71328-1

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NO. 71328-1

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

MITCH MICHKOWSKI,

Appellant,

v.

SNOHOMISH COUNTY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Court should uphold summary judgment dismissal of Plaintiff Steven "Mitch" Michkowski's claims because he cannot establish causation in this retaliatory discharge action. Mr. Michkowski was terminated from his at-will position as the District Court Director of Administration for the Snohomish County District Court due to the collective dissatisfaction of the District Court judges with his performance in critical areas of his job. Mr. Michkowski alleges Snohomish County terminated him for raising workplace safety issues regarding District Court bailiffs, but it is undisputed that the judges who made the decision to terminate Mr. Michkowski did not know before terminating him that he had raised workplace safety issues. Mr. Michkowski lacks any evidence showing that retaliation for raising workplace safety issues was a factor, let alone a substantial factor, in the decision to terminate his employment. Summary judgment should be affirmed.[1]

II. STATEMENT OF THE ISSUE

Whether summary judgment dismissing a claim of retaliatory

[1] In his Notice of Appeal, Mr. Michkowski also assigned error to the order on his motion to continue in which Judge Dingledy continued the summary judgment hearing by two days and extended the date for Mr. Michkowski's response by one week. CP 180. In his Opening Brief, however, Mr. Michkowski did not include this assignment of error and did not argue the motion to continue. Assignments of error not argued in the brief are waived. Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987); State v. J-R Distributors, Inc., 82 Wn.2d 584, 624, 512 P.2d 1049 (1973). As a result, the County will not discuss the motion to continue beyond noting its briefing to the trial court. CP 265-71.

discharge for raising workplace safety issues pursuant to RCW 49.17.160 must be upheld when the undisputed evidence establishes that the decision makers did not know the Plaintiff had raised workplace safety issues before making their decision and thus there is no evidence of a causal connection between the Plaintiff's protected activity and his termination.

III. STATEMENT OF THE CASE

A. Organization of the Snohomish County District Court

The Snohomish County District Court is the judicial body that adjudicates infractions, criminal traffic and criminal non-traffic violations, and processes small claims, civil actions, name changes, anti-harassment orders and domestic violence protection orders in Snohomish County. The District Court has four divisions: Cascade Division in Arlington; Everett Division in Everett; Evergreen Division in Monroe; and South Division in Lynnwood. CP 438-39.

At the time of Mr. Michkowski's employment, the District Court bench consisted of the following eight judges in the four court divisions:

Everett
Tam Bui, Presiding Judge
Roger M. Fisher, Judge

South
Timothy P. Ryan, Judge (now retired)
Carol A. McRae, Judge
Jeffrey D. Goodwin, Judge

Cascade
Jay F. Wisman, Judge

Evergreen
Steven M. Clough, Judge
Patricia L. Lyon, Judge

CP 387, 392, 397, 402-03, 410, 417, 435, 439.

Within the District Court, administrative decisions, including decisions relating to the District Court budget, facility issues, operational issues, and personnel decisions such as hiring and firing, are determined by vote of the eight judges acting as a body. The judges have regular meetings to confer and determine a course of action on administrative issues. Administrative functions are carried out by the Presiding Judge, the District Court Director, the District Court Assistant Director, and the supervisors in each division. CP 439.

Each division of the District Court also employs various court personnel involved in courtroom functions, including legal process assistants (LPAs), probation officers, and bailiffs. The bailiffs were responsible for maintaining order and security in the courtrooms. CP 439.

B. The District Court Director Position

The District Court Director of Administration is responsible for directing and coordinating operations of the consolidated Snohomish County District Court. The Director works under the authority of the

District Court judges and the supervision of the Presiding Judge. The Director position is at-will and serves at the pleasure of the eight judges. CP 439.

The duties of the Director include preparing the District Court budget, managing the non-judicial operations of the District Court, attending judges meetings, and otherwise acting at the direction of the eight judges of the District Court. CP 441, 454-56. Although the Director works most closely with the Presiding Judge, the Director reports to all of the sitting judges and is expected to act in accordance with their instructions. CP 440.

C. The District Court Budget

In order to establish a budget for the District Court, the judges select judicial members to sit on a budget committee with the District Court Director. CP 442. The role of the budget committee is to prepare a proposed budget for review by the eight judges. Once the judges have had the opportunity to review and approve the proposed budget, it is submitted to the Snohomish County Executive according to a schedule issued by the Snohomish County Department of Finance. Once approved by the County Executive, the proposed budget is submitted to the Snohomish County Council for final approval in order to fund the programs and activities of the District Court. CP 442.

One of the primary functions of the District Court Director is to prepare and implement the District Court budget as directed by the judges. In this role, the Director is required to submit budget recommendations to the judges, prepare budget proposals as directed by the judges, prepare and present the budget approved by the judges to the county executive and county council, and ensure the judges are informed of the status of the budget throughout the year. CP 439-40.

In preparing the proposed budget, information is entered into a Budget Development Tool, or BDT, which is a computer program created by the Snohomish County Finance Department. The Finance Department loads the BDT with current spending levels for each department. Variances and any requests to fund additional positions or programs must be entered into the BDT and submitted in the form of "priority packages" by the department. Each priority package must include a narrative section, which provides a detailed description justifying the additional funds requested. CP 338-39; CP 442-43.

As a part of his job duties, the District Court Director is required to become proficient in the use of the BDT and receives training and one-on-one assistance in order to do so. CP 442. The District Court Budget Committee requires the Director to draft priority packages that accurately reflect the decisions of the District Court bench for the coming fiscal year.

CP 442-43.

D. Mr. Michkowski's Employment

1. Hiring Decision

In 2011, the District Court judges organized a selection committee to hire a Director of Administration that included Presiding Judge Bui, Judge Ryan, Judge McRae, Judge Lyon, and Judge Goodwin. CP 398, 404, 411, 418, 440. During interviews, the selection committee asked each applicant about experience preparing and implementing budgets. CP 404, 418, 440. During Mr. Michkowski's interview, he touted his previous experience preparing and managing budgets in other court systems. CP 404, 411, 418, 440. Based on his stated qualifications and experience, the judges considered him the best qualified applicant and offered him the job. CP 398, 418, 440. He started work on January 9, 2012. CP 440-41.

2. Bailiff Safety Issues and Concerns

On January 13, 2012, Mr. Michkowski attended his first judges meeting. At that meeting, the judges discussed an advisory memorandum dated January 4, 2012 from the Civil Division of the Snohomish County Prosecuting Attorney's Office discussing safety and risk issues surrounding District Court bailiffs carrying firearms in the performance of their duties. The memorandum was the culmination of an ongoing conversation between judges and the Civil Division regarding the firearm

issue. In the memorandum, the Civil Division recommended the District Court either discontinue the practice of allowing bailiffs to carry firearms or require the bailiffs to obtain firearm certification and training. At the same meeting, without any involvement from Mr. Michkowski, the judges adopted the recommendation to prohibit bailiffs from continuing to carry firearms. CP 441, 458-59.

3. Michkowski Performance Issues

a. Budget

In 2012, the budget committee consisted of Presiding Judge Bui, Judge Ryan, Judge Lyon, and Mr. Michkowski. CP 443. The budget committee held its first meeting on Mr. Michkowski's second day of work. At that meeting, and on subsequent meetings, the judges on the budget committee emphasized to Mr. Michkowski that the budget needed to be his top priority above all other duties and responsibilities. CP 443.

On June 19, 2012, the Budget Committee held a meeting at which Mr. Michkowski recommended the District Court request funding for a payroll, purchasing, and accounting coordinator and a trainer position for the 2013 fiscal year. At the same meeting, the budget committee judges rejected his proposal and directed Mr. Michkowski to submit a budget priority package requesting two Legal Process Assistant (LPA) positions. CP 420.

The next day, Mr. Michkowski emailed the budget committee about the budget submission and indicated he was going to submit a priority package for an accounting coordinator position as he had proposed. In a reply email, Judge Ryan instructed Mr. Michkowski *not* to submit a priority package identifying the position as an accounting coordinator because the budget committee had already rejected that proposal. CP 420, 428.

On July 3, 2012, Mr. Michkowski submitted the District Court budget to the Executive's Office and included a priority package requesting a payroll, purchasing, and accounting coordinator in place of one of the LPA positions. CP 420-21, 444, 486; CP 80-81. On July 5, 2012, when the judges discovered what Mr. Michkowski had submitted, they immediately directed him to amend the submission to accurately reflect the decisions of the budget committee. CP 420-21, 444. When Mr. Michkowski submitted a revised priority package for the two LPA positions, the associated narrative sections he submitted contained only once sentence each. CP 444, 477-86.

On July 13, 2012, Judges Ryan and Bui held a meeting with Mr. Michkowski to discuss why he had submitted the budget with a priority package that included an accounting coordinator position when this had been rejected by the budget committee. Judge Ryan asked Mr.

Michkowski if he had misunderstood the judges' instructions. Mr. Michkowski said he had not misunderstood but did not offer any explanation for his actions. CP 421, 445.

On July 27, 2012, Judge Bui issued a written reprimand to Mr. Michkowski regarding his performance on the budget submissions. In acknowledging receipt of the reprimand Mr. Michkowski stated that he "wished to remain voiceless" about the content but stated he was "unequivocally committed to the executing without exception the directives issued by the presiding judge on behalf of the court." CP 445-46, 502-04.

b. AllianceOne Collections

Several of the judges also became dissatisfied with Mr. Michkowski's performance through his handling of a debt collection project. In July 2012, Mr. Michkowski was pursuing a pilot project to bring an outside vendor (AllianceOne) into the South Division of the District Court to act as a collection agent for fines imposed by the Court. CP 399, 412-13, 422. AllianceOne is a for-profit corporation that also collects for other entities, acts on their behalf in filing contested matters in the District Court, and appears before the members of the District Court Bench. CP 412-13. Judge McRae and Judge Ryan objected to the project because they believed having a for-profit collection agency in the

courthouse would affect the appearance of judicial impartiality. CP 413, 422. Judge McRae also had serious concerns that allowing on-site collections would violate a judicial ethics opinion regarding allowing a for-profit entity to lease space in the same premises as a court. CP 413. For these reasons, the judges of the South Division voted down the proposal and told Mr. Michkowski not to pursue it in South District Court. CP 399, 413, 422.

Due to ongoing frustrations with Mr. Michkowski's performance regarding the budget and other matters, on August 20, 2012, Judge Ryan and Presiding Judge Bui met with Mr. Michkowski to go over a list of performance expectations. Among the listed expectations, Judges Ryan and Bui instructed Mr. Michkowski regarding the need to update Judge Bui as the Presiding Judge of his projects and activities. They also made it clear to Mr. Michkowski that, although Judge Bui as the Presiding Judge supervised his work, he worked for all of the judges and was responsible for following all of their directives. They further discussed Mr. Michkowski's duties with respect to the budget, monitoring court operations, and interacting with outside entities. The judges emphasized to Mr. Michkowski that, because he was new to the District Court, it was important for him to "listen, learn, and get the lay of the land." CP 423, 447, 506.

The following day, August 21, 2012, Mr. Michkowski met with an AllianceOne representative and Lyndsey Downs, the Deputy Prosecuting Attorney assigned to advise District Court, to discuss the collections project. Due to concerns she had about the project, Ms. Downs contacted Judge Ryan and noted in her conversation that Mr. Michkowski had not told her that the South Division judges had already voted down the collections proposal. Judge Ryan was surprised to hear Mr. Michkowski was still pursuing the project after the South Division judges had rejected it and without first obtaining explicit permission from Presiding Judge Bui to meet with Ms. Downs. CP 423-24. On August 22, 2012, after Judge Ryan informed her of these developments, Judge Bui emailed Mr. Michkowski and instructed him to stop pursuing the collections project. CP 423-24, 448, 508, 510-11.

4. Michkowski Presents a Memorandum Raising Bailiff Safety and Training Issues to Judge Bui

On the following day, August 23, 2012, Mr. Michkowski met with Judge Bui and presented her with a memorandum outlining safety concerns connected to bailiff duties to maintain order and security in the courtroom, lack of training for bailiffs to perform those duties, and potential liability to the Court. CP 448-49, 513-14. When Mr. Michkowski gave her the memorandum, he asked Judge Bui to initial his

copy to acknowledge that she had received it. Mr. Michkowski had never before asked Judge Bui to initial documents and Judge Bui declined to do so. Mr. Michkowski then forwarded the memorandum to Judge Bui as an email attachment. CP 448-49. In a tersely written email response, Judge Bui told Mr. Michkowski he needed to find another way to keep records than to have her sign for them. Judge Bui then forwarded the email chain without the attachment to Judge Ryan for his information. CP 424-25, 448-49, 516, 518. Judge Bui did not discuss the memorandum or its content with Judge Ryan or any of the judges. CP 449.

5. Other Performance Concerns

In addition to the budget and collections issues, each of the judges had their own frustrations and annoyances with Mr. Michkowski's job performance and behavior. Those frustrations included him not delivering materials to judges meetings; perceiving him as exhibiting an arrogant and condescending manner toward judges and others; pursuing projects, such as a history of the court, that were seen as a waste of time; pursuing projects, such as tracking affidavits of prejudice filed against the judges, that were not authorized; and exhibiting a controlling management style with District Court Staff. CP 398-99, 406, 423, 436, 446.

In addition, the Bench felt Mr. Michkowski spent an inappropriate amount of time micromanaging Robert Veliz, who became the Assistant

Director of District Court in October 2012. CP 400, 406, 424, 449. As an example, Mr. Michkowski required Mr. Veliz to check in with him before leaving the County Campus to visit the outlying divisions. On October 17, 2012, Judge Goodwin and Judge Bui met with Mr. Michkowski and Mr. Veliz in order to emphasize the importance of them finding a way to work together. CP 400, 449.

On November 27, 2012, increasingly concerned that Mr. Michkowski was pursuing projects that were not priorities for the Court and without approval by the bench, Judge Bui emailed Mr. Michkowski requesting an update on "all projects, prioritizations of those projects, decision-making for the project, etc." CP 450, 522.

6. The Judges Vote to Terminate Mr. Michkowski

Due to the ongoing concerns with Mr. Michkowski's performance, the judges decided to discuss whether to continue Mr. Michkowski's employment as he was approaching his year anniversary. CP 450. Judge Bui advocated letting the issue wait until the next regular judges meeting in January 2013, but was overridden by the other judges in favor of a special meeting set for December 5, 2012. CP 20, 23-28.

At the special meeting, Judges Ryan, McRae, Goodwin, Wisman, Clough, and Lyon voted to terminate Mr. Michkowski from his position. Judge Fisher was absent and thus did not vote. Notably, Presiding Judge

Bui, the only judge who had read Mr. Michkowski's memorandum three months earlier or was otherwise aware that he had raised the issue of bailiff safety, abstained from the vote. In the discussion at the meeting, the judges discussed Mr. Michkowski's performance issues; they did not discuss the safety issues raised by Mr. Michkowski either before or during the meeting, and no judge other than Judge Bui was even aware at the time that Mr. Michkowski had ever raised bailiff safety issues. The voting judges based their decision on their views of Mr. Michkowski's job performance. CP 390, 394-95; 400-01, 407-08, 414-15, 424-26, 436-37, 450.

On December 7, 2012, Judge Bui and Judge Goodwin informed Mr. Michkowski of his termination. Mr. Michkowski said repeatedly: "This isn't the last you'll hear from me." CP 400, 451.

7. Mr. Michkowski's Complaints to the Department of Labor and Industries

a. Safety Complaint

Shortly after his termination, Mr. Michkowski for the first time filed a complaint with the Department of Labor and Industries ("L&I") regarding workplace safety and training for bailiffs. After an investigation, L&I issued a citation finding the County did not implement and enforce effective safety and training programs for bailiffs. CP 59.

b. Retaliatory Discharge Complaint

Within days after his termination, Mr. Michkowski also filed a complaint under RCW 49.17.160 with L&I alleging he had been terminated in retaliation for raising workplace safety issues with the District Court. CP 319-20. After an investigation, L&I dismissed his complaint, concluding there was insufficient evidence to support a finding of retaliation and the basis for termination was consistent with the operations of the District Court. CP 322-23.

On March 19, 2013, Mr. Michkowski appealed L&I's decision to the director under RCW 49.17.160(2). CP 327-30. On April 8, 2013, the L&I Director affirmed the decision. CP 337. On July 5, 2013, Mr. Michkowski filed this retaliatory discharge action. CP 554-61. On December 20, 2013, the Snohomish County Superior Court dismissed all claims on summary judgment. CP 4-5. Mr. Michkowski then filed this appeal. CP 1.

IV. ARGUMENT

When reviewing an Order Granting Summary Judgment, the appellate court engages in the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); Kauzlarich v. Yarbrough, 105 Wn. App. 632, 640, 20 P.3d 946 (2001). Summary judgment should be granted when there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). "A party cannot create genuine issues of material fact by 'mere allegations, argumentative assertions, conclusory statements, and speculation.'" In re Kelly and Moesslang, 170 Wn. App. 722, 738, 287 P.3d 12 (2012) (quoting Greenhalgh v. Dep't of Corr., 160 Wn. App. 706, 714, 248 P.2d 150 (2011)), review denied, 176 Wn.2d 1018 (2013). The purpose of summary judgment is to determine if there are any genuine issues of material fact so as to avoid long and expensive litigation and an unnecessary trial. See American Exp. Centurion Bank v. Stratman, 172 Wn. App. 667, 292 P.3d 128, 133 (2012); Padron v. Goodyear Tire & Rubber Co., 34 Wn. App. 473, 662 P.2d 67, 68 (1983).

A. Michkowski Cannot Establish Causation Linked to Workplace Safety Issues

Mr. Michkowski raises a retaliatory discharge claim for raising workplace safety issues in violation of the WISHA statute, which prohibits an employer from discharging an employee for filing a WISHA complaint or raising workplace safety issues with the employer. RCW 49.17.160(2); WAC 296-360-100(3). In order to establish his claim, Mr. Michkowski must establish that: (1) he engaged in protected activity; (2) he was discharged; and (3) there is a causal connection between him engaging in the protected activity and the County's discharge decision. See, e.g.

Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 68-72, 821 P.2d 18 (1991) (exercising workers compensation rights under RCW 51.48.025); Becker v. Washington State University, 165 Wn. App. 235, 250, 266 P.3d 893 (2011) (opposing discriminatory practices under RCW 49.60.210), review denied, 173 Wn.2d 1033, 277 P.3d 668 (2012).

1. No Decision Maker Knew About the Safety Complaint

Mr. Michkowski cannot prove his case because he cannot show the judges who made the decision to terminate him had any knowledge of him having raised workplace safety issues. In order to prove a decision-maker made its decision to terminate an employee based on the employee having engaged in protected activity, the employee must show the decision-maker had actual knowledge the employee engaged in the protected activity. Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1197 (9th Cir. 2003); Hinds v. Sprint/United Management Co., 523 F.3d 1187 (10th Cir. 2008); Luckie v. Ameritech Corp., 389 F.3d 708, 715 (7th Cir. 2004). In this case, Mr. Michkowski cannot establish any of the voting judges had such knowledge.

It is undisputed the decision-makers in this case were the District Court judges acting by majority vote. Six judges voted in the decision to terminate Mr. Michkowski: Judges Clough, Goodwin, Lyon, McRae, Ryan, and Wisman. Judge Fisher was not present. Presiding Judge Bui

abstained from the vote. CP 390, 400, 407, 414, 424, 436-37, 450.

It is also undisputed that Mr. Michkowski raised workplace safety and training issues only with Presiding Judge Bui, who abstained from the vote. In his March 17, 2013 letter to the Department of Labor and Industries, Mr. Michkowski admits he did not raise the issue with any other judge:

> I reported my concerns to my reporting authority, the Presiding Judge (not the court at large, the county, or any other authority . . .).

CP 328.[2]

In addition, there is no evidence that any of the six judges who voted to terminate Mr. Michkowski knew he had raised workplace safety issues before his termination. It is undisputed that bailiff safety and training issues were well known to the bench, and had been discussed for many years, but there is no evidence to suggest that any of the judges who voted to terminate Mr. Michkowski associated the issue with Mr. Michkowski. Each voting judge submitted a declaration stating he or she was not aware Mr. Michkowski had raised workplace safety or training issues until he filed the safety complaint with L&I after his termination. Workplace safety issues were not discussed in connection with Mr. Michkowski either before or during the meeting discussing the termination

[2] While Mr. Michkowski also filed a safety complaint with L&I, the complaint cannot support his cause of action because he did not file it until after his discharge.

decision. In the face of these undisputed facts, it defies logic that the basis for the decision to terminate Mr. Michkowski could in any way be related to him having raised workplace safety issues. It is logically impossible for anyone to make a decision as a reaction to a fact of which he or she is unaware. Any assertion to the contrary is based on speculation and conjecture, which is insufficient to defeat summary judgment. Suarez v. Newquist, 70 Wn. App. 827, 832, 855 P.2d 1200 (1993).

Mr. Michkowski suggests interview notes from the L&I investigation support an inference that the voting judges knew about his safety complaints, but this is based on speculation and an inaccurate reading of the record. Mr. Michkowski characterizes the L&I interview notes as stating that one of the bailiffs said "Michkowski 'has voiced safety concerns on several occasions, and has made recommendations.'" Based on this reading of the record, Mr. Michkowski asserts that there is an inference that, if a bailiff knew, the voting judges knew. App. Br. at 17. In addition to the argument being speculative, however, the factual assertion it is based on is not supported by the record. Contrary to his assertions, the L&I notes state that the bailiff, and not Mr. Michkowski, had voiced safety concerns and made recommendations and that "he [the bailiff] suffered no adverse employment action for voicing his concerns." CP 74. No aspect of the L&I investigation supports an inference that the

voting judges had a basis to connect Mr. Michkowski to safety complaints.

Mr. Michkowski also suggests there is an inference that Judge Ryan knew the content of Mr. Michkowski's August 23, 2012 memorandum to Judge Bui based on her forwarding the email chain, but this assertion is directly contradicted by the record. It is not disputed that, after Judge Bui refused to initial the memorandum to prove she had received the memorandum, Mr. Michkowski sent it to her by email, and she responded with a terse email showing her irritation about being asked to sign. CP 448-49, 516. Judge Bui then forwarded the email chain showing her irritation, but without the memorandum attached, to Judge Ryan. CP 425, 518. Judge Ryan never received the memorandum nor discussed its content with Judge Bui. CP 425, 449. The email chain itself has no subject line and the email makes no reference to the workplace safety issues discussed in the memorandum. CP 516. Nothing in the evidence supports an inference that Judge Ryan or any other voting judge knew Mr. Michkowski had raised workplace safety issues.

2. Imputed Knowledge Cannot Motivate Action

In the absence of any factual support for causation in his retaliation claim, Mr. Michkowski contends that each of the voting judges should be imputed with knowledge of his workplace safety complaint as a matter of law. Mr. Michkowski has a misunderstanding of the well-established law

in retaliation cases. Under standard agency principles, a principle is chargeable with notice to an agent when the agent receives the notice while acting within the scope of his or her authority as an agent. See Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 876 (1989). In arguing agency principles, Mr. Michkowski conflates Snohomish County's duty to resolve workplace safety issues with his burden to prove a causal connection between his safety complaint and the discharge decision made by the District Court judges.

The County is not disputing whether it has a duty to resolve workplace safety issues. It does. L&I conducted an investigation regarding bailiff workplace safety and training and issued a citation for two safety-related violations. Under agency principles, Judge Bui's knowledge about workplace safety issues could be imputed to the County for the purpose of its duty to resolve those issues. If, for example, someone were injured because the County did not resolve safety issues of which Judge Bui were aware, the County could face potential liability for breach of its duty of care. Knowledge of the agent creates the duty of care and is imputed to the principal for the purpose of determining whether the duty has been breached. In the retaliatory discharge context, the issue is not whether a duty has been created but whether the discharge decision was motivated by certain knowledge, specifically knowledge that

workplace safety issues were raised. L&I understood this distinction when it found both that the County had violated safety standards but had not retaliated against Mr. Michkowski for raising the safety issues. No one can be said to have made a decision based upon knowledge which he or she does not actually possess.

In arguing agency, Mr. Michkowski relies on Kimbro v. Atlantic Richfield Co., 889 F.2d 869 (1989). In Kimbro, the plaintiff sued his former employer (ARCO) under the Washington anti-discrimination statute for failing to reasonably accommodate his migraine condition. Although Kimbro was ultimately fired as a result of absenteeism (which was caused primarily by his migraine headaches), his lawsuit alleged a failure to make reasonable accommodations, rather than discriminatory discharge. ARCO argued that it could not be held liable because the management personnel who decided to fire Kimbro were unaware of the severity of his condition. The Ninth Circuit rejected this defense because Kimbro's immediate supervisor was fully aware of Kimbro's condition, and, under ARCO's own policy, had a duty to report this information to the ARCO managers. Under state law, this knowledge created a duty to accommodate Kimbro's disability. Under these circumstances, the court held that the supervisor's knowledge was chargeable to ARCO under general state-law agency principles. See Kimbro, 889 F.2d at 872-73, 875-

77.

As has been recognized by other courts, however, the reasoning in Kimbro is limited to creating a duty to accommodate and does not apply to discriminatory discharge cases. In Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1184 (2005), the Court held that, although imputing knowledge from agent to principal applies to reasonable accommodation cases, it cannot apply in discriminatory discharge cases because it "defies logic to argue that [an employer's] 'real intention' was to fire [an employee] 'because of' a disability [the employer] knew nothing about." Similarly, it defies logic to argue that the "real intention" of the District Court judges was to retaliate against Mr. Michkowski because of a memorandum on bailiff training and safety about which they knew nothing. The judges here voted to terminate Mr. Michkowski's employment based on each of their perceptions of the deficiencies in his performance. Whether Plaintiff agrees that his performance was in fact deficient is not the issue.

B. It is Not Material That Mr. Michkowski Believes He Performed Well

Mr. Michkowski also attempts to raise a factual issue by disputing the judges' contentions that he performed poorly. The County disagrees with any assertion that Mr. Michkowski performed his position satisfactorily, but for the purpose of this appeal, will assume the facts as

asserted by Mr. Michkowski. The reality is that whether Mr. Michkowski disagrees with the Judge's perception of his performance or that he in fact performed well is immaterial. The judges each had their own independent basis for evaluating Mr. Michkowski's performance on several levels, including day-to-day business, the budget, and larger special projects. Whether a judge's opinion of his performance was accurate or not does not create a material issue of fact because there is no basis to believe that any of the voting judges formed their termination decision based on Mr. Michkowski raising safety issues. As such, no judge based his or her vote to terminate on an illegal reason that could give rise to a claim of retaliation.

Mr. Michkowski's assertion that the District Court judges did not communicate well with him or each other, that he was right and the judges were wrong, or that he had good reasons for acting in the way he did during his employment does not support his retaliation claim. Even if he is right, and the judges were confused about his performance or the expectations placed upon him, their miscommunication or confusion was not based on the safety issues he raised with Judge Bui. The Court is not here to second-guess the personnel decisions of the District Court, but to determine whether there is a connection between Mr. Michkowski raising workplace safety issues and his termination. The only issue about his

performance that makes any difference is whether each judge had an honest belief in the reasons he or she held when deciding how to vote. Nothing in the record calls this into question.

Mr. Michkowski's focus on disputing his poor performance is a red herring intended to draw the Court's attention away from the fact that there is no evidence that the voting judges based their decision to terminate Mr. Michkowski's employment on him raising safety issues. Therefore, there are no material facts in dispute and upholding the summary judgment dismissal with prejudice of Mr. Michkowski's Complaint is appropriate and required by law.

V. CONCLUSION

Mr. Michkowski cannot prove causation because he cannot show the judges who made the decision to terminate his employment had any knowledge of him having raised workplace safety issues. Summary judgment dismissal of his retaliatory discharge claim should be upheld.

Respectfully submitted on April 25, 2014.

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CERTIFICATE OF SERVICE

I certify that on April 25, 2014, I caused a copy of the foregoing document to be served via U.S. Mail to the following counsel of record for Appellant:

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