach all employees of the government level, division, or subdivision. Employees shall be notified by each department or agency of state government each year of the procedures and protections under this chapter. The annual notices shall include a list of public officials, as defined in RCW 42.40.020, authorized to receive whistleblower reports. The list of public officials authorized to receive whistleblower reports shall also be prominently displayed in all agency offices.

[2008 c 266 § 5; 1989 c 284 § 5; 1982 c 208 § 7.]

NOTES:

Findings—Intent—2008 c 266: See note following RCW 42.40.020.

RCW 42.40.080

Contracting for assistance.

The auditor has the authority to contract for any assistance necessary to carry out the provisions of this chapter.

[1999 c 361 § 4.]

RCW 42.40.090

Administrative costs.

The cost of administering this chapter is funded through the auditing services revolving account created in RCW **43.09.410**.

[1999 c 361 § 5.]

RCW 42.40.100

Assertions against auditor.

A whistleblower wishing to provide information under this chapter regarding asserted improper governmental action against the state auditor or an employee of that office shall provide the information to the attorney general who shall act in place of the auditor in investigating and reporting the matter.

[1999 c 361 § 6.]

RCW 42.40.110

Performance audit.

The office of financial management shall contract for a performance audit of the state employee whistleblower program on a cycle to be determined by the office of financial management. The audit shall be done in accordance with generally accepted government auditing standards beginning with the fiscal year ending June 30, 2001. The audit shall determine at a minimum: Whether the program is acquiring, protecting, and using its resources such as personnel, property, and space economically and efficiently; the causes of inefficiencies or uneconomical practices; and whether the program has complied with laws and rules on matters of economy and efficiency. The audit shall also at a minimum determine the extent to which the desired results or benefits established by the legislature are being achieved, the effectiveness of the program, and whether the auditor has complied with significant laws and rules applicable to the program.

The cost of the audit is a cost of operating the program and shall be funded by the auditing services revolving account created by RCW **43.09.410**.

[1999 c 361 § 8.]

RCW 42.40.910

Application of chapter.

Chapter 266, Laws of 2008 and chapter 361, Laws of 1999 do not affect the jurisdiction of the legislative ethics board, the executive ethics board, or the commission on judicial conduct, as set forth in chapter **42.52** RCW. The senate, the house of representatives, and the supreme court shall adopt policies regarding the applicability of chapter **42.40** RCW to the senate, house of representatives, and judicial branch.

[2008 c 266 § 9; 1999 c 361 § 7.]

NOTES:

Findings—Intent—2008 c 266: See note following RCW **42.40.020**.

APPENDIX B

HOUSE BILL REPORT

SSB 5672

As Passed House - Amended:

April 14, 1999

Title: An act relating to retaliatory action against a whistleblower.

Brief Description: Retaliating against a whistleblower.

Sponsors: Senate Committee on State & Local Government (originally sponsored by Senators Kline, Costa, Prentice, Fraser, Fairley, Shin, Kohl-Welles, Haugen, Hargrove and McAuliffe).

Brief History:

Committee Activity:

State Government: 3/23/99, 4/2/99 [DPA].

Floor Activity:

Passed House - Amended: 4/14/99, 96-0.

Brief Summary of Substitute Bill (As Amended by House Committee)

- Changes the burden of proof under the state Whistleblower Act so that a state agency must demonstrate that a retaliatory action did not occur and adds examples of what constitutes retaliatory action.

HOUSE COMMITTEE ON STATE GOVERNMENT

Majority Report: Do pass as amended. Signed by 8 members: Representatives McMorris, Republican Co-Chair; Romero, Democratic Co-Chair; Campbell, Republican Vice Chair; Miloscia, Democratic Vice Chair; Dunshee; Haigh; Lambert and D. Schmidt.

Staff: Steve Lundin (786-7127).

Background:

Legislation was enacted in 1982 establishing a whistleblower protection program for state employees, to encourage state employees to report improper governmental actions and to protect the rights of state employees who make such disclosures.

Employees who provide information about improper governmental action in good faith are protected from retaliatory action and have remedies available under the Human Rights Commission laws. A retaliatory action could include a number of actions, such as frequent staff changes, frequent and undesirable office changes, refusal to assign meaningful work, demotion, reduction in pay, denial of a promotion, suspension, dismissal, and a supervisor or superior encouraging co-workers to behave in a hostile manner toward the whistleblower.

An agency is allowed to exercise its supervisory authority over a whistleblower, including terminating, suspending, or disciplining such an employee. However, the agency is required to implement any order made by the Human Rights Commission, other than an order of suspension if the agency has terminated the retaliator.

Summary of Amended Bill:

Changes are made to the retaliatory action provisions of the state whistleblower law.

A presumption is established for a cause of action if a retaliatory action occurs, including any of the listed types of retaliatory actions. The agency presumed to have taken retaliatory action may rebut that presumption by providing a preponderance of the evidence that the agency actions were justified by reasons unrelated to the employee's status as a whistleblower.

The list of retaliatory actions is expanded to include a change in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish.

Appropriation: None.

Fiscal Note: Not Requested.

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

Testimony For: This is part of a package of bills relating to the Whistleblower Act. This reverses the legal burden of proof. The Human Rights Commission only found retaliation in only one out of 64 cases.

Testimony Against: None.

Testified: Senator Klein, prime sponsor; and Lynn McKinnon, Washington Public Employees Association.

FINAL BILL REPORT

SSB 5672

C 283 L 99

Synopsis as Enacted

Brief Description: Retaliating against a whistleblower.

Sponsors: Senate Committee on State & Local Government (originally sponsored by Senators Kline, Costa, Prentice, Fraser, Fairley, Shin, Kohl-Welles, Haugen, Hargrove and McAuliffe).

Senate Committee on State & Local Government
House Committee on State Government

Background: Whistleblowers are state employees who in good faith report alleged improper governmental action to the State Auditor. This includes employees who are believed to have reported improper governmental action but who actually have not, and employees who provide information in good faith to the Auditor in connection with a whistleblower investigation. Improper governmental action does not include personnel actions.

When a whistleblower can prove both that he or she has been subjected to workplace retaliation and that the retaliation occurred as a result of the person being a whistleblower, then the remedies provided under the statutes governing the Human Rights Commission (HRC) apply. There is a list of 12 actions given as examples of retaliation.

The State Auditor refers cases of alleged retaliation to the HRC for investigation as an unfair practice. The HRC also has responsibility for investigating complaints of unfair practices due to discrimination because of race, creed, color, national origin, sex, marital status, age, or mental or physical disability. These complaints must allege violation of the law in employment, places of public accommodation, credit or insurance transactions.

In seven years, out of 65 whistleblower retaliation complaints, the HRC has found reasonable cause to believe that retaliation against a whistleblower has been, or is being committed, only once. It is argued that the whistleblower is at a disadvantage in having to prove that the reason why an agency took retaliatory action against him or her is because the person was a whistleblower. The one case where the HRC decided the whistleblower met this burden is scheduled to be heard before an administrative law judge under the Administrative Procedure Act in 1999.

Summary: If the whistleblower can prove that a retaliatory action was taken against him or her, then a cause of action for the remedies under the statutes governing the HRC is established. The agency presumed to have taken this retaliation action may rebut that presumption by proving by a preponderance of the evidence that the action was justified for reasons unrelated to the person's status as a whistleblower. A 13th example of retaliation is specified, that being an unwanted change in the location of the employee's workplace or an unwanted change in the basic nature of the employee's job.

Votes on Final Passage:

Senate	49	0	
House	96	0	(House amended)
Senate	41	1	(Senate concurred)

Effective: July 25, 1999

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 5672

Chapter 283, Laws of 1999

56th Legislature
1999 Regular Session

WHISTLEBLOWERS--RETALIATORY ACTIONS

EFFECTIVE DATE: 7/25/99

Passed by the Senate April 23, 1999
YEAS 41 NAYS 1

BRAD OWEN
President of the Senate

Passed by the House April 19, 1999
YEAS 96 NAYS 0

CLYDE BALLARD
**Speaker of the
House of Representatives**

FRANK CHOPP
**Speaker of the
House of Representatives**

Approved May 13, 1999

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

I, Tony M. Cook, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5672** as passed by the Senate and the House of Representatives on the dates hereon set forth.

TONY M. COOK
Secretary

FILED

May 13, 1999 - 3:17 p.m.

**Secretary of State
State of Washington**

B06

SUBSTITUTE SENATE BILL 5672

AS AMENDED BY THE HOUSE

Passed Legislature - 1999 Regular Session

State of Washington 56th Legislature 1999 Regular Session

By Senate Committee on State & Local Government (originally sponsored by Senators Kline, Costa, Prentice, Fraser, Fairley, Shin, Kohl-Welles, Haugen, Hargrove and McAuliffe)

Read first time 02/18/1999.

1 AN ACT Relating to retaliatory action against a whistleblower; and
2 amending RCW 42.40.050.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 42.40.050 and 1992 c 118 s 3 are each amended to read
5 as follows:

6 (1) Any person who is a whistleblower, as defined in RCW 42.40.020,
7 and who ~~((as a result of being a whistleblower))~~ has been subjected to
8 workplace reprisal or retaliatory action ~~((has))~~ is presumed to have
9 established a cause of action for the remedies provided under chapter
10 49.60 RCW. For the purpose of this section "reprisal or retaliatory
11 action" means but is not limited to any of the following:

- 12 ~~((+1))~~ (a) Denial of adequate staff to perform duties;
- 13 ~~((+2))~~ (b) Frequent staff changes;
- 14 ~~((+3))~~ (c) Frequent and undesirable office changes;
- 15 ~~((+4))~~ (d) Refusal to assign meaningful work;
- 16 ~~((+5))~~ (e) Unwarranted and unsubstantiated letters of reprimand or
17 unsatisfactory performance evaluations;
- 18 ~~((+6))~~ (f) Demotion;
- 19 ~~((+7))~~ (g) Reduction in pay;

B07

1 ~~((8))~~ (h) Denial of promotion;
2 ~~((9))~~ (i) Suspension;
3 ~~((10))~~ (j) Dismissal;
4 ~~((11))~~ (k) Denial of employment; ~~((and))~~
5 ~~((12))~~ (l) A supervisor or superior encouraging coworkers to
6 behave in a hostile manner toward the whistleblower; and
7 (m) A change in the physical location of the employee's workplace
8 or a change in the basic nature of the employee's job, if either are in
9 opposition to the employee's expressed wish.
10 (2) The agency presumed to have taken retaliatory action under
11 subsection (1) of this section may rebut that presumption by proving by
12 a preponderance of the evidence that the agency action or actions were
13 justified by reasons unrelated to the employee's status as a
14 whistleblower.
15 (3) Nothing in this section prohibits an agency from making any
16 decision exercising its authority to terminate, suspend, or discipline
17 an employee who engages in workplace reprisal or retaliatory action
18 against a whistleblower. However, the agency also shall implement any
19 order under chapter 49.60 RCW (other than an order of suspension if the
20 agency has terminated the retaliator).

Passed the Senate April 23, 1999.

Passed the House April 19, 1999.

Approved by the Governor May 13, 1999.

Filed in Office of Secretary of State May 13, 1999.

B08

APPENDIX C

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE SENATE BILL 6776

Chapter 266, Laws of 2008

60th Legislature
2008 Regular Session

WHISTLEBLOWER PROTECTION--STATE EMPLOYEES

EFFECTIVE DATE: 06/12/08

Passed by the Senate March 12, 2008
YEAS 46 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House March 11, 2008
YEAS 95 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved March 31, 2008, 11:39 a.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 6776** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

April 1, 2008

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 6776

AS AMENDED BY THE HOUSE

Passed Legislature - 2008 Regular Session

State of Washington 60th Legislature 2008 Regular Session

By Senate Government Operations & Elections (originally sponsored by
Senators Kline, Roach, Fraser, Fairley, and Swecker)

READ FIRST TIME 02/08/08.

1 AN ACT Relating to state employee whistleblower protection;
2 amending RCW 42.40.020, 42.40.030, 42.40.040, 42.40.070, 42.40.050, and
3 42.40.910; reenacting and amending RCW 49.60.230 and 49.60.250;
4 creating new sections; and prescribing penalties.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The legislature finds and declares that
7 government exists to conduct the people's business, and the people
8 remaining informed about the actions of government contributes to the
9 oversight of how the people's business is conducted. The legislature
10 further finds that many public servants who expose actions of their
11 government that are contrary to the law or public interest face the
12 potential loss of their careers and livelihoods.

13 It is the policy of the legislature that employees should be
14 encouraged to disclose, to the extent not expressly prohibited by law,
15 improper governmental actions, and it is the intent of the legislature
16 to protect the rights of state employees making these disclosures. It
17 is also the policy of the legislature that employees should be
18 encouraged to identify rules warranting review or provide information

1 to the rules review committee, and it is the intent of the legislature
2 to protect the rights of these employees.

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

5 **Sec. 2.** RCW 42.40.020 and 1999 c 361 s 1 are each amended to read
6 as follows:

7 As used in this chapter, the terms defined in this section shall
8 have the meanings indicated unless the context clearly requires
9 otherwise.

10 (1) "Auditor" means the office of the state auditor.

11 (2) "Employee" means any individual employed or holding office in
12 any department or agency of state government.

13 (3) "Good faith" means the individual providing the information or
14 report of improper governmental activity has a reasonable basis in fact
15 for reporting or providing the ((communication)) information. (("Good
16 faith" is lacking when the employee knows or reasonably ought to know
17 that the report is malicious, false, or frivolous.)) An individual who
18 knowingly provides or reports, or who reasonably ought to know he or
19 she is providing or reporting, malicious, false, or frivolous
20 information, or information that is provided with reckless disregard
21 for the truth, or who knowingly omits relevant information is not
22 acting in good faith.

23 (4) "Gross mismanagement" means the exercise of management
24 responsibilities in a manner grossly deviating from the standard of
25 care or competence that a reasonable person would observe in the same
26 situation.

27 (5) "Gross waste of funds" means to spend or use funds or to allow
28 funds to be used without valuable result in a manner grossly deviating
29 from the standard of care or competence that a reasonable person would
30 observe in the same situation.

31 ((+5)) (6)(a) "Improper governmental action" means any action by
32 an employee undertaken in the performance of the employee's official
33 duties:

34 (i) Which is ((+a)) a gross waste of public funds or resources as
35 defined in this section;

36 (ii) Which is in violation of federal or state law or rule, if the
37 violation is not merely technical or of a minimum nature; ((+e))

1 (iii) Which is of substantial and specific danger to the public
2 health or safety;

3 (iv) Which is gross mismanagement; or

4 (v) Which prevents the dissemination of scientific opinion or
5 alters technical findings without scientifically valid justification,
6 unless state law or a common law privilege prohibits disclosure. This
7 provision is not meant to preclude the discretion of agency management
8 to adopt a particular scientific opinion or technical finding from
9 among differing opinions or technical findings to the exclusion of
10 other scientific opinions or technical findings. Nothing in this
11 subsection prevents or impairs a state agency's or public official's
12 ability to manage its public resources or its employees in the
13 performance of their official job duties. This subsection does not
14 apply to de minimis, technical disagreements that are not relevant for
15 otherwise improper governmental activity. Nothing in this provision
16 requires the auditor to contract or consult with external experts
17 regarding the scientific validity, invalidity, or justification of a
18 finding or opinion.

19 (b) "Improper governmental action" does not include personnel
20 actions, for which other remedies exist, including but not limited to
21 employee grievances, complaints, appointments, promotions, transfers,
22 assignments, reassignments, reinstatements, restorations,
23 reemployments, performance evaluations, reductions in pay, dismissals,
24 suspensions, demotions, violations of the state civil service law,
25 alleged labor agreement violations, reprimands, claims of
26 discriminatory treatment, or any action which may be taken under
27 chapter 41.06 RCW, or other disciplinary action except as provided in
28 RCW 42.40.030.

29 ~~((+6+))~~ (7) "Public official" means the attorney general's designee
30 or designees; the director, or equivalent thereof in the agency where
31 the employee works; an appropriate number of individuals designated to
32 receive whistleblower reports by the head of each agency; or the
33 executive ethics board.

34 (8) "Substantial and specific danger" means a risk of serious
35 injury, illness, peril, or loss, to which the exposure of the public is
36 a gross deviation from the standard of care or competence which a
37 reasonable person would observe in the same situation.

1 ~~((7))~~ (9) "Use of official authority or influence" includes
2 threatening, taking, directing others to take, recommending,
3 processing, or approving any personnel action such as an appointment,
4 promotion, transfer, assignment including but not limited to duties and
5 office location, reassignment, reinstatement, restoration,
6 reemployment, performance evaluation, determining any material changes
7 in pay, provision of training or benefits, tolerance of a hostile work
8 environment, or any adverse action under chapter 41.06 RCW, or other
9 disciplinary action.

10 ~~((8))~~ (10)(a) "Whistleblower" means:

11 (i) An employee who in good faith reports alleged improper
12 governmental action to the auditor or other public official, as defined
13 in subsection (7) of this section, initiating an investigation by the
14 auditor under RCW 42.40.040; or

15 (ii) An employee who is perceived by the employer as reporting,
16 whether they did or not, alleged improper governmental action to the
17 auditor or other public official, as defined in subsection (7) of this
18 section, initiating an investigation by the auditor under RCW
19 42.40.040.

20 (b) For purposes of the provisions of this chapter and chapter
21 49.60 RCW relating to reprisals and retaliatory action, the term
22 "whistleblower" also means:

23 ~~((a))~~ (i) An employee who in good faith provides information to
24 the auditor or other public official, as defined in subsection (7) of
25 this section, in connection with an investigation under RCW 42.40.040
26 and an employee who is believed to have reported asserted improper
27 governmental action to the auditor or other public official, as defined
28 in subsection (7) of this section, or to have provided information to
29 the auditor or other public official, as defined in subsection (7) of
30 this section, in connection with an investigation under RCW 42.40.040
31 but who, in fact, has not reported such action or provided such
32 information; or

33 ~~((b))~~ (ii) An employee who in good faith identifies rules
34 warranting review or provides information to the rules review
35 committee, and an employee who is believed to have identified rules
36 warranting review or provided information to the rules review committee
37 but who, in fact, has not done so.

1 **Sec. 3.** RCW 42.40.030 and 1995 c 403 s 510 are each amended to
2 read as follows:

3 (1) An employee shall not directly or indirectly use or attempt to
4 use the employee's official authority or influence for the purpose of
5 intimidating, threatening, coercing, commanding, influencing, or
6 attempting to intimidate, threaten, coerce, command, or influence any
7 individual for the purpose of interfering with the right of the
8 individual to: (a) Disclose to the auditor (or representative thereof)
9 or other public official, as defined in RCW 42.40.020, information
10 concerning improper governmental action; or (b) identify rules
11 warranting review or provide information to the rules review committee.

12 (2) Nothing in this section authorizes an individual to disclose
13 information otherwise prohibited by law, except to the extent that
14 information is necessary to substantiate the whistleblower complaint,
15 in which case information may be disclosed to the auditor or public
16 official, as defined in RCW 42.40.020, by the whistleblower for the
17 limited purpose of providing information related to the complaint. Any
18 information provided to the auditor or public official under the
19 authority of this subsection may not be further disclosed.

20 **Sec. 4.** RCW 42.40.040 and 1999 c 361 s 3 are each amended to read
21 as follows:

22 (1)(a) In order to be investigated, an assertion of improper
23 governmental action must be provided to the auditor or other public
24 official within one year after the occurrence of the asserted improper
25 governmental action. The public official, as defined in RCW 42.40.020,
26 receiving an assertion of improper governmental action must report the
27 assertion to the auditor within fifteen calendar days of receipt of the
28 assertion. The auditor retains sole authority to investigate an
29 assertion of improper governmental action including those made to a
30 public official. A failure of the public official to report the
31 assertion to the auditor within fifteen days does not impair the rights
32 of the whistleblower.

33 (b) Except as provided under RCW 42.40.910 for legislative and
34 judicial branches of government, the auditor has the authority to
35 determine whether to investigate any assertions received. In
36 determining whether to conduct either a preliminary or further
37 investigation, the auditor shall consider factors including, but not

1 limited to: The nature and quality of evidence and the existence of
2 relevant laws and rules; whether the action was isolated or systematic;
3 the history of previous assertions regarding the same subject or
4 subjects or subject matter; whether other avenues are available for
5 addressing the matter; whether the matter has already been investigated
6 or is in litigation; the seriousness or significance of the asserted
7 improper governmental action; and the cost and benefit of the
8 investigation. The auditor has the sole discretion to determine the
9 priority and weight given to these and other relevant factors and to
10 decide whether a matter is to be investigated. The auditor shall
11 document the factors considered and the analysis applied.

12 (c) The auditor also has the authority to investigate assertions of
13 improper governmental actions as part of an audit conducted under
14 chapter 43.09 RCW. The auditor shall document the reasons for handling
15 the matter as part of such an audit.

16 (2) Subject to subsection (5)(c) of this section, the identity or
17 identifying characteristics of a whistleblower is confidential at all
18 times unless the whistleblower consents to disclosure by written waiver
19 or by acknowledging his or her identity in a claim against the state
20 for retaliation. In addition, the identity or identifying
21 characteristics of any person who in good faith provides information in
22 an investigation under this section is confidential at all times,
23 unless the person consents to disclosure by written waiver or by
24 acknowledging his or her identity as a witness who provides information
25 in an investigation.

26 (3) Upon receiving specific information that an employee has
27 engaged in improper governmental action, the auditor shall, within
28 ((five)) fifteen working days of receipt of the information, mail
29 written acknowledgement to the whistleblower at the address provided
30 stating whether a preliminary investigation will be conducted. For a
31 period not to exceed ((thirty)) sixty working days from receipt of the
32 assertion, the auditor shall conduct such preliminary investigation of
33 the matter as the auditor deems appropriate.

34 (4) In addition to the authority under subsection (3) of this
35 section, the auditor may, on its own initiative, investigate incidents
36 of improper state governmental action.

37 (5)(a) If it appears to the auditor, upon completion of the
38 preliminary investigation, that the matter is so unsubstantiated that

1 no further investigation, prosecution, or administrative action is
2 warranted, the auditor shall so notify the whistleblower summarizing
3 where the allegations are deficient, and provide a reasonable
4 opportunity to reply. Such notification may be by electronic means.

5 (b) The written notification shall contain a summary of the
6 information received and of the results of the preliminary
7 investigation with regard to each assertion of improper governmental
8 action.

9 (c) In any case to which this section applies, the identity or
10 identifying characteristics of the whistleblower shall be kept
11 confidential unless the auditor determines that the information has
12 been provided other than in good faith. If the auditor makes such a
13 determination, the auditor shall provide reasonable advance notice to
14 the employee.

15 (d) With the agency's consent, the auditor may forward the
16 assertions to an appropriate agency to investigate and report back to
17 the auditor no later than sixty working days after the assertions are
18 received from the auditor. The auditor is entitled to all
19 investigative records resulting from such a referral. All procedural
20 and confidentiality provisions of this chapter apply to investigations
21 conducted under this subsection. The auditor shall document the
22 reasons the assertions were referred.

23 (6) During the preliminary investigation, the auditor shall provide
24 written notification of the nature of the assertions to the subject or
25 subjects of the investigation and the agency head. The notification
26 shall include the relevant facts and laws known at the time and the
27 procedure for the subject or subjects of the investigation and the
28 agency head to respond to the assertions and information obtained
29 during the investigation. This notification does not limit the auditor
30 from considering additional facts or laws which become known during
31 further investigation.

32 ~~((7))~~(a) If it appears to the auditor after completion of the
33 preliminary investigation that further investigation, prosecution, or
34 administrative action is warranted, the auditor shall so notify the
35 whistleblower, the subject or subjects of the investigation, and the
36 agency head and either conduct a further investigation or issue a
37 report under subsection ~~((10))~~ (9) of this section.

1 (b) If the preliminary investigation resulted from an anonymous
2 assertion, a decision to conduct further investigation shall be subject
3 to review by a three-person panel convened as necessary by the auditor
4 prior to the commencement of any additional investigation. The panel
5 shall include a state auditor representative knowledgeable of the
6 subject agency operations, a citizen volunteer, and a representative of
7 the attorney general's office. This group shall be briefed on the
8 preliminary investigation and shall recommend whether the auditor
9 should proceed with further investigation.

10 (c) If further investigation is to occur, the auditor shall provide
11 written notification of the nature of the assertions to the subject or
12 subjects of the investigation and the agency head. The notification
13 shall include the relevant facts known at the time and the procedure to
14 be used by the subject or subjects of the investigation and the agency
15 head to respond to the assertions and information obtained during the
16 investigation.

17 ~~((+8))~~ (7) Within sixty working days after the preliminary
18 investigation period in subsection (3) of this section, the auditor
19 shall complete the investigation and report its findings to the
20 whistleblower unless written justification for the delay is furnished
21 to the whistleblower, agency head, and subject or subjects of the
22 investigation. In all such cases, the report of the auditor's
23 investigation and findings shall be sent to the whistleblower within
24 one year after the information was filed under subsection (3) of this
25 section.

26 ~~((+9))~~ (8)(a) At any stage of an investigation under this section
27 the auditor may require by subpoena the attendance and testimony of
28 witnesses and the production of documentary or other evidence relating
29 to the investigation at any designated place in the state. The auditor
30 may issue subpoenas, administer oaths, examine witnesses, and receive
31 evidence. In the case of contumacy or failure to obey a subpoena, the
32 superior court for the county in which the person to whom the subpoena
33 is addressed resides or is served may issue an order requiring the
34 person to appear at any designated place to testify or to produce
35 documentary or other evidence. Any failure to obey the order of the
36 court may be punished by the court as a contempt thereof.

37 (b) The auditor may order the taking of depositions at any stage of
38 a proceeding or investigation under this chapter. Depositions shall be

1 taken before an individual designated by the auditor and having the
2 power to administer oaths. Testimony shall be reduced to writing by or
3 under the direction of the individual taking the deposition and shall
4 be subscribed by the deponent.

5 (c) Agencies shall cooperate fully in the investigation and shall
6 take appropriate action to preclude the destruction of any evidence
7 during the course of the investigation.

8 (d) During the investigation the auditor shall interview each
9 subject of the investigation. If it is determined there is reasonable
10 cause to believe improper governmental action has occurred, the subject
11 or subjects and the agency head shall be given fifteen working days to
12 respond to the assertions prior to the issuance of the final report.

13 ~~((+10+))~~ (9)(a) If the auditor determines there is reasonable cause
14 to believe an employee has engaged in improper governmental action, the
15 auditor shall report, to the extent allowable under existing public
16 disclosure laws, the nature and details of the activity to:

17 (i) The subject or subjects of the investigation and the head of
18 the employing agency; ~~((and))~~

19 (ii) If appropriate, the attorney general or such other authority
20 as the auditor determines appropriate;

21 (iii) Electronically to the governor, secretary of the senate, and
22 chief clerk of the house of representatives; and

23 (iv) Except for information whose release is specifically
24 prohibited by statute or executive order, the public through the public
25 file of whistleblower reports maintained by the auditor.

26 (b) The auditor has no enforcement power except that in any case in
27 which the auditor submits an investigative report containing reasonable
28 cause determinations to the agency, the agency shall send its plan for
29 resolution to the auditor within fifteen working days of having
30 received the report. The agency is encouraged to consult with the
31 subject or subjects of the investigation in establishing the resolution
32 plan. The auditor may require periodic reports of agency action until
33 all resolution has occurred. If the auditor determines that
34 appropriate action has not been taken, the auditor shall report the
35 determination to the governor and to the legislature and may include
36 this determination in the agency audit under chapter 43.09 RCW.

37 ~~((+11+))~~ (10) Once the auditor concludes that appropriate action
38 has been taken to resolve the matter, the auditor shall so notify the

1 whistleblower, the agency head, and the subject or subjects of the
2 investigation. If the resolution takes more than one year, the auditor
3 shall provide annual notification of its status to the whistleblower,
4 agency head, and subject or subjects of the investigation.

5 ~~((12))~~ (11) Failure to cooperate with such audit or
6 investigation, or retaliation against anyone who assists the auditor by
7 engaging in activity protected by this chapter shall be reported as a
8 separate finding with recommendations for corrective action in the
9 associated report whenever it occurs.

10 (12) This section does not limit any authority conferred upon the
11 attorney general or any other agency of government to investigate any
12 matter.

13 **Sec. 5.** RCW 42.40.070 and 1989 c 284 s 5 are each amended to read
14 as follows:

15 A written summary of this chapter and procedures for reporting
16 improper governmental actions established by the auditor's office shall
17 be made available by each department or agency of state government to
18 each employee upon entering public employment. Such notices may be in
19 agency internal newsletters, included with paychecks or stubs, sent via
20 electronic mail to all employees, or sent by other means that are
21 cost-effective and reach all employees of the government level,
22 division, or subdivision. Employees shall be notified by each
23 department or agency of state government each year of the procedures
24 and protections under this chapter. The annual notices shall include
25 a list of public officials, as defined in RCW 42.40.020, authorized to
26 receive whistleblower reports. The list of public officials authorized
27 to receive whistleblower reports shall also be prominently displayed in
28 all agency offices.

29 **Sec. 6.** RCW 42.40.050 and 1999 c 283 s 1 are each amended to read
30 as follows:

31 (1)(a) Any person who is a whistleblower, as defined in RCW
32 42.40.020, and who has been subjected to workplace reprisal or
33 retaliatory action is presumed to have established a cause of action
34 for the remedies provided under chapter 49.60 RCW.

35 (b) For the purpose of this section, "reprisal or retaliatory
36 action" means, but is not limited to, any of the following:

- 1 ~~((a))~~ (i) Denial of adequate staff to perform duties;
- 2 ~~((b))~~ (ii) Frequent staff changes;
- 3 ~~((c))~~ (iii) Frequent and undesirable office changes;
- 4 ~~((d))~~ (iv) Refusal to assign meaningful work;
- 5 ~~((e))~~ (v) Unwarranted and unsubstantiated letters of reprimand or
- 6 unsatisfactory performance evaluations;
- 7 ~~((f))~~ (vi) Demotion;
- 8 ~~((g))~~ (vii) Reduction in pay;
- 9 ~~((h))~~ (viii) Denial of promotion;
- 10 ~~((i))~~ (ix) Suspension;
- 11 ~~((j))~~ (x) Dismissal;
- 12 ~~((k))~~ (xi) Denial of employment;
- 13 ~~((l))~~ (xii) A supervisor or superior behaving in or encouraging
- 14 coworkers to behave in a hostile manner toward the whistleblower; ~~((and~~
- 15 ~~((m))~~ (xiii) A change in the physical location of the employee's
- 16 workplace or a change in the basic nature of the employee's job, if
- 17 either are in opposition to the employee's expressed wish;
- 18 (xiv) Issuance of or attempt to enforce any nondisclosure policy or
- 19 agreement in a manner inconsistent with prior practice; or
- 20 (xv) Any other action that is inconsistent compared to actions
- 21 taken before the employee engaged in conduct protected by this chapter,
- 22 or compared to other employees who have not engaged in conduct
- 23 protected by this chapter.

24 (2) The agency presumed to have taken retaliatory action under

25 subsection (1) of this section may rebut that presumption by proving by

26 a preponderance of the evidence that there have been a series of

27 documented personnel problems or a single, egregious event, or that the

28 agency action or actions were justified by reasons unrelated to the

29 employee's status as a whistleblower and that improper motive was not

30 a substantial factor.

31 (3) Nothing in this section prohibits an agency from making any

32 decision exercising its authority to terminate, suspend, or discipline

33 an employee who engages in workplace reprisal or retaliatory action

34 against a whistleblower. However, the agency also shall implement any

35 order under chapter 49.60 RCW (other than an order of suspension if the

36 agency has terminated the retaliator).

1 **Sec. 7.** RCW 49.60.230 and 1993 c 510 s 21 and 1993 c 69 s 11 are
2 each reenacted and amended to read as follows:

3 (1) Who may file a complaint:

4 (a) Any person claiming to be aggrieved by an alleged unfair
5 practice may, personally or by his or her attorney, make, sign, and
6 file with the commission a complaint in writing under oath or by
7 declaration. The complaint shall state the name of the person alleged
8 to have committed the unfair practice and the particulars thereof, and
9 contain such other information as may be required by the commission.

10 (b) Whenever it has reason to believe that any person has been
11 engaged or is engaging in an unfair practice, the commission may issue
12 a complaint.

13 (c) Any employer or principal whose employees, or agents, or any of
14 them, refuse or threaten to refuse to comply with the provisions of
15 this chapter may file with the commission a written complaint under
16 oath or by declaration asking for assistance by conciliation or other
17 remedial action.

18 (2) Any complaint filed pursuant to this section must be so filed
19 within six months after the alleged act of discrimination except that
20 complaints alleging an unfair practice in a real estate transaction
21 pursuant to RCW 49.60.222 through 49.60.225 must be so filed within one
22 year after the alleged unfair practice in a real estate transaction has
23 occurred or terminated and a complaint alleging whistleblower
24 retaliation must be filed within two years.

25 **Sec. 8.** RCW 49.60.250 and 1993 c 510 s 23 and 1993 c 69 s 14 are
26 each reenacted and amended to read as follows:

27 (1) In case of failure to reach an agreement for the elimination of
28 such unfair practice, and upon the entry of findings to that effect,
29 the entire file, including the complaint and any and all findings made,
30 shall be certified to the chairperson of the commission. The
31 chairperson of the commission shall thereupon request the appointment
32 of an administrative law judge under Title 34 RCW to hear the complaint
33 and shall cause to be issued and served in the name of the commission
34 a written notice, together with a copy of the complaint, as the same
35 may have been amended, requiring the respondent to answer the charges
36 of the complaint at a hearing before the administrative law judge, at
37 a time and place to be specified in such notice.

1 (2) The place of any such hearing may be the office of the
2 commission or another place designated by it. The case in support of
3 the complaint shall be presented at the hearing by counsel for the
4 commission: PROVIDED, That the complainant may retain independent
5 counsel and submit testimony and be fully heard. No member or employee
6 of the commission who previously made the investigation or caused the
7 notice to be issued shall participate in the hearing except as a
8 witness, nor shall the member or employee participate in the
9 deliberations of the administrative law judge in such case. Any
10 endeavors or negotiations for conciliation shall not be received in
11 evidence.

12 (3) The respondent shall file a written answer to the complaint and
13 appear at the hearing in person or otherwise, with or without counsel,
14 and submit testimony and be fully heard. The respondent has the right
15 to cross-examine the complainant.

16 (4) The administrative law judge conducting any hearing may permit
17 reasonable amendment to any complaint or answer. Testimony taken at
18 the hearing shall be under oath and recorded.

19 (5) If, upon all the evidence, the administrative law judge finds
20 that the respondent has engaged in any unfair practice, the
21 administrative law judge shall state findings of fact and shall issue
22 and file with the commission and cause to be served on such respondent
23 an order requiring such respondent to cease and desist from such unfair
24 practice and to take such affirmative action, including, (but not
25 limited to) hiring, reinstatement or upgrading of employees, with or
26 without back pay, an admission or restoration to full membership rights
27 in any respondent organization, or to take such other action as, in the
28 judgment of the administrative law judge, will effectuate the purposes
29 of this chapter, including action that could be ordered by a court,
30 except that damages for humiliation and mental suffering shall not
31 exceed (~~ten~~) twenty thousand dollars, and including a requirement for
32 report of the matter on compliance. Relief available for violations of
33 RCW 49.60.222 through 49.60.224 shall be limited to the relief
34 specified in RCW 49.60.225.

35 (6) If a determination is made that retaliatory action, as defined
36 in RCW 42.40.050, has been taken against a whistleblower, as defined in
37 RCW 42.40.020, the administrative law judge may, in addition to any
38 other remedy, require restoration of benefits, back pay, and any

1 increases in compensation that would have occurred, with interest;
2 impose a civil penalty upon the retaliator of up to ~~((three))~~ five
3 thousand dollars; and issue an order to the state employer to suspend
4 the retaliator for up to thirty days without pay. At a minimum, the
5 administrative law judge shall require that a letter of reprimand be
6 placed in the retaliator's personnel file. No agency shall issue any
7 nondisclosure order or policy, execute any nondisclosure agreement, or
8 spend any funds requiring information that is public under the public
9 records act, chapter 42.56 RCW, be kept confidential; except that
10 nothing in this section shall affect any state or federal law requiring
11 information be kept confidential. All penalties recovered shall be
12 paid into the state treasury and credited to the general fund.

13 (7) The final order of the administrative law judge shall include
14 a notice to the parties of the right to obtain judicial review of the
15 order by appeal in accordance with the provisions of RCW 34.05.510
16 through 34.05.598, and that such appeal must be served and filed within
17 thirty days after the service of the order on the parties.

18 (8) If, upon all the evidence, the administrative law judge finds
19 that the respondent has not engaged in any alleged unfair practice, the
20 administrative law judge shall state findings of fact and shall
21 similarly issue and file an order dismissing the complaint.

22 (9) An order dismissing a complaint may include an award of
23 reasonable attorneys' fees in favor of the respondent if the
24 administrative law judge concludes that the complaint was frivolous,
25 unreasonable, or groundless.

26 (10) The commission shall establish rules of practice to govern,
27 expedite, and effectuate the foregoing procedure.

28 (11) Instead of filing with the commission, a complainant may
29 pursue arbitration conducted by the American arbitration association or
30 another arbitrator mutually agreed by the parties, with the cost of
31 arbitration shared equally by the complainant and the respondent.

32 **Sec. 9.** RCW 42.40.910 and 1999 c 361 s 7 are each amended to read
33 as follows:

34 This act and chapter 361, Laws of 1999 ~~((does))~~ do not affect the
35 jurisdiction of the legislative ethics board, the executive ethics
36 board, or the commission on judicial conduct, as set forth in chapter

1 42.52 RCW. The senate, the house of representatives, and the supreme
2 court shall adopt policies regarding the applicability of chapter 42.40
3 RCW to the senate, house of representatives, and judicial branch.

4 NEW SECTION. **Sec. 10.** If any provision of this act or its
5 application to any person or circumstance is held invalid, the
6 remainder of the act or the application of the provision to other
7 persons or circumstances is not affected.

8 NEW SECTION. **Sec. 11.** If specific funding for the purposes of
9 this act, referencing this act by bill or chapter number, is not
10 provided by June 30, 2008, in the omnibus appropriations act, this act
11 is null and void.

Passed by the Senate March 12, 2008.

Passed by the House March 11, 2008.

Approved by the Governor March 31, 2008.

Filed in Office of Secretary of State April 1, 2008.

LAW OFFICES OF JEFFREY NEEDLE

June 27, 2022 - 10:38 AM

Transmittal Information

Filed with Court: Supreme Court
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Appellate Court Case Title: John Boespflug v. State of Washington, Dept. of L and I
Superior Court Case Number: 17-2-05538-4

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