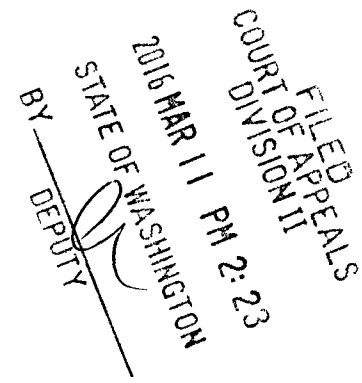
Case # 48098-1-II



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

MICHAEL NOEL,

Appellant,

v.

CITY OF LAKEWOOD,

Respondent.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted Respondent's motion for summary judgment because there were issues of material fact applicable to all claims made by Appellant.

2. The trial court erred when it ruled that Appellant's claims were subject to CR 41(a)(4) despite RCW .

Issues Pertaining to Assignment of Error:

1. Do RCW 4.96 et seq., and CR 41(a)(4) conflict when a Plaintiff's tort claims are not precise and utilizes a voluntary dismissal?

(De Novo)

2. Does a material issue of fact exist when a Plaintiff presents evidence of regarding a perceived disability as well as evidence of disparate treatment?

(De Novo)

3. Does a material of fact exist when a Plaintiff presents evidence that he was treated more harshly than other employees for the same or similar conduct.

(De Novo)

B. STATEMENT OF THE CASE

On March 2, 2012, Sergeant Michael Noel was terminated from his position with the Lakewood Police Department (hereafter "LPD") after

nearly eight years of faithful service to the department and the City of Lakewood. Sgt. Noel served the City of Lakewood under two separate administrations. He was hired from the Pierce County Sheriff's Department August 30, 2004, as a Sergeant and served in that capacity until his employment was terminated. Clerk's Papers 363-389.

When Sgt. Noel was hired from the Pierce County Sheriff's Department, the LPD was headed by Chief Larry Saunders. Clerk's Papers 363-389. He retired from the department in 2008, at which time, after a selection process Asst. Id. Chief Brett Farrar ascended to the lead post of the Lakewood Police Department. Id. In June 2008, then probationary Sergeant Mike Zaro was promoted to Asst. Chief at the recommendation of Farrar. Clerk's Papers 390-499. Prior to his promotion to a sergeant, Zaro had been a detective with the LPD. He too was a lateral hire from the Pierce County Sheriff's Department where his last position was as a detective. Id.

During Noel's tenure at the LPD, his annual performance evaluations were generally satisfactory and superior. Clerk's Papers 363-389. He received many commendations from citizens and members of other police agencies. Id. Of significant note is the annual evaluation conducted by Lieutenant Jeff Alwine on September 12, 2010. Id. Lt. Alwine notes in the Supervisor's Additional Comments section, "[s]ince January, my dealings

with Michael have been positive." Id. Additionally, Lt. Alwine stated, ". . . I know the day-to-day operations are, for the most part being handled in a manner consistent with what is expected." Id. Based upon Lt. Alwine's evaluation of Sgt. Noel's performance, Noel was rated at the superior level in most categories. Moreover, Lt. Alwine had no concerns that Sgt. Noel was a harm to himself or others. He had no concerns about his mental well-being. Clerk's Papers 390-499. Lt. Alwine felt that Sgt. Noel and his squad were headed in the right direction following the murder of their comrades on November 29, 2009. Id.

Beginning on May 2009, Sgt. Noel was subjected to an internal affairs investigation for speaking with a boy who allegedly spoke expletives to Sgt. Noel's son while riding a school bus on the way home. Clerk's Papers 363-389. The matter was investigated and Sgt. Noel was given a reprimand for the incident. In accordance with the LPD's Manual of Operating Standards, the reprimand was to be removed from Sgt. Noel's employment file at this next annual employment review. Clerk's Papers 390-499. The reprimand from the bus incident was, in fact, used against Sgt. Noel in subsequent proceedings. Heidi Wachter's letter regarding use of the bus incident discipline violated the LPD's MOS. Clerk's Papers 77-229.

In 2010, Sgt. Noel was again investigated for an incident for which he had no involvement and no control. Sgt. Noel's wife, Diana Noel, was employed by a company that bought jewelry from patrons. Mrs. Noel approached Chief Farrar and spoke with him about the possibility of her company sponsoring a charity event to benefit Tina Griswold. The event was approved by Chief Farrar. During the planning of the event, Ms. Kris Nash, was called by Mrs. Noel who left a message on Ms. Nash's cellular phone. It was determined during the course of the investigation against Sgt. Noel that Ms. Nash mentioned the call to Assistant Chief Zaro that Mrs. Noel had left a message on her cell phone. Mrs. Noel obtained Ms. Nash's telephone number from an LPD roster of contact information her husband maintained at their residence. Sgt. Noel was at the LPD at the time Mrs. Noel called Ms. Nash. Sgt. Noel was not disciplined for this incident. Clerk's Papers 363-389.

On February 14, 2011, Sgt. Noel, Off. Darrin Lattimer and Off. Matt Brown, were involved in a shooting resulting in the death of a suspect. Clerk's Papers 390-499. All 3 officers were immediately placed on administrative leave in accordance with standard policy. Id. Pending the outcome of the shooting investigation, the 3 officers involved in the Valentine's Day shooting were invited to attend a debriefing of the shooting. Sgt. Noel and Off. Lattimer did not attend the debriefing. At

the time of the scheduling of the debriefing, the shooting had not yet been determined to be "justified". Id., Clerk's Papers 77-229.

On April 21, 2011, Sgt. Noel had been cleared of the shooting as it was determined to have been justified. Id. He was returned to work on March 9, 2011. Clerk's Papers 390-499. Upon his return, however, a notice of the initiation of an internal investigation was waiting for him in his departmental mailbox. Sgt. Noel and Off. Lattimer were being investigated for missing the debriefing. Shortly after receiving notice of this investigation, Sgt. Noel received yet another notice that he was being investigated for participating in a gathering wherein the participants at the gathering held their own debriefing of the shooting. While being investigated for participating in the gathering, it was determined that Sgt. Noel only participated in the dinner. The dinner was not organized by him and no discussion of the February 14, 2011 shooting was ever engaged in by the officers. Id., Clerk's Papers 363-389.

On or about April 6, 2011, Sgt. Noel attended his Loudermill with Chief Farrar. Id. During the heated exchange, Sgt. Noel was denied the opportunity to present his side of the story as to the reasons he missed the debriefing. Sgt. Noel was permitted to disclose that upon the completion of the investigation of the missed debriefing, he contacted a Pierce County Sheriff's Deputy to verify his statement contained in the investigation

package provided to Sgt. Noel. It was based upon this disclosure that Sgt. Noel was subjected to yet another internal affairs investigation and maintained on administrative leave. On April 8, 2011, Sgt. Noel was served with another notice regarding internal affairs investigation numbered 2011PSS-004. Id., Clerk's Papers 77-229.

During the month of April 2011, Detective Les Bunton was approached by Chief Farrar to specifically discuss Sgt. Noel. Clerk's Papers 390-499. Chief Farrar knew that Det. Bunton and Sgt. Noel were good friends. Det. Bunton recalls that Chief Farrar approached him in an effort to convince Bunton to talk "some sense" into Noel to claim that Noel was suffering a disability. Id. The purpose of Noel making such a claim was so that Noel could maintain his job and exit the department under a disability claim. Id. Chief Farrar told Officer Wurts that Sgt. Noel was mentally unstable. Clerk's Papers 500-510.

On August 5, 2011, Appellant filed suit seeking injunctive relief and a temporary restraining order. Clerk's Papers 230-362, 38-69. Appellant sought to restrain the efforts of Respondents attempts to have him subjected to a second psychological examination despite having been cleared by the department's psychologist in February 2011. Id. The requested relief was denied and Appellant appeared for the examination as

scheduled on August 8, 2011. That action was dismissed by the court for want of prosecution. Id.

Despite having followed through with all the requirements of the LPD administration, including yet another internal affairs investigation during the fall of 2011, Appellant's employment with Respondent was terminated in March 2012. Clerk's Papers 390-499.

Appellant filed a Standard Tort Claim with the Respondent on May 27, 2011. An amendment to the May 27, 2011 presentment was filed with Respondent on April 4, 2014. The amendment included Appellant's claims under RCW 49.60. Id., Clerk's Papers 363-389.

Appellant filed suit on May 3, 2012. Clerk's Papers 230-362. That cause was removed by Respondents to Federal District Court. Id. After Appellants dismissed the possible federal claims, the Federal District Court lacked jurisdiction over the remaining claims and remanded the case to Pierce County Superior Court under the original cause 12-2-08690-2. Clerk's Papers 38-69.

On June 24, 2013, prior to any rulings by the Federal District Court, Appellant filed suit under Pierce County Cause number 13-2-11383-5 but dismissed as indicated by Respondents and based upon RCW 4.96. Id.

Respondents moved for summary judgment in Pierce County cause 12-2-08690-2 in material part claiming that Appellant had failed to present all tort claims as required under RCW 4.96. That action was dismissed by the Honorable Kathrine Stolz. Clerk's Papers 390-499, 363-389. Respondents recognized in their motion materials that Appellant was still well within the statute of limitations. Clerk's Papers 390-499.

Appellant filed the underlying cause in Pierce County Superior Court on June 5, 2014. Clerk's Papers 230-362.

C. ARGUMENT

I. Plaintiff amended his May 27, 2011 claims presentment with that presented to the City of Lakewood on April 4, 2014 pursuant to rulings and RCW 4.96

On April 4, 2014, Plaintiff filed with the City of Lakewood a Standard Tort Claim Form amending the May 27, 2011 presentment. The April 4, 2014 form absolutely lists claims for violations of RCW 49.60, the Washington Law Against Discrimination. If the court deems that Plaintiff's claims under the WLAD were not explicitly listed, then those claims may be properly dismissed until the ripening of the April 4, 2014 presentment. The issue in this regard may be jurisdictional. Defendants argue that Plaintiff's WLAD claims "fail because it was not included on the tort claim form served on the City by Noel prior to initiating this

lawsuit." Def. Motion Summary Judgment, pg. 17, lines 8-9. Clerk's Papers 38-69, 390-499.

RCW 4.96.010(1) states that a party must file a claim for damages with a local governmental entity before commencing a tort action against that entity. RCW 4.96.020 outlines the process a tort claimant must follow in filing a claim for damages. The claimant must (1) prepare a tort claim form containing certain minimum information outlined in RCW 4.96.020(3)(a); (2) have the claim form signed in one of the ways specified in RCW 4.96.020(3)(b); (3) present the claim by delivering or mailing the claim form to the person the governmental entity designates to receive claims as provided in RCW 4.96.020(2); and (4) wait until 60 days have elapsed after the claim was presented before commencing an action against the governmental entity as provided in RCW 4.96.020(4).

The purpose of claim filing statutes is to "allow government entities time to investigate, evaluate, and settle claims." Medina v. Pub. Util. Dist. No. 1 of Benton Cnty, 147 Wn.2d 303, 310 (2002). Allowing time for investigation and evaluation also provides an opportunity for governmental entities to assess the potential costs and benefits of litigation. See Williams v. State, 76 Wn.App. 237, 248, 885 P.2d 845 (1994).

The Respondents have admitted that Plaintiff's failure to present separate and distinct claims under RCW 4.96 et seq., deprives the courts of subject matter jurisdiction. Id. As a condition precedent to suit Plaintiff must file tort claims for separate and distinct tort causes of action. Defendant requested dismissal of Plaintiff's WLAD claim on the basis that Noel failed to identify the claim on the tort claim served on the City on May 27, 2011. Clerk's Papers 390-499. Id. Defendants' have cited to no authority dispositive of the issue that all tort claims have to be listed at one time, especially tort claims that have not ripened or occurred. In the same way that Defendants claim they should not be required to guess what the Plaintiff is claiming, Plaintiff should not be required to anticipate what wrongs a Defendant will accomplish against a Plaintiff. The law does not require any party to speculate on the actions of others prior to filing a tort claim against a government action.

Taken to its logical step, dismissal of a claim in which a trial court lacks jurisdiction should be dismissed if a condition precedent has not been accomplished prior to filing suit. This was the argument of Defendants on June 6, 2014 in Pierce County Cause Number 12-2-08690-2. Id. It was the basis upon which the Honorable Judge Katherine M. Stolz signed the June 6, 2014 Order Rendering Moot Defendants' Summary Judgment.

Respondents have cited to Jones v. University of Washington, 62 Wn. App. 653 (1991). Jones is an employment discrimination case involving wrongful termination based upon age and racial discrimination. Jones is distinguishable from the instant case in that Jones commenced suit and then 19 days into the suit he filed a tort claim with the State in violation of former RCW 4.92.110. Jones v. UW, 62 Wn. App. at 655. After the statute of limitations had run, the UW brought their motion for summary judgment, which was granted.

In Noel, however, there is no dispute that a claim for damages was presented prior to commencement of suit on May 27, 2011. That claim for damages was amended on April 4, 2014. The amendment ripened on or about June 4, 2014, 60 days after filing. The instant suit was then filed on June 5, 2014. Hence, the claims contained in the April 4, 2014 presentment were proper causes of action in the case before this court.

Jones is also distinguished from Noel's by virtue of the absence of CR 41(a)(4). In fact, Appellant has not found a case that involved the interplay of both the court rule and the presentment statute in the same case. Appellant argues that the presentment statute takes precedence over the civil rule. Requiring anything else would mandate a precise notice requirement in a statute which allows for substantial compliance. RCW 4.96.020(5).

II. Two dismissal rule is inapplicable.

In Spokane County v. Specialty Auto & Truck Painting, Inc., 153 Wash.2d 238, 103 P.3d 792 (2004), the Court was asked to determine the extent of the "two-dismissal" rule. In that case, Spokane County sued Specialty Auto for over billing. Because the county's governing board did not authorize the lawsuit, the county filed a second, authorized action. Specialty Auto moved to clarify the duplicate complaints. After discussions between the parties, Spokane County agreed to dismiss the first complaint; however, the parties never entered a formal stipulation. The superior court entered Spokane County's order to dismiss the first action, pursuant to CR 41(a). Two months later Specialty Auto filed a tort claim against Spokane County. In order to coordinate the actions, but without discussing it with Specialty Auto, Spokane County voluntarily dismissed its second complaint and then filed its third complaint against Specialty Auto. Specialty Auto filed a motion to dismiss based on CR 41(a)(4), but the trial court denied the motion, finding that the rule did not apply. See id. at 242-43, 103 P.3d 792.

In construing the rule, the Court pointed out that it must interpret court rules in a manner " 'that advances the underlying purpose of the rules, which is to reach a just determination in every action.' " Id. at 245 103 P.3d 792 (quoting Burnett v. Spokane Ambulance, 131 Wash.2d 484,

498, 933 P.2d 1036 (1997)). The Court found it could fulfill the purpose of the rule while following its plain language by narrowly construing CR 41(a)(4) to apply only to dismissals that the plaintiff voluntarily and unilaterally obtained. See id. at 245, 103 P.3d 792. The Washington Supreme Court therefore "reject[ed] Spokane County's request that we ... attempt to determine the intent of the parties," id. at 247, 103 P.3d 792, and established a bright line rule that any unilateral dismissal by a plaintiff falls within the parameters of CR 41(a)(4). See id. at 246, 103 P.3d 792. Conversely, where a defendant stipulated to the dismissal or the dismissal was by court order, then the dismissal was not unilateral and the rule did not apply. See id. at 248, 103 P.3d 792.

By virtue of the Order Rendering Moot Defendants' Summary Judgment Motion on June 6, 2014, the court entered an order based upon the agreement of the parties and the absence of full presentment of claims that were dismissed by the Honorable Judge Benjamin Settle in the removed Federal action. Plaintiff's claims, as presented in the tort claim filed with Defendants on April 4, 2014 had ripened on June 4, 2014. Thus, the current cause of action was filed on June 5, 2014. Moreover, a dismissal on the basis of RCW4.96 et seq., is in line with maintaining judicial economy as a cause of action that does not meet the condition

precedent should be dismissed in order to comply with the prerequisites of the statutory scheme.

III. WLAD Discrimination and Retaliation.

To establish a prima facie case of disparate treatment based on disability, a plaintiff must show that she or he (1) has a disability or perceived to have a disability, (2) suffered an adverse employment action, (3) was doing satisfactory work, and (4) was treated differently than someone not in the protected class. Kirby v. City of Tacoma, 124 Wn.App. 454, 468, 98 P.3d 827 (Div. II, 2004); accord: Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 152, 94 P.3d 930 (2004).

To establish the first prong of a claim for disparate treatment, a plaintiff must show that she or he was disabled in the meaning of the statute. For the second prong, a plaintiff must establish that she or he was subject to adverse employment action. An adverse employment action requires "an actual adverse employment action, such as a demotion or advance transfer, or a hostile work environment that amounts to an adverse employment action." Robel v. Roundup Corp., 148 Wn.2d 35, 74, n. 24, 59 P.3d 611 (2002). An adverse employment action, therefore, is more than an "'inconvenience or alteration of job responsibilities.'" Kirby, 124 Wn.App at 465 (quoting DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 192 (7th Cir. 1995).

The third prong may be shown, for example, that the employee consistently received positive evaluations during his employment. The fourth prong can be satisfied by showing that the employer treats able-bodied employees more favorably than it treats the disabled plaintiff.

An employer may be liable for employment decisions when the employer has knowledge of a disability. In addition, an employee's conduct resulting from a disability, not merely the disability per se, may be protected under the WLAD when the employer know or should have known of a disability. Riehl, supra at 152; see also Gambini v. Total Renal Care, 486 F.3d 1087, 1093 (9th Cir. 2007). Discrimination is illegal if it is based upon the employer's perception that the employee is disabled, even if she or he is not, in fact, disabled. Barnes v. Washington Natural Gas Co., 22 Wn.App. 576, 591 P.2d 461 (Div. I, 1979). An undiagnosed condition can even be a disability under the WLAD if (1) it can be recognized or diagnosed; (2) it has a record or history, and (3) if it substantially limits the employee's ability to do his or her job. Callahan v. Walla Walla Housing Authority, 126 Wn.App. 812 (Div. III, 2005).

The case Barnes v. Washington Natural Gas is cited by both Plaintiff and Defendant. As the court stated "[t]he issue here is narrow: May a plaintiff claiming not to be handicapped sue under the Act on the grounds that he was discriminatorily discharged under the erroneous belief

he suffered a handicap?" Barnes v. Washington Natural Gas, 22 Wn.App. at 577. The court resoundingly answered the question in the affirmative. Id. "Prejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be nonexistent." Id. at 582. The law's application is not limited to Plaintiffs actually afflicted with handicaps, "excluding those who are discriminated against in the same way because they are only thought to have handicaps." Id.

Plaintiff's claim of disability discrimination is based on timing. By the second week of April 2011, the administration had exhibited its intent to use an alleged mental instability claim to keep Michael Noel from returning to his job. Clerk's Papers 500-510. Chief Farrar had a discussion with Detective Les Bunton in April 2011. Initially, Det. Bunton believed this discussion, specifically concerning Noel, occurred in April 2010. Clerk's Papers 390-499. Det. Bunton confirmed that the conversation he had with Chief Farrar occurred after the February 14, 2011, shooting in which Sgt. Noel was involved. Id.

Chief Farrar confirmed that he had a conversation with Det. Bunton regarding Sgt. Noel making an L&I claim as an option. Id. It is, however, the conversations that Chief Farrar had with Officer Brian

Wurts, Union President of the Lakewood Police Independent Guild (LPIG), that are the most revealing of Chief Farrar's discriminatory intent and defamation. Chief Farrar confirmed that he had no medical information regarding any medical or psychological conditions of Noel. Clerk's Papers 500-510. Moreover, Farrar could not provide a date or incident in which Noel was injured. Id. Instead, Farrar stated "Noel is mentally unstable and I won't have him back to work." Id. Chief Farrar's statements and actions affirmatively show that he was not going to have Michael Noel returned back to work as of the late spring or early summer of 2011. The only reason for making a statement that Noel would not be returned to work was based upon the disability. Id.

This is the type of situation that the holding of Barnes v. Washington Natural Gas contemplates. Armed with no evidence of a disability, Chief Farrar took the affirmative step in April 2011 to keep Noel from returning to his position. In fact, Defendants admit that Plaintiff was psychologically cleared to return to his duties as a patrol sergeant for the City of Lakewood Police Department, "and did return to work on February 26, 2011". Clerk's Papers 390-499. The timing of the statements of Farrar and Zaro regarding taking action to prevent Noel from returning to the LPD is affirmatively shown by the delay and lack of any meaningful action on the part of the administration. There exists a

dispute of material fact as to when Plaintiff was terminated from his position and what the true basis of that termination was. Additionally, there exists a dispute as to whether Farrar and Zaro used fraudulent means to terminate Noel's employment with the LPD.

Plaintiff can establish the elements of a discrimination claim. First, Chief Farrar states to third parties that Noel is "mentally unstable". He states this without any information regarding the truth or falsity of such a statement. Second, adverse employment action comes finally culminates in Noel's termination. After Noel refuses to submit a claim of disability, the Chief and Asst. Chief retaliate against Noel by taking away his ability to perform law enforcement duties. Farrar goes so far as to state that in order for Noel to keep his job, Noel needs to file an L&I claim. Third, Noel is performing well as an officer for the LPD. Finally, according the Brian Wurts, during his tenure as the guild President, no other officer was treated in the same or similar manner as Noel. Sgt. Noel was finally terminated from his position with the Lakewood Police Department for following the order to submit to another fit for duty examination. All elements of a prima facie case have been met and established.

RCW 49.60.210(1) makes it unlawful for "any employer, employment agency, labor union, or other persons to discharge, expel, or otherwise discriminate against any person because he or she has (1)

opposed any practices forbidden by [the law against discrimination] or ... (2) filed a charge, testified, or assisted in any proceeding under this [the law against discrimination]." Under RCW 49.60.210, the employee bears the burden of proving that the employer's action was retaliatory and that such retaliation was the cause of the employee's damages. See: Delahunty v. Cahoon, 66 Wn.App. 829, 839, 832 P.2d 1378, 1383-84 (Div. III, 1992). Three elements are needed to support this cause of action: (1) the employee engaged in a statutorily protected activity, (2) an adverse employment action was taken, and (3) the statutorily protected activity was a substantial factor in the employer's adverse employment decision. Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 861-62, 991 P.2d 1182, 1191 (Div. III, 2000); see: Kahn v. Salerno, 90 Wn.App. 110, 129, 951 P.2d 321, 331 (Div. I, 1998); Delahunty, supra at 839.

Washington courts usually analyze retaliation claims under a burden shifting framework. To establish a prima facie case of retaliation the plaintiff must produce evidence of (1) a protected activity by the employee, (2) an adverse action by the employer and (3) the employer's knowledge of the protected activity. Allison v. City of Seattle, 118 Wn.2d 79, 89 n.3, 821 P.2d 34, 39 (1991); Graves v. Dep't of Game, 76 Wn.App. 705, 712, 887 P.2d 424, 427 (Div. III, 1994).

Washington courts have generally labeled this third element as requiring proof of a "causal connection" between the exercise of the legal right and the adverse employment action. See: Wilmot v. Kaiser Aluminum and Chem. Corp., 118 Wn.2d 46, 68, 821 P.2d 18, 29 (1991). However, the Washington Supreme Court has emphasized that a showing of "but for" causation is not required to establish a prima facie case of retaliation. See: Allison, supra, at 89 n.3. Instead, a plaintiff need only show that the protected activity was "a substantial factor" for the adverse action. See e.g.: Vasquez v. State, 94 Wn.App. 976, 984, 974 P.2d 348, 352-53 (Div. III, 1999).

As for the first prong of the above test, this is satisfied if an employee had a good faith, objectively reasonable belief that her activity is protected by the statute. Estevez v. Faculty Club of Univ. of Wash., 129 Wn. App. 774, 798, 120 P.3d 579 (Div. I, 2005) (plaintiff need only prove that her complaints went to conduct that was "arguably" a violation of law); (plaintiff need only show "reasonable belief ' that discrimination occurred); Kahn, supra, 90 Wn. App. at 130 (plaintiff s "opposition must be to conduct that is at least arguably a violation of the law"); Blackford v. Battelle Mem 'l Inst., 57 F.Supp.2d 1095, 1099 (interpreting the WLAD).

Protection for opposition activity also extends to employees who confirm unlawful behavior in response to questioning during an

employer's investigation of co-worker complaints. See: Crawford v. Metro. Gov't of Nashville et. al., U.S. 129 S.Ct. 846, 2009 U.S. LEXIS 870 (2009). While Washington courts have not addressed this specific factual scenario and whether it constitutes opposition or participation activity, courts have protected employee participation in investigations. See: Blinka v. WSBA, 109 Wn.App. 575, 590, 36 P.3d 1094, 1102 (Div. I, 2001), rev. denied, 146 Wn.2d 1021 (2002) (retaliating against employee for participating in internal investigation would violate the WLAD); See also: Gaspar v. Peshastin Hi-Up Growers, 131.Wash.App. 630, 128 P.3d 627 (Div. III, 2006), rev. den'd, Wn.2d, 152 P.3d 1033 (2007) (discharging employee in retaliation for cooperating with a police investigation violates public policy).

When "participation" is the protected activity, the standard is more liberal in that an employee need not prove the merits of the underlying claim because, unlike the "opposition clause," the "participation clause" does not mention "practices forbidden by [RCW 49.60]." RCW 49.60.210(1); Blinka, supra at 583-84. Federal courts have interpreted "participation" to include a wide range of activities connected with reporting unlawful activity, extending far beyond just the filing of a formal charge. See e.g.: Merritt v. Dillard Paper Co., 120 F.3d 1181 (11th Cir. 1997) (testifying in deposition for co-worker's Title VII suit is protected

activity); see also: Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997) (finding employee's meeting with EEO counselor was protected activity where counselor thought formal complaint would be filed and notified management officials). But see: Brower v. Runyon, 178 F.3d 1002, 1006 (8th Cir. 1999) (finding that employee's visit with EEO counselor to "explore her options" did not constitute protected activity where she didn't complain of discrimination).

With respect to the second element of retaliation claims, an adverse employment action must involve a change that is more than an "inconvenience or alternation of job responsibilities." Kirby v. City of Tacoma, 124 Wn.App. 454, 465, 98 P.3d 827, 833 (Div. II, 2004) (internal citations omitted). Thus, reducing an employee's workload and pay constitutes an adverse employment action, whereas yelling at an employee or threatening to fire an employee is not. Id. (internal citations omitted). A demotion or adverse transfer may also constitute an adverse employment action. See: Campbell v. State, 129 Wn.App. IO, 22, 118 P.3d 888, 893 (Div. III, 2005) (jury question whether demotion without loss of pay was an adverse action) (citing Robel v. Roundup Corp., 148 Wn.2d 35, 74 n.14, 59 P.3d 611, 631 n.14 (2002) (Bridge, J. dissenting in part)).

Federal law offers some useful guidance on this issue. The Ninth Circuit has adopted the EEOC's broad definition of an adverse

employment action as any action by an employer that is "reasonably likely to deter employees from engaging in protected activity," such as "lateral transfers, unfavorable job references, and changes in work schedules." Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000); see also: Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir.1997) (holding dissemination of unfavorable job reference an adverse employment action even though the plaintiff would not have received the prospective job in any event - squarely rejecting the employer's "no harm, no foul" argument); Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 869 (9th Cir.1996) (finding lateral transfer constitutes an adverse employment action).

The third prima facie element is met by establishing a causal link between the employee's activity and the employer's adverse action. Absent an admission by a decision maker, plaintiffs must gather circumstantial evidence of motive. "Because employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose." Vasquez, supra at 985 (citing Kahn, supra at 130). For instance, proximity in time between the protected activity and the adverse action is circumstantial evidence of the employer's motivation, as is comparison of the employee's performance

evaluations before and after the protected activity. See: Vasquez, supra at 985 (citing Kahn, supra at 130-31).

With respect to proximity of time, there is no exact time period sufficient to create an issue of fact. The other indicia of retaliation are usually factored into the analysis. See: Estevez v. Faculty Club of Univ. of Wash., 129 Wn.App. 774, 120 P.3d 579 (Div. I, 2005) (finding summary judgment inappropriate where in addition to direct evidence, employee who had never received negative performance review or been reprimanded was terminated nine days after reporting harassing behavior, and the day after telling employer she would seek a restraining order).

The passage of one to three months has been sufficient to support an inference of retaliation. Campbell v. State, 129 Wn.App. 10, 18, 118 P.3d 888, 891 (Div. III, 2005) (finding prima facie case established where employee filed complaint on April 18 and demoted "in May."); Anica v. Wal-Mart Stores, Inc., 120 Wn. App. 481, 491-92, 84 P.3d 1231 (Div. I, 2004) (finding causation element satisfied where employee discharged approximately three months after filing claim). Longer gaps in time have not supported a finding of causation. See: Francom, supra at 862 (the lapse of 15 months between employee complaint and alleged adverse employment actions did not support an inference of retaliatory motive.).

The Ninth Circuit has articulated its standard as follows: "[c]ausation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." Yartzojf v. Thomas, F.2d 1371, 1376 (9th Cir. 1987). Ninth Circuit decisions are generally consistent with Washington cases on the issue of what length of time supports a prima facie finding of causation. See e.g.: Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 507 (9th Cir. 2000) ("evidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant."); Miller v. Fairchild Indus., Inc., 885 F.2d 498, 505 (9th Cir. 1989) (holding that discharges 42 and59 days after EEOC hearings were sufficient to establish prima facie case of causation); Yartzoff, supra at 1376 (finding sufficient evidence of causation where adverse actions occurred less than three months after complaint was filed, two weeks after charge first investigated, and less than two months after investigation ended). But see: Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74, 121 S.Ct. 1508, 1511 (2001) (holding that timing alone did not support claim of

retaliation because almost two years had passed between protected activity and adverse employment action).

Washington case law seems to recognize a "rebuttable presumption" of causation after a prima facie case is shown, which shifts the burden of persuasion to the employer to prove a non-retaliatory motive for its actions. Vasquez, supra at 985 ("if the employee establishes that he or she participated in an opposition activity, the employer knew of the opposition activity, and he or she was discharged, then a rebuttable presumption is created in favor of the employee that precludes us from dismissing the employee's case.") An employee can demonstrate evidence of pretext by showing that: (I) the proffered reasons have no basis in fact, or (2) even if based in fact, the employer was not motivated by these reasons, or (3) the reasons are insufficient to motivate an adverse employment decision.

Finally, in terms of proving causation, it is important to bear in mind that a claimant need not show that retaliatory motivation was the main reason for action against an employee - liability is established when an employer is motivated in part by retaliation. Kahn, supra at 129.

In the instant case, Plaintiff filed an action requesting injunctive relief. Such relief was denied. Plaintiff reasonably opposed the actions against him based upon the absence of any mental defect as claimed by

Chief Farrar and Asst. Chief Zaro. Such action was not precluded by the Defendants, yet he was reminded in disciplinary letters from the City Attorney and Chief Farrar that the injunctive relief that was sought was an attempt to thwart the investigation process. He was a direct participant in asserting his legal rights. At the next bidding process, Sgt. Noel was no longer permitted to request shifts and was completely taken off of the shift rolls. Within a short period of time, Sgt. Noel's employment was terminated.

What should also be considered in the context of retaliation and wrongful termination is the fact that Sgt. Noel followed an order of his superior officer and submitted to a fit for duty examination that was to be conducted by a "non-physician". After having injunctive relief denied, Sgt. Noel appeared and participated in a battery of three separate psychological examinations which was all multiple choice exams. Clerk's Papers 390-499. After the conclusion of the testing, scoring and evaluation, Alan Friedman, Ph.D., could not make a conclusion of Sgt. Noel's fit for duty, yet claimed it was because Sgt. Noel was deceptive on a multiple choice examination. In fact, despite the validity of one of the examinations, Alan Friedman, Ph.D., invalidated one of the examinations. Id, at the very least, this is circumstantial evidence of what Defendants'

were attempting to accomplish despite having Sgt. Noel cleared for duty in February 2011.

Plaintiff has established all elements of her retaliation claim and summary judgment is precluded.

IV. DEFAMATION

A defamation plaintiff must establish four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. Mohr v. Grant, 153 Wash.2d 812, 822, 108 P.3d 768 (2005); Bender v. City of Seattle, 99 Wash.2d 582, 599, 664 P.2d 492 (1983). The degree of fault necessary to make out a prima facie case of defamation depends on if the plaintiff is a private individual or a public figure or official. Bender, 99 Wash.2d at 599, 664 P.2d 492. The negligence standard of fault applies if the plaintiff is a private individual; negligence is established by a preponderance of the evidence. Id. A plaintiff who is a public figure or official must prove "actual malice," i.e., knowledge of falsity or reckless disregard of the truth or falsity, by clear and convincing evidence. Id. (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)) (citations omitted); Moe v. Wise, 97 Wash.App. 950, 957, 989 P.2d 1148 (1999).

To establish the falsity element of defamation, the plaintiff must show the offensive statement was "provably false." Schmalenberg v.

Tacoma News, Inc., 87 Wash.App. 579, 590-91, 943 P.2d 350 (1997). "Expressions of opinion are protected by the First Amendment" and " are not actionable." Robel v. Roundup Corp., 148 Wash.2d 35, 55, 59 P.3d 611 (2002) (quoting Camer v. Seattle Post-Intelligencer, 45 Wash.App. 29, 39, 723 P.2d 1195 (1986)). But a statement meets the provably false test to the extent it expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion. Schmalenberg, 87 Wash.App. at 590-91, 943 P.2d 350; see Valdez-Zontek v. Eastmont Sch. Dist., 154 Wn.App, 158; Henderson v. Pennwalt Corp., 41 Wash.App. 547, 557, 704 P.2d 1256 (1985) (citing Benjamin v. Cowles Publ'g Co., 37 Wash.App. 916, 684 P.2d 739 (1984); RESTATEMENT (SECOND) OF TORTS § 566 (1976)). One way a statement could be provably false is when "it falsely describes the act, condition or event that comprises its subject matter." Schmalenberg, 87 Wash.App. at 591, 943 P.2d 350. If a direct statement of facts would be defamatory, then a statement of an opinion implying the existence of those false facts supports a defamation action. Henderson, 41 Wash.App. at 557, 704 P.2d 1256. Such is the case when ordinary persons hearing the statements would not perceive them to be "pure" expressions of opinion. Id. at 557-58, 704 P.2d 1256.

Whether the plaintiff is a public figure for purposes of a defamation claim is a question of law for the court to decide. Clawson v. Longview Publ'g Co., 91 Wash.2d 408, 413, 589 P.2d 1223 (1979). "To be considered a public figure, courts usually require the plaintiff to voluntarily seek to influence the resolution of public issues." Camer, 45 Wash.App. at 42, 723 P.2d 1195(citing Bender, 99 Wash.2d at 600, 664 P.2d 492). In Clawson, the court stated the most important factor distinguishing public and private plaintiffs is the assumption of the risk of greater public scrutiny of public life. Clawson, 91 Wash.2d at 416, 589 P.2d 1223. Of secondary importance is the public plaintiff's ease of access to the press. Id. at 414-15, 589 P.2d 1223. The actual malice standard applies to any aspect of a public official's life reflecting upon his or her fitness for the position. Id. at 416-17, 589 P.2d 1223. The Clawson court explained:

> With officials wielding general power and exercising broad discretion, the scope of that standard is necessarily comprehensive, encompassing virtually all of the public official's life.... However, with persons such as respondent, the "public official" standard fails to sweep so broadly; exposure is limited to matters more closely connected to actual job performance. In essence, we find two pertinent variables: (1) the importance of the position held, and (2) the nexus between that position and the allegedly defamatory information specifically, how closely the defamatory material bears upon fitness for office.

Clawson, 91 Wash.2d at 417, 589 P.2d 1223 (citations omitted); see Eubanks v. N. Cascades Broad., 115 Wash.App. 113, 122-24, 61 P.3d 368 (2003).

The dispositive question under the Clawson test is whether any nexus exists between Michael Noel's public employment duty and the defamatory statements alleging mental instability. The unsubstantiated comment of mental instability in light of no evidence has no bearing on the manner in which Noel performed his public duties. As of April 2011 it was told to third parties that Noel was "mentally unstable" and the Chief wanted to preserve Noel's job. Clerk's Papers 390-499, 500-510. In fact, Chief Farrar stated that the only way for Noel to keep his job was to submit to a fraud and claim that he was suffering from a disability in order to receive L&I benefits. At no time did Chief Farrar state to Det. Bunton that his opinion was that Noel was mentally unstable. Stating falsely that a police officer is mentally unstable is the beginning of the end of the career is claimed to be mentally unstable. To date, there has been no finding that Noel is (or ever was) "mentally unstable".

Thus, no close nexus exists between the mental instability and Noel's job performance. The mental instability statements therefore do not fall within the permissible scope of his public role. See Clawson, 91 Wash.2d at 417, 589 P.2d 1223; Eubanks, 115 Wash.App. at 122-24, 61

P.3d 368. "I always thought Michael was a very competent, you know, from a police point of view, from a tactical point of view, from a knowledge point of view on police matters and laws and – I found him very competent." Clerk's Papers 390-499. In fact, Chief Farrar had no concerns that Michael was a danger to himself or the public and certainly never took action to protect Michael from himself. Clerk's Papers 390-499.

When a plaintiff has established a prima facie case of defamation, the defendant can assert either an absolute or qualified privilege to defend against liability for defamatory statements. See Bender, 99 Wash.2d at 600, 664 P.2d 492. When the facts are not in dispute as to the circumstances of the alleged defamatory communication, the determination whether a privilege applies is a matter of law for the court to decide. Moe, 97 Wash.App. at 957, 989 P.2d 1148; Parry v. George H. Brown & Assocs., Inc., 46 Wash.App. 193, 196, 730 P.2d 95 (1986). The privilege applies when the declarant and the recipient have a common interest in the "subject matter of the communication." Moe, 97 Wash.App. at 957-58, 989 P.2d 1148.

A common interest privilege generally applies to organizations, partnerships and associations and "arises when parties need to speak freely and openly about subjects of common organizational or pecuniary

interest." Id. at 958, 959, 989 P.2d 1148; see also Momah v. Bharti, 144 Wash.App. 731, 747-48, 182 P.3d 455 (2008). If the defendant establishes that the privilege applies, the privilege may be lost if the plaintiff can show it was abused. Bender, 99 Wash.2d at 600, 664 P.2d 492 (citing Gem Trading Co. v. Cudahy Corp., 92 Wash.2d 956, 960, 603 P.2d 828 (1979)). Even a private individual plaintiff must then show abuse of the privilege under the heightened clear and convincing standard. Bender, 99 Wash.2d at 601, 664 P.2d 492; Moe, 97 Wash.App. at 963, 989 P.2d 1148. Historically, defamatory communications were deemed actionable regardless of whether they took the form of opinion or fact. Id. at 11, 110 S.Ct. 2695. However, due to concerns about stifling valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation; it afforded " ' legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.' "Id. at 13, 110 S.Ct. 2695 (quoting 1 FOWLER V. HARPER & FLEMING JAMES, JR., LAW OF TORTS § 5.28, at 456 (1956)).

Generally, the privilege of fair comment applied only to a statement of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion. Id. at 14, 110 S.Ct. 2695 (citing RESTATEMENT (SECOND) OF TORTS § 566 cmt. a

(1977)). " Thus under the common law, the privilege of ' fair comment' was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech." Id.

Even at common law, the privilege of fair comment did not extend to " 'a false statement of fact, whether it was expressly stated or implied from an expression of opinion.' "Id. at 19, 110 S.Ct. 2695 (quoting RESTATEMENT § 566 cmt. a). In Milkovich, the Supreme Court reiterated that a statement structured as an opinion may still be actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion, because it may then contain a provably false factual connotation. Id. at 20, 110 S.Ct. 2695 (citing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); Dunlap v. Wayne, 105 Wash.2d 529, 540, 716 P.2d 842 (1986) (quoting RESTATEMENT § 566)).

As the Supreme Court explained:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.

497 U.S. at 18-19, 110 S.Ct. 2695.

A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. RESTATEMENT § 566 cmt. c (emphasis added), quoted in Dunlap, 105 Wash.2d at 540, 716 P.2d 842. When the audience knows the facts underlying an opinion and can judge the truthfulness of the allegedly defamatory statement themselves, the basis for liability for the opinion is undercut. RESTATEMENT § 566 cmt. c.

Plaintiff has never been determined to be "mentally unstable". Such a statement was absolutely false and has never been established. Chief Farrar unabashedly told third parties that Noel was mentally unstable. Chief Farrar knew that such a statement was false. As a result of espousing the false statements, Noel was terminated from his position with the LPD at the hands of Chief Farrar.

V. FRAUD

Clear, cogent, and convincing evidence is required to support a claim of fraud. Williams v. Joslin, 65 Wash.2d 696, 697, 399 P.2d 308

(1965). The nine elements of fraud are (1) representation of an existing fact, (2) materiality of the fact, (3) falsity of the fact, (4) the speaker's knowledge of the falsity of the fact, (5) the speaker's intent that the fact should be acted on by the person to whom the fact was represented, (6) ignorance of the fact's falsity on the part of the person to whom it is represented, (7) reliance on the truth of the factual representation, (8) the right of the person to rely on the factual representation, and (9) the person's consequent damage from the false factual representation. Sigman v. Stevens-Norton, Inc., 70 Wash.2d 915, 920, 425 P.2d 891 (1967). See also Alejandre v. Bull, 159 Wash.2d 674, 690, 153 P.3d 864 (2007).

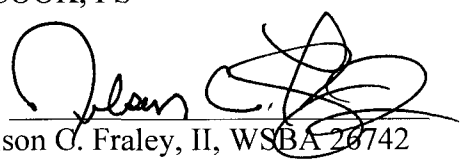
E. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court remand this matter to the trial court to allow Appellant to take his claims to trial against Respondents.

Dated this 11th day of March, 2016.

Respectfully submitted,

FAUBION, REEDER, FRALEY
& COOK, PS

By: 
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DECLARATION OF SERVICE

I certify under penalty of perjury that on the 11th day of March 2016, I served a copy of this BRIEF OF APPELLANT to the individuals and via the method(s) designated below:

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