

64139-5

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No. 64139-5-I

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

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RONG SU

Appellant,

v.

SMITH & JUST, P.S.

Respondent.

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**RESPONDENT'S OPENING BRIEF**

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## **I. INTRODUCTION**

The trial court properly dismissed Appellant Rong Su's ("Su" or "Appellant") claims. Appellant has limited her appeal to only one of her claims: her allegation that she was discharged in violation of the public policy contained in R.C.W. 49.52.050. Su failed to establish the elements required in her claim. Furthermore, Respondent Smith & Just, P.S. ("Smith & Just" or "Respondent") has established a legitimate, non-pretextual reason for Appellant's discharge, which she has failed to rebut. Consequently, Appellant has failed to present a basis for overturning the trial court's summary dismissal of her claim that she was discharged in violation of a public policy.

## **II. APPELLANT'S ASSIGNMENTS OF ERROR**

- A.** Did the trial court misapply the summary judgment standard when it dismissed Appellant's claim that she was discharged in violation of a public policy found in R.C.W. 49.52.050?
- B.** Did the trial court misapply the governing law when it dismissed Appellant's claim that she was discharged in violation of a public policy found in R.C.W. 49.52.050?

### III. STATEMENT OF THE CASE

#### A. Procedural Background

On August 21, 2009, Respondent Smith & Just obtained summary judgment against Appellant Su, dismissing all of her claims. CP 253-254<sup>1</sup>. Appellant's Complaint had alleged a failure to pay proper wages pursuant to R.C.W. 49.52.050, retaliatory discharge in violation of R.C.W. 49.46, and alternatively, she claimed that her discharge was in violation of public policy. CP 4-5. In Appellant's response to summary judgment, Appellant acknowledged that she was no longer seeking a claim for back wages under RCW 49.52.050. CP 159. On September 10, 2009, Appellant filed a Notice of Appeal. On January 21, 2010, Appellant filed her opening brief. On January 22, 2010, Appellant filed a subsequent brief, correcting pages to her original filing. Appellant has limited her appeal solely to the allegation that the trial court erred in dismissing her claim that she was discharged in violation of the public policy contained in R.C.W. 49.52.050.

#### B. Factual Background

Smith & Just is a public accounting firm in Seattle, Washington. CP 213, ¶ 2. Appellant was hired on January 12, 2007 as an at-will

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<sup>1</sup> References to the Clerk's Papers will be cited as CP \_\_\_, indicating the page number.

employee. CP 17:14-16, 18:18—19:8, 70-73. She was hired to perform accounting services. CP 70-73.

Appellant was originally hired as a full-time salaried employee. CP 69. She was scheduled to receive a draw against production-based compensation in the amount of \$44,000 per year. CP 70-73. Her base salary was computed by using her expected employee production. *Id.* Her base salary represented 33 percent of her expected production. *Id.* Employee production is determined by billable hours. *Id.* However, prior to starting at Smith & Just, Appellant informed Smith & Just she would need to work less than full-time during a transition period with her former employer. CP 20:21—21:10. Smith & Just agreed that Appellant's compensation would be adjusted accordingly. CP 133; 171, ¶ 4; 214. As a result, Su received pay at an hourly rate of \$21.15 per hour. CP 133. Appellant's pay rate never changed through her employment at Smith & Just. *Id.*

Appellant understood that Smith & Just had a billable-hours requirement during tax season. CP 59:15-21. Tax season starts in mid-February. CP 61:2-9. During tax season, all accountants are required to maintain 50-billable hours per week. CP 214, ¶ 4. The 50-billable hour requirement is a job expectation and does not negatively affect pay in any

manner<sup>2</sup>. Employees are expected to use all their available work time for billable hours during tax season. CP 61:16-19; 140. Appellant never met Smith & Just's 50-hour per week billable requirement. CP 60:7-10; 75—132; 133. In fact, her average billable hours during tax season was approximately 34.50 hours per week. *Id.*

On or around February 23, 2007, Appellant was called into a meeting with one of Smith & Just's partners, Norman Roberts. CP 36. Appellant admits that Roberts was upset with her performance because she could not meet the 50-hour per week billable requirement.<sup>3</sup> CP 36:7-20. Mr. Roberts informed her that her employment with Smith & Just was not working out and she should start looking for another job. CP 34:2-7; 36:25—37:5; 38: 4-18; 215, ¶ 7. Prior to the time Appellant was informed

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<sup>2</sup> Appellant attempts to enmesh Smith & Just's 50-billable hour requirement with base pay. Appellant's brief unnecessarily confuses these two matters.. The two issues are distinctly separate. The billable hour requirement is a performance standard. It does not affect base pay or salary. Appellant was changed from salary to hourly because she could not work full-time. Her hourly rate was equal to the full-time salary if she worked on a full-time 40 hour per week basis. In fact, because Appellant was paid on an hourly basis, her pay would have been positively affected had she actually met the 50-hour billable requirement, since she would have earned more than her former base salary for those weeks. Moreover, Appellant never raised an issue with management during her employment that she was not being paid properly under her contract by paying her at an hourly rate. Her only specific complaint concerned minor disputes about her timesheets. The change in compensation claim was never articulated until after litigation commenced.

<sup>3</sup> Appellant changed her deposition testimony with her first declaration, submitted after Smith & Just filed its summary judgment motion. *Cf.* CP 34:2-7 (informed of her termination on February 23, 2009) *with* CP 174-175, ¶ 11 (informed of her termination on February 21, 2009). For the Court's purpose, neither date changes the analysis.

by Mr. Roberts that her employment would be ending, she had not made any complaint about her wages. CP 24:14—25:22; 36:7—37:15; 38:4-18; 231:2—232:8. At the February 23, 2007 meeting, Appellant did not raise any specific wage concerns. CP 36:7-24; 231:2—232:8. Su asserts that during the meeting, she made a general comment that she had concerns about the way she was being paid, but did not get specific. CP 36:19-24. Appellant's only asserted "complaints" concerning wage issues occurred on February 26, 2007 and April 2, 2007. *Id.*<sup>4</sup>

On February 26, 2007, Appellant and her supervisor, Jacquie Dahl, exchanged e-mails regarding one of Appellant's time sheets. CP 136-137. Dahl disputed the accuracy of the time sheet. *Id.* The dispute was based on a two minute conversation between Appellant and Dahl that Appellant charged two-tenths of an hour for on her time sheet. *Id.* Dahl informed Appellant that she should keep track of her *de minimis* time until it cumulatively reached six minutes (or one-tenth of an hour). *Id.* Then, after Appellant's time reached one-tenth of an hour, she should report the time on her time sheet. *Id.* Appellant ultimately chose to drop the issue because it was only eight minutes of time. *Id.*

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<sup>4</sup> Appellant disingenuously asserts in her brief that these were complaints about not being paid proper wages under her contract. Appellant's Brief, pp. 8-9. However, as can be seen from the admitted facts, the two incidents involved how many minutes were on her timesheets, not claims over her contractual rate of pay.

On April 2, 2007, Appellant was terminated. CP 52:19-24. Appellant exhibited poor performance in a number of areas and an inability to get along with others. She failed to meet the billable requirements during tax season. CP 35:12—37:5; CP 75-132; 133; 215, ¶¶ 7, 8. She had poor attendance during tax season. CP 31:10-19, 42:23—44:3; 215, ¶¶ 7, 8. She made mistakes on her tax returns. CP 29:20—30:10, 32:1—33:15; 134; 135. She also had difficulties getting along with her fellow co-workers. Su Tr. 45:17—46:9, 46:23—47:6, 48:2-14, 49:5—51:15; 215, ¶¶ 7, 8. All of these factors led to her discharge. CP 215, ¶¶ 7, 8.

On April 2, 2007 she complained, *via* her personal email account that she used from home, that she was required to work one-tenth of an hour without pay. CP 62:10-20; 141. Appellant's supervisor, Jacquie Dahl, had requested that Appellant dispose of classified financial information that had accumulated on her desk by placing it in the shredder container. CP 141. Smith & Just required accountants to promptly dispose of classified financial information in the shredding bin. CP 214-215, ¶ 6. Appellant continually failed to follow this protocol, leaving confidential financial information on her desk. CP 63:2-16; 64:16-19. Appellant was required to deposit these classified materials in the shredding bin that was located approximately 50 feet from Appellant's

desk. *Id.*; 65:7—66:3. Appellant was only required to deposit the papers in the bin, not actually shred the documents. CP 66:9-14. Appellant complained after her termination that she was not properly paid for the three minutes it took to perform this task, even though Appellant had been informed during her discharge that she was being paid for the full day of April 2. CP 67:11-20.

Appellant subsequently filed a wage claim with the Department of Labor (“DOL”). CP 53:20—54:9. Appellant’s claim to the DOL was based on hours allegedly worked, but not paid, because Appellant had failed to submit those hours on her time sheets. CP 57:8-17. At no point during the DOL process did Appellant ever allege that she was not paid properly under her contract, nor did she ever allege that Smith & Just ever improperly deducted wages from her paycheck. CP 57:8-22. Appellant and Smith & Just ultimately reached a written settlement agreement regarding the wage claim. CP 54:19-23. Smith & Just paid Appellant \$3,114.41 for back pay and attorney fees. CP 55:20-23; 56:9-25; 58:8-12; 138; 139. Appellant was advised not to sign the settlement agreement if she was owed any back wages, including wages owed as a result of any improper deductions. CP 138.

#### IV. ARGUMENT

##### A. Standard Of Review

This case presents issues of whether summary judgment was properly awarded against Appellant. The Appellate Court engages in the same inquiry as the trial court. Thus, summary judgment under CR 56(c) must be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Havens v. C&D Plastics, Inc.*, 124 Wash. 2d 158, 876 P.2d 435 (1994); *Wilson v. Steinbach*, 98 Wash. 2d 434, 656 P.2d 1030 (1982).

##### B. Legal Standard for a Claim Alleging Wrongful Discharge in Violation of Public Policy

Appellant has provided an incomplete legal analysis to this Court in her opening brief, relied upon facts that are not in the court record, ignored undisputed facts in the record, and attempted to change uncontroverted facts. Appellant has failed to provide evidence that her wrongful discharge in violation of public policy claim should survive dismissal. The public policy tort that Appellant relies upon is a narrowly-tailored exception to the employment at-will doctrine. *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 232 (1984). Under this doctrine, the

courts will not interfere with an employer's right to terminate an employee for any non-discriminatory reason, unless the employer's actions contravenes a clear public right. *Gardner v. Loomis Armored, Inc.*, 128 Wash. 2d 931, 936, 913 P.2d 377 (1996). "[C]ourts should proceed cautiously if called upon to declare public policy absent some legislative or judicial expression on the subject." *Id* at 937. Also, contrary to Appellant's assertion in her opening brief, the determination of "what qualifies as a clear mandate of public policy is a question of law." *Id.* (quoting *Dicomes v. State*, 113 Wash. 2d 612, 618 (1989)).

To establish her claim that she was wrongfully discharged in violation of public policy, Appellant must show that her discharge "contravened a clearly stated public policy." *Gardner*, 128 Wash. 2d at 936. Then, if the employer can show a legitimate business reason for her discharge, Appellant must provide sufficient evidence that a jury could find pretext. *Id.* If Appellant fails either prong of this test, then summary judgment is appropriate. In this instance, the trial court properly determined that Appellant failed on both prongs.

To establish if an employee's discharge contravenes public policy, the Washington Supreme Court has established a four-part test. Appellant

must satisfy each part of the test or summary judgment is appropriate<sup>5</sup>. Appellant must show: the existence of a clear public policy (clarity); discouraging Appellant's conduct would jeopardize that public-policy linked conduct (jeopardy); the public-policy linked conduct caused the dismissal (causation); and, Smith & Just has not established an overriding policy justification (absence of overriding justification). *Gardner*, 128 Wash. 2d at 941<sup>6</sup>. Here, Appellant has failed to show that her conduct was protected by a clear public policy. Specifically, Appellant has failed the clarity element and the causation element. Furthermore, Appellant has failed to provide any evidence showing that Smith & Just's legitimate business reasons for termination were pretextual.

**C. Appellant has Failed to Establish that her Actions are Covered by a Clearly Established Public Policy under R.C.W. 49.52.050.**

Under the clarity element, Appellant must show that her actions are encompassed in the statute that she claims was contravened. The trial courts have been instructed not to expand the protections of a statute with

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<sup>5</sup> Appellant properly identified the elements for determining a public policy. *Appellant's Opening Brief*, p. 10. As noted, however, this is only one-half of a wrongful discharge in violation of public policy claim. Appellant essentially ignores the second-half of the test and attempts to improperly combine it in the determination of whether a public policy was contravened.

<sup>6</sup> Of note, when the Court adopted this four-part public policy test, the Court expressly noted that it was not changing the existing common law standard. *Gardner*, 128 Wash. 2d at 941. Instead, the Court found that this test provided a good guide for standards that were already in place. *Id.*

the public policy tort. *See generally Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 232 (1984). The Appellant has the “burden to prove that a clear mandate of public policy has been violated.” *See Roe v. Quality Transp. Serv.*, 67 Wash. App. 604, 607 (1992). The Court should look to the letter or purpose of the statute to determine if a public policy has been violated. *Id.* In this instant action, Appellant’s discharge does not constitute a violation of R.C.W. 49.52.050. Therefore, her actions were not intended to be protected by R.C.W. 49.52.050 and her discharge fails to violate a clearly established public policy under R.C.W. 49.52.050.

In pertinent part, an employer violates R.C.W. 49.52.050, if the employer: “Willfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by ... *contract...*” R.C.W. 49.52.050(2) (emphasis added). Appellant has alleged in her opening brief that Smith & Just violated R.C.W. 49.52.050 by failing to pay her properly under her contract, unlawfully revised her contract and retaliated against her for complaining about not being paid her contract rate<sup>7</sup>. Noticeably, Appellant fails to cite the statute and simply ignores the

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<sup>7</sup> Appellant’s first two claims are created from obligations found in R.C.W. 49.52.050(2). Wage retaliation is not protected under R.C.W. 49.52.050, but instead under R.C.W. 49.46.100.

statutory requirements. Appellant was paid all wages owed. Moreover, Appellant provides no evidence that Smith & Just willfully deprived her of any wages. Finally, Appellant has provided no evidence that she complained to Smith & Just, at any time, that she was not being paid pursuant to her “contract” rate.

1. Appellant was properly paid.

Prior to starting her employment at Smith & Just, Appellant requested that she initially be allowed to work part-time. CP 171, ¶ 4; 214, ¶ 3. Smith & Just agreed to prorate her salary accordingly. *Id.* The parties’ agreement allowed for Smith & Just to amend Appellant’s rate of base salary without written consent. CP 197, ¶ 13. As a result of Appellant’s request, Appellant was paid on an hourly basis at an hourly rate of \$21.15. CP 133; 171, ¶ 4; 214, ¶ 3. The Court must also consider Appellant’s post-discharge complaint to the DOL, which further evidences that she was aware that she was being paid on an hourly basis. Appellant’s sole complaint to the DOL was that she was not paid for hours that she failed to submit on her timesheet<sup>8</sup>. CP 57:8-22. Appellant previously acknowledged that she had been paid for all of her hours she

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<sup>8</sup> It becomes even more evident that Appellant was paid on an hourly basis when one considers her DOL complaint. Under her agreement, Appellant would have been a professional salaried-exempt employee, not entitled to any compensation under the Federal Labor Standards Act. *See* 29 U.S.C. § 213(a)(1).

submitted. *Id.* Furthermore, Appellant, in signing the DOL agreement acknowledged that she had received “payment in full” with regard to any alleged “unpaid wages, employment benefits, or other compensation” due to her as of her last day of employment. CP 138. Appellant was also advised not to sign the agreement, unless she had actually received payment of all back wages due<sup>9</sup>. *Id.*

Moreover, Appellant provides no evidence or argument that Smith & Just acted willfully as is required by R.C.W. 49.52.050(2). From the beginning Smith & Just has adamantly denied that Appellant was ever paid improperly. CP 215-216, ¶¶ 9,10. Smith & Just entered into the agreement with the DOL for the sole purpose of resolving the dispute in the least expensive manner possible. *Id.* Smith & Just, in paying Appellant, reasonably relied upon its conversations with Appellant that she would be paid on an hourly basis. Any discrepancy to Appellant’s pay is the sole result of a bona fide dispute between Appellant and Smith & Just as to whether she should be paid on an hourly basis. When a bona fide dispute exists, the willful element of R.C.W. 49.52.020(2) will be found lacking. *See Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152, 160 (1998). In the instant action, Appellant has presented *no* evidence of any ill intent by Smith & Just. In fact, the only evidence is that prior to

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<sup>9</sup> Su was represented by legal counsel during the DOL process, as evidenced by the

starting her employment, Appellant was informed that she would be paid on a prorated basis and all of her pay checks support the fact that she was consistently paid in such a manner. CP 133; 171, ¶ 4; 214, ¶ 3.

2. Appellant has provided no evidence that she was the subject of retaliation.

The issue of wage retaliation is found in R.C.W. 49.46.100, not R.C.W. 49.52.050. *See generally Hume v. American Disposal, Inc.*, 124 Wash. 2d 656, 662 (1994). To the extent the Court converts Appellant's retaliation claim from a R.C.W. 49.52.050 to a R.C.W. 49.46.100, Respondent addresses that claim herein. In order to establish a retaliation claim, Appellant must establish that (a) she engaged in protected activity; (b) employer took some adverse employment action against her; and (c) the protected activity was a substantial factor in the adverse action. *Blinka v. Washington State Bar Assn.*, 109 Wash. App. 575 (2001). Here, Appellant has failed to show that she engaged in a protected activity under the wage statutes and has failed to show causation<sup>10</sup>. Therefore, her claim that she was retaliated against in violation of a public policy is not supported by the facts or the law.

Federal case law under the Federal Labor Standards Act ("FLSA") makes it clear that generalized, minor grumblings about a few minutes

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payment of attorney fees. CP 138.

<sup>10</sup> Causation, however, will be addressed more fully in the next section.

work do not rise to the level of protected activity. The Washington Minimum Wage Act (R.C.W. 49.46) is based upon the FLSA. As a result, federal authority is persuasive in interpreting the state act in the absence of adequate state authority. *Clawson v. Grays Harbor College District No. 2*, 109 Wash. App. 379 (2001)<sup>11</sup>. “When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled work hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the FLSA. It is only when an employee is required to give up a substantial measure of [her] time and effort that compensable working time is involved.” *Lindow v. United States*, 738 F.2d 1057, 1062 (9<sup>th</sup> Cir. 1984).

Moreover, Appellant is only protected if she actually files a complaint to the employer. *Lambert v. Ackerly*, 180 F.3d 997, 1007 (9<sup>th</sup> Cir. 1999). “[N]ot all abstract grumblings will suffice to constitute the filing of a complaint with one’s employer,’ and that ‘[t]here is a point at which an employee’s concerns and comments are too generalized and informal to constitute ‘complaints’ that are ‘filed’ with an employer within the meaning of the [statute].” *Id.* (quoting, *Valerio v. Putnam Assoc., Inc.*, 173 F.3d 35, 44 (1<sup>st</sup> Cir. 1999)).

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<sup>11</sup> There is no Washington case that has determined the *de minimis* standard under Washington law.

In the instant case, Appellant's actions are the epitome of generalized grumblings that fail to rise to the level of a complaint. On February 26, 2009 (at least three days after she was told that she was going to be discharged), Appellant and her supervisor sent e-mails back and forth regarding 8 minutes of time, which Appellant ultimately told the supervisor not to worry about. CP 136-137. On April 2, 2009 (five weeks after she was informed that she was going to be discharged), Appellant sent an email complaining about 0.1 of an hour. In both instances, there was not a dispute over Appellant being paid for her time, but instead over how much Appellant rounded-up her time. Such complaining is not the equivalent of the protected activity contemplated by the wage anti-retaliation provisions and therefore, not entitled to the protections of the RCW 49.46.100. Moreover, neither incident involved a specific complaint about her contract compensation being changed.

Appellant's final assertion of protected activity concerned an alleged comment she made in a meeting with Norman Roberts on February 21. Mr. Roberts had called her into the office because of her statements that she could not meet the firm's 50 billable hour requirement during tax season, and he informed her that Smith & Just was terminating her employment and she should start looking for another job. CP 36:7—38:18; 231:2—232:10. Because Mr. Roberts was upset regarding

Appellant's inability to meet the firm requirements, she decided not to bring up any issues regarding her wages. *Id.* Appellant states that she informed Mr. Roberts that she had some concerns about the way she was being paid, but did not get into any specifics, because he was really mad about the 50 billable hours issue. CP 36:15-24. CP 174, ¶ 11.

Appellant fails to provide sufficient evidence that she engaged in a protected activity. An employee engages in protected activity only if he or she raises a specific complaint about a statute or contract violation with her employer, which requires more than a generalized comment about her pay. Appellant's asserted statement that she had a concern about how she was paid falls well short of the mark. At most, it would be considered generalized grumbling, and too generalized to be considered a complaint under the wage statutes. *See Lambert*, 180 F.3d at 1007.

In *Lambert*, the Court held that in order to establish the filing of a complaint with employer about wages, an employee must communicate the substance of his allegations to the employer (for example, failing to pay adequate overtime or minimum wage) in order to be engaged in protected activity. By Appellant's own admission, she did not communicate the substance of her complaint to Mr. Roberts, but only a general statement that she had a concern about the way she was being

paid. Therefore, her activity does not rise to the level of protected activity, which is required by R.C.W. 49.46.

**D. Appellant has Failed to Show that her Discharge was Caused by her 'Protected Activity.'**

Appellant admits she was informed on or around February 23 that her employment with Smith & Just was not working out and she should start looking for another job. CP 34:2-7, 36:25-37:5, 38:4-8. Her claimed protected activities all occurred after Roberts had confronted Su about her inability to meet the 50 billable hours requirement. Appellant asserts that she told Norm Roberts in this conversation that she had a concern about her pay fails to establish causation. Appellant admits that Mr. Roberts was angry at her before she made the comment, because she could not meet the billable hour requirement, and that he had told her to start looking for other work. CP 36:7-24; 231:8-13. The only evidence Appellant has produced is that Mr. Roberts was upset and decided to end her employment because she could not meet the billable hour requirements of the firm. Appellant also alleges that her subsequent conversations with the office manager on February 26 and April 2, 2007 constituted protected activity. It is a matter of both common sense and case precedent that employment decisions occurring before an alleged protected activity cannot establish the causal link required for proving a retaliation claim.

Appellant utterly fails to refute this central point in her response brief. Since the decision to terminate Appellant occurred before these activities, there can be no basis to find a retaliation claim in violation of state statute or public policy.

**E. Appellant has Failed to Rebut Smith & Just's Legitimate Business Reasons for her Termination.**

Once an employer shows a legitimate reason for termination in response to an employee's prima facie case of wrongful termination, the burden shifts back to the employee, who must show that the stated reason is pretextual or that plaintiff's protected activity was a substantial factor motivating the discharge. *See Anica v. WalMart Stores*, 120 Wash. App. 481 (2004).

Smith & Just had legitimate business reasons for Appellant's discharge. Appellant was fired because of her performance and her inability to get along with others. CP 215, ¶ 7, 8. Specifically, she failed to meet the billable requirements for Smith & Just tax accountants during tax season. CP 35:12—37:5; 215, ¶ 7. Appellant had a poor attendance record. CP 31:10-19; 42:23—44:3; 215, ¶ 7. She also made errors on her tax returns. CP 29:20—30:10, 32:1—33:15; 134; 135. Finally, she had repeated incidents of failing to get along with her co-workers. CP 45:17—46:9; 47:23—48:6; 48:2-14; 49:5—51:15; 215, ¶¶ 7, 8. Appellant admits

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Smith & Just had legitimate business reasons for Appellant's discharge. Appellant was fired because of her performance and her inability to get along with others. CP 215, ¶ 7, 8. Specifically, she failed to meet the billable requirements for Smith & Just tax accountants during tax season. CP 35:12—37:5; 215, ¶ 7. Appellant had a poor attendance record. CP 31:10-19; 42:23—44:3; 215, ¶ 7. She also made errors on her tax returns. CP 29:20—30:10, 32:1—33:15; 134; 135. Finally, she had repeated incidents of failing to get along with her co-workers. CP 45:17—46:9; 47:23—48:6; 48:2-14; 49:5—51:15; 215, ¶¶ 7, 8. Appellant admits

all these problems occurred, even though she was only employed with Smith & Just for about three months. Any of these reasons alone is a sufficient business justification for Appellant's termination.

Appellant's asserts that the timing between her "complaints" and her discharge rebuts Respondent's stated reasons for discharge. However, in a case such as this, a temporal connection alone is insufficient, especially when Appellant acknowledges the legitimacy of the employer's complaints and all circumstantial evidence points to the validity of the complaints. Appellant was informed on February 23, 2007, prior to her alleged protected activities, that Smith & Just was going to end her employment and she needed to look for a new job. Smith & Just allowed Appellant time to find a new job because it understood Appellant's immigration status required employment. CP 215, ¶ 7. As a result, Appellant was given more opportunities than would normally be provided. During that time, Appellant admittedly missed several days of work during tax season; she had several run-ins with other employees; and, she continued to exhibit poor work quality. She also failed to meet her billable hour requirements. On April 2, 2007, Smith & Just could no longer accept the problems associated with Appellant continued employment and terminated her. *Id.* All evidence and logical inferences mandate that Appellant was terminated for valid business reasons.

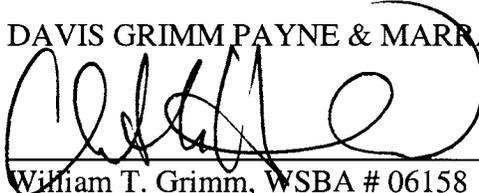
In *Anica v. Wal-Mart Stores*, 120 Wash. App. 481 (2004), plaintiff was fired even though she had just returned from a worker's compensation injury; defendant's sole basis for terminating plaintiff was that she had failed to provide company with her social security number. Plaintiff based her pretext argument on the idea that the timing of the discharge betrayed defendant's true motive. The Court, however, found that plaintiff did not have sufficient evidence to show that a substantial factor of defendant's action was motivated by retaliation or pretext. In the present situation, Appellant was fired for a number of business-related reasons, including failing to meet the 50 billable hours requirement. Appellant cannot establish that a substantial factor of Respondent's proffered reasons for her termination was based on retaliation. Therefore, the Court must affirm the trial court's dismissal of Appellant's claims of retaliation.

#### V. CONCLUSION

Respondent Smith & Just, P.S. respectfully requests that the Court affirm the trial court's order granting summary judgment.

Dated this 19<sup>th</sup> day of February, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 19, 2010, a true and correct copy of the above and foregoing "Respondent's Opening Brief" was duly sent out for same day service via ABC Legal Messenger, and mailed out for service on Appellant via first-class U.S. certified mail, return receipt requested on this 19<sup>th</sup> day of February, 2010, to the following address:

Rong Su  
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