

65927-8

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NO. 65927-8

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

PAULETTE WESTON,

Appellant,

v.

BERNARD JOSEPH HARRIGAN, a single man, and CARLOS D.
BENAVIDEZ and KINDRA BENAVIDEZ, husband and wife, and their
marital community, and the WASHINGTON LIQUOR CONTROL
BOARD, a Division of the State of Washington,

Respondents.

STATE RESPONDENTS' BRIEF

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I. INTRODUCTION

Paulette Weston sold liquor to a minor during a routine compliance check by Washington State Liquor Control Board (WSLCB) officers. She had been an Albertsons' employee for twenty-three years at the time she made the sale. On the evening Ms. Weston made the sale, she wrote a statement for Albertsons in which she admitted she had not correctly entered the minor's date of birth. Albertsons fired Ms. Weston for violating a store policy prohibiting alcohol and tobacco sales to minors. She was represented by her union during her subsequent employment hearings. Albertsons offered Ms. Weston her job back prior to arbitration. Ms. Weston did not accept reinstatement. Her termination was upheld at arbitration. WSLCB played no role in Ms. Weston's employment hearings.

Ms. Weston subsequently sued the WSLCB, first in federal court (where dismissal of her civil rights claims was affirmed by the Ninth Circuit in December 2009), and now in the Washington's state courts, where her remaining claim for tortious interference with her employment was dismissed by the trial court in April 2010.

II. COUNTERSTATEMENT OF THE ISSUES

1. Where the federal court has already found the determinative facts asserted in Ms. Weston's claims to be unsupported by admissible evidence, is Ms. Weston's tortious interference claim barred by Washington's issue preclusion case law?
2. Did the trial court correctly find that Ms. Weston was unable to make a prima facie case for tortious interference where the federal courts had found all of her allegations regarding the WSLCB's intent, purpose, and motive to be unsupported by competent evidence?
3. Did the trial court abuse its discretion when it found that the dismissal of Ms. Weston's charge under RCW 66.44.270 by a criminal prosecutor in a Washington district court did not satisfy her burden of proof on her claim for tortious interference with her employment and did not destroy any defense the WSLCB might make to her tortious interference claim?

III. COUNTERSTATEMENT OF THE CASE

A. Procedural Posture

Paulette Weston filed a tort claim in this case on October 11, 2007, and filed a lawsuit, against the present respondents, in federal district court in March 21, 2008, asserting claims under 42 U.S.C. § 1983 as well as state tort claims for negligence and tortious interference. The federal court dismissed the civil rights claim with prejudice, but declined to assert jurisdiction over the state law claims. Appendix A (CP at 439-48). The Ninth Circuit affirmed the federal district court's dismissal of

Ms. Weston's civil rights claim on December 22, 2009, without oral argument. Appendix B (CP at 450-54).

On March 27, 2009, Ms. Weston filed this case, asserting a claim for tortious interference with her employment. CP at 825-46. She amended her complaint on April 14, 2009. CP at 7-23. WSCLB asserted counterclaims for violations of RCW 4.84.185 (frivolous action) and RCW 4.24.350 (abuse of process) in its answer because the federal district court decision had found all of Ms. Weston's factual assertions to be unsubstantiated. CP at 32-23. The matter was stayed pending a final decision in the federal case. CP at 927-28.

The Ninth Circuit affirmed the federal district court's award of summary judgment in December 2009. Ms. Weston moved for partial summary judgment on February 23, 2010, making the res judicata argument she makes here. CP at 36-51. WSLCB moved for summary judgment on March 19, 2010. CP at 131-45. The motion to compel discovery that is discussed in Ms. Weston's opening brief was filed on April 10, 2010, six days before the scheduled summary judgment hearing and almost two months after Ms. Weston had filed her own partial summary judgment motion on liability. CP at 627-33. The trial court denied Ms. Weston's motion for partial summary judgment and granted the WSLCB's motion for summary judgment, dismissing Ms. Weston's

state case on April 16, 2010. CP at 749-51. The trial court denied Ms. Weston's motion to compel at the same hearing. CP at 752-53.

Ms. Weston moved for reconsideration.¹ CP at 792-802. The trial court issued an order denying reconsideration and issued an opinion. CP 815-16. This court's commissioner denied discretionary review of the issues now presented on appeal. Appendix C (CP at 1022-31). Subsequently, the parties stipulated to a dismissal of WSLCB's counterclaims in order to expedite a final decision by this Court. CP at 1035-36. Ms. Weston filed this appeal on August 20, 2010. CP at 817-24. Her notice of appeal appends two trial court orders: the order denying her motion for partial summary judgment and granting defendants' motion for summary judgment (CP at 820-22) and the trial court's order denying reconsideration (CP at 823-24). Ms. Weston did not appeal the trial court's denial of her motion to compel. CP 817-24.

¹ WSLCB objected to Ms. Weston's motion on the grounds that it failed to satisfy the requirements for reconsideration under CR 59 in that the "new evidence" it introduced had been readily available to both parties since the discovery in the federal case. CP at 803-8.

B. Counterstatement Of Facts²

1. Overview

On September 29, 2005, Plaintiff Paulette Weston sold alcohol to a minor operative employed by the WSLCB during a routine WSLCB liquor compliance check at Albertsons Store No. 410 on Aurora Avenue North in Seattle, Washington.³ Immediately following the sale, Ms. Weston's private employer (Albertsons Inc.) placed her on temporary suspension, pending an investigation.⁴ She was terminated on October 1, 2005 for violating store policy prohibiting sale of alcohol or tobacco to minors.⁵

Ms. Weston appealed her termination through her union.⁶ Shortly before her arbitration hearing, Albertsons offered to reinstate her.⁷ She declined the offer⁸ and proceeded to arbitration, where her termination

² WSLCB's response brief is supported (as its Motion for Summary Judgment was) by the substantial evidence developed during discovery in Ms. Weston's prior lawsuit against WSLCB, *Weston v. WSLCB, et al*, Cause No. C08-469RSM (W.D. Wa.). That evidence is set forth in the Record on Appeal that was considered by the U.S. Court of Appeals for the Ninth Circuit (No. 09-35243). True and correct copies of Excerpts of the Record and Supplemental Excerpts of the Record on appeal are included in the Clerk's Papers (CP 146-454). CP at 151-247 contain the Excerpts of the Record, Vol. 2 (2ER), prepared by Ms. Weston for the Ninth Circuit. CP at 248-454 contain the Supplemental Excerpts of the Record (SER) prepared by WSLB.

³ CP at 159. *See also* a copy of the WSLCB Compliance Check Sale Form for this sale, which is found in the record at CP at 299. It is authenticated at CP at 291 ll 8-23.

⁴ CP at 320 ll. 4-16.

⁵ CP at 349 l. 24 – CP at 350 l. 25; CP at 428 ¶ 3.23.

⁶ CP at 326 l. 10 – CP at 327 l. 1.

⁷ CP at 304 ll. 13-23.

⁸ CP at 304 ll. 13-23.

was upheld.⁹ She subsequently filed a lawsuit in the federal district court against the WSLCB. The procedural history of her federal case is discussed above.

2. The Compliance Check

The liquor compliance check at issue in this case was one of ten performed on the evening of September 29, 2005, by WSLCB officers Bernard Harrigan and Carlos Benavidez.¹⁰ The officers were assisted by Louise Carey,¹¹ an underage WSLCB operative.¹² Carey was nineteen at the time of this compliance check.¹³ She carried her valid Washington State Drivers License (WDL).¹⁴ It was a vertical WDL,¹⁵ the standard format for WDLs issued to persons under the age of 21.¹⁶ At the top of the license there is an expiration date of 12-05-06.¹⁷ Carey's photograph is on the right-hand side of the license.¹⁸ About midway down the license, to the left of the photograph, is Carey's birth date (DOB), which is

⁹ CP at 329 ll. 5-6. Weston's appeal was handled by her union and she was represented by counsel during the arbitration hearing. CP at 327 l. 2 – CP at 328 l. 7. No representative of WSLCB, including the officers, testified at the arbitration hearing. CP at 328 ll. 22-24.

¹⁰ CP at 254 l. 21 – CP at 255 l. 11.. Bernard Harrigan and Carlos Benavidez are collectively referred to as "officers."

¹¹ Hereafter referred to as "Carey."

¹² CP at 159; CP at 260 ll. 13-25; CP at 290 l. 18 – CP at 291 l. 23.

¹³ CP at 289 ll. 7-17; CP at 300.

¹⁴ CP at 393 ll. 1-10; CP at 398; CP at 394 ll. 23-25; VP at 397. A copy of Carey's WDL is found at CP at 300 and is attached to this response brief as Appendix D.

¹⁵ CP at 287 l. 23 – CP at 288 l. 3; CP at 289 ll. 7-16; CP at 300.

¹⁶ CP at 302 l. 1 – CP at 303 l. 5.

¹⁷ CP at 300.

¹⁸ CP at 300.

12-05-1985.¹⁹ Underneath the DOB is the “AGE 21 ON” date, which is 12-05-2006.²⁰ Consistent with WSLCB procedures the officers instructed Carey to use her valid WDL when asked for identification by any of the ten sellers they were checking that evening.²¹

According to Harrigan’s log book, the officers and Carey arrived at Albertsons at 1920.²² Carey entered the store, followed by the officers.²³ She selected a bottle of Kendall Jackson Chardonnay to purchase²⁴ and randomly selected the check-out line through which she would proceed.²⁵

When she got to the register, Carey handed Ms. Weston (the cashier at that particular register) the bottle of wine.²⁶ Ms. Weston claims that Carey also asked for a package of cigarettes, which she retrieved for Carey but never scanned into the cash register.²⁷ Ms. Weston did scan the bottle of wine. The Point of Sale (POS) system installed in Albertsons’

¹⁹ CP at 300.

²⁰ CP at 300.

²¹ CP at 287 l. 23 – CP at 288 l. 2.

²² CP at 287 l. 23 – CP at 288 l. 2; CP at 282; CP at 260 ll. 5-8. The Officers use a military time.

²³ CP at 275 ll. 16-21; CP at 260 ll. 13-22.

²⁴ CP at 292 l. 24 – CP at 293 l. 2; CP at 210 l. 24 – CP at 211 l. 13.

²⁵ CP at 277 l. 24 – CP at 278 l. 1; CP at 260 ll. 17-25; CP at 393 l. 1-10; CP at 394 ll. 23-25; CP at 397; CP at 398. There is no evidence that Carey knew Weston was the cashier in the check-out line she selected, at the time the selection was made.

²⁶ CP at 211 ll. 11-13.

²⁷ Weston does not know what happened to the cigarettes after she went to get them. The cigarettes are not included on the sales receipt.

computerized cash registers asked her to input the purchaser's date of birth.²⁸

Ms. Weston asked Carey for her ID.²⁹ Carey gave Ms. Weston her valid WDL.³⁰ Ms. Weston looked carefully at the license.³¹ She knew it was a minor's license because it was a vertical license.³² She verified that the license had not expired.³³ She compared the photo on the WDL with Carey to make sure it was Carey's ID.³⁴ She observed the 12-05-1985 DOB and the 12-05-2006 "AGE ON 21" date.³⁵ Given the date of purchase (September 29, 2005), it was clear from the WDL that Carey would not be 21 years old for at least fifteen months.

The POS system only accepted two digits for the year of birth.³⁶ Ms. Weston entered "12-05-06"--the date Carey *would be* 21--instead of Carey's date of birth ("12-05-85").³⁷ The POS system cleared the

²⁸ CP at 309 l. 4 – CP at 311 l. 10.

²⁹ CP at 309 l. 4 – CP at 311 l. 10.

³⁰ CP at 296 l. 6 – CP at 297 l. 4; CP at 299.

³¹ CP at 309 l. 4 – CP at 310 l. 7.

³² CP at 309 l. 4 – CP at 310 l. 7.

³³ CP at 309 l. 4 – CP at 310 l. 7.

³⁴ CP at 309 l. 4 – CP at 310 l. 7.

³⁵ CP at 216 l. 9 – CP at 217 l. 5.

³⁶ CP at 220 ll. 15-16.

³⁷ CP at 265 ll. 12-20; CP at 314 ll. 2-21; CP at 322 l. 20 – CP at 324 l. 5; CP at 333; CP at 330 ll. 3-10; CP at 334. A copy of the sales receipt is located at CP at 334.

purchase, apparently because it determined the purchaser was born in 1906.³⁸

The purchase price for the wine, including tax, was \$16.31.³⁹ Carey gave Ms. Weston twenty dollars.⁴⁰ Ms. Weston bagged the wine and gave it to Carey with the receipt and \$3.69 in change.⁴¹ Carey left the register and headed to the officers' car.⁴² The officers retrieved the wine, the receipt and the change from her before she left the store.⁴³

During the sale, Harrigan stood behind Carey in the check-out line where he could closely observe the sale and assist her if necessary.⁴⁴ Benavidez was close by, where he could observe the sale and offer back-up support as needed.⁴⁵ Ms. Weston alleges that Harrigan appeared

³⁸ CP at 265 ll. 12-20; CP at 314 ll. 2-21; CP at 322 l. 20 – CP at 324 l. 5; CP at 333; CP at 330 ll. 3-10; CP at 334. A copy of the sales receipt is located at CP at 334.

³⁹ CP at 265 ll. 12-20; CP at 314 ll. 2-21; CP at 322 l. 20 – CP at 324 l. 5; CP at 333; CP at 330 ll. 3-10; CP at 334. A copy of the sales receipt is located at CP at 334.

⁴⁰ CP at 265 ll. 12-20; CP at 314 ll. 2-21; CP at 322 l. 20 – CP at 324 l. 5; CP at 333; CP at 330 ll. 3-10; CP at 334. A copy of the sales receipt is located at CP at 334.

⁴¹ CP at 265 ll. 12-20; CP at 314 ll. 2-21; CP at 322 l. 20 – CP at 324 l. 5; CP at 333; CP at 330 ll. 3-10; CP at 334. A copy of the sales receipt is located at CP at 334.

⁴² CP at 294 l. 6 – CP at 295 l. 15; CP at 262 ll. 4-25.

⁴³ *Id.* Ms. Weston testified that she does not know what happened to the receipt after she gave it to Carey. CP at 222 l. 20 – CP at 223 l. 20. Carey can't recall whether she turned and gave it to Harrigan or gave it to Benavidez as she was leaving the store. CP at 134 ll. 3-19. Harrigan's contemporaneous official reports state that he received the receipt from Carey. CP at 62 l. 16 – CP at 63 l. 25; CP at 261 l. 21 – CP at 262 l. 1; CP at 397-98. The receipt Harrigan turned in as evidence matches the transaction record in Albertson's electronic journal record for the sale. CP at 333-34.

⁴⁴ CP at 261 ll. 5-7; CP at 278 ll. 2-22.

⁴⁵ CP at 261 ll. 6-14.

disheveled and both officers engaged in random and suspicious movements during the sale, which were distracting.⁴⁶

When the sale was completed, Harrigan showed Ms. Weston his badge and advised her she had just sold alcohol to a minor.⁴⁷ She was very upset and insisted that the register had cleared the sale.⁴⁸ She told Harrigan, “I could be fired for this.”⁴⁹ Benavidez joined Harrigan at the cash register.⁵⁰ The cash register lane was closed.⁵¹

Ms. Weston’s supervisor, Dawn Sedowsky, joined the officers and Ms. Weston at the register.⁵² Harrigan showed Ms. Weston and Sedowsky the sales receipt for the transaction.⁵³ Ms. Weston alleges that Sedowsky ran test scans using wine bottles from “an end display of wine” and a 12-05-06 birth date.⁵⁴

⁴⁶ CP at 423-24, ¶3.6.

⁴⁷ CP at 261 l. 15 – CP at 262 l. 13.

⁴⁸ CP at 196 l. 17 – CP at 197 l. 4; CP at 94 l. 1 – CP at 95 l. 10.

⁴⁹ CP at 94 ll. 1-7.

⁵⁰ CP at 229 l. 25.

⁵¹ CP at 388. Store Director Howard Dochow testified that the transaction involving the sale of liquor to the minor was the last transaction Weston would have done on the evening of September 29, 2005. CP at 388.

⁵² CP at 94 l. 11 – CP at 96 l. 1.

⁵³ CP at 330 ll. 3-22.

⁵⁴ CP at 95 l. 17 – CP at 96 l. 6. Weston doesn’t describe the results of these scans and Sedowsky did not testify. The test scans did not generate sales receipts because they did not involve completed transactions in which money was tendered. CP at 361-64.

Harrigan described the WSLCB's follow-up process to Sedowsky and Ms. Weston.⁵⁵ He gave Sedowsky his business card, with an inventory receipt for the wine, and asked her to have the manager call if there were any questions.⁵⁶ He left the store, joining Benavidez and Carey in the car.⁵⁷ They tagged the evidence,⁵⁸ completed the Liquor Compliance Sale Check form,⁵⁹ and left the parking lot at 1945.⁶⁰

⁵⁵ CP at 258 l. 6 – CP at 259 l. 4; CP at 267 l. 15 – CP at 268 l. 15.

⁵⁶ CP at 258 l. 6 – CP at 259 l. 4; CP at 267 l. 15 – CP at 268 l. 15

⁵⁷ CP at 269 l. 7 – CP at 271 l. 14.

⁵⁸ CP at 269 l. 7 – CP at 271 l. 14; CP at 271 ll. 6-14.

⁵⁹ CP at 269 l. 7 – CP at 271 l. 14; CP at 271 ll. 6-14.

⁶⁰ CP at 172 l. 5 – CP at 173 l. 6. Harrigan prepared an official case report (CP at 183) and warning notice (AVN) (2ER35) for Albertsons. Pursuant to WSLCB policy he wrote up a criminal citation, which was ultimately dismissed (CP at 271 ll. 2-5). There is no evidence in the record regarding why the charges were dismissed. Under the unauthenticated evidence relied upon by Ms. Weston, there is no evidence that a WSLCB representative, including the individual defendants, was present when the criminal citation was dismissed. CP at 129-30.

3. The Termination Decision

Ms. Weston was sent home on suspension pending an investigation.⁶¹ Before she left the store, she provided her employer with a written statement regarding what happened during the liquor compliance check.⁶² In that statement, she admits that she mistakenly entered the date Carey was turning 21 into the POS system, instead of Carey's date of birth.⁶³

As part of its investigation, Albertsons printed a copy of the electronic journal entry for Ms. Weston's last cash register transaction of the evening.⁶⁴ The data in that entry matches the sales receipt for Carey's purchase of the bottle of Kendall Jackson Chardonnay.⁶⁵ Both indicate that on September 29, 2005, at 7:21 p.m., at cash register terminal 7, Ms. Weston (Operator No. 140) sold a bottle of Kendall Jackson Chardonnay to a purchaser with a "12-05-06" DOB.⁶⁶

Albertsons also reviewed Ms. Weston's personnel file.⁶⁷ It contained a "Last and Final Agreement" that she signed in August, 2002

⁶¹ CP at 320 ll. 4-16.

⁶² CP at 97 ll 5-23; CP at 314 ll. 1-21.

⁶³ CP at 314 ll. 1-21. A copy of her statement is found in CP at 332. In her statement, Ms. Weston admits: "I did key in 12-05-06."

⁶⁴ CP at 341 l. 18 – CP at 354 l. 13; CP at 358. A copy of the electronic journal report is found in the record at CP at 358 (*see also*, CP at 361-66).

⁶⁵ CP at 322 l. 20 – CP at 324 l. 5; CP at 333; CP at 330 ll. 3-10.

⁶⁶ CP at 323 l. 17 – CP at 324 l. 10.

⁶⁷ CP at 341 l. 18 – CP at 353 l. 13.

after she sold tobacco to a minor in violation of company policy.⁶⁸ The agreement states, in pertinent part, “any violations in the future will result in immediate termination.”⁶⁹ On October 1, 2005, Albertsons advised Ms. Weston that she was terminated.⁷⁰

C. Prior Dispositive Rulings

In Ms. Weston’s federal district court case she alleged, *inter alia*, that the WSLCB violated her procedural and substantive due process rights under the Fifth and Fourteenth Amendments and tortiously interfered with her employment relationship when the WSLCB and the individual defendants intentionally induced her to make an illegal sale, knowing such a sale would cause her to lose her job.⁷¹ Further, she alleged (as she does in this case) that the officers used improper methods to induce the sale including harassing and distracting movements, an altered driver’s license for the minor operative and a false sales receipt.⁷² Finally, she advanced the same “two-buy” theory she originally advanced in this case.⁷³

⁶⁸ CP at 341 l. 18 – CP at 353 l. 13.

⁶⁹ CP at 360.

⁷⁰ CP at 428 ¶ 3.23.

⁷¹ CP at 419-37.

⁷² CP at 419-37; *See, e.g.*, CP at 15, ¶ 3.17. The two buy theory appears to allege that the 7:21 PM sale was a test run that was not used by the officers because it included the pack of cigarettes. WSLCB policy specifies that a compliance check includes a single purchase. This theory was found to be unsupported by competent evidence in the federal cases.

⁷³ CP 422 ¶ 3.5.

WSLCB's federal motion for summary judgment as to all pending claims was predicated upon extensive discovery, including written discovery, document production and depositions.⁷⁴ Ms. Weston's responsive pleadings relied, in part, on testimony from her father, who--without any experience that might qualify him as an expert--asserted that the minor operative used an altered driver's license, thereby fraudulently inducing his daughter to make an illegal sale.⁷⁵ The WSLCB moved to strike Mr. Weston's testimony as well as copies of the fake Washington State Driver's License (WDL) he created and relied upon to support his theory of the case.⁷⁶

March 20, 2009,⁷⁷ the federal district court issued an order granting WSLCB's motion to strike and WSLCB's motion for summary judgment as to Weston's federal constitutional claims and dismissed her state law claims, without prejudice, on jurisdictional grounds.⁷⁸ Judge Ricardo Martinez made the following findings:

- "Agent Harrigan's random motions, while distracting to plaintiff, were not so threatening or egregious as to demonstrate a

⁷⁴ CP at 147, ¶3. All parties involved in the compliance check were deposed Howard Dochow, the Albertson's Store Director who terminated Weston, and Weston's father, Paul Weston, were also deposed.

⁷⁵ Appendix A (CP at 439-48).

⁷⁶ Appendix A (CP at 439-48).

⁷⁷ Appendix A (CP at 439-48).

⁷⁸ CP at 439-48.

purposeful intent to harm plaintiff unrelated to legitimate law enforcement concerns.”⁷⁹

- Ms. Weston presented “no evidence that defendants even knew that their ‘sting’ operation would cause her to lose her job.”⁸⁰
- “Mr. Weston is not qualified as an expert witness; his opinion in drivers’ licenses is not based on the facts of record in this case, and is otherwise inadmissible. His demonstration of an altered driver’s license is irrelevant.”⁸¹
- “Ms. Carey testified at her deposition that she carried only her actual Washington State driver’s license on the compliance test.... She also specifically denied that she carried a driver’s license with a “date of birth” showing 12-05-2006.... These statements were made under oath. Plaintiff has presented no evidence whatsoever to controvert this sworn evidence. Her conclusory allegations made on an unsupported theory are wholly insufficient to create an issue of fact on this point.”⁸²
- “Plaintiff’s remaining factual contentions regarding the transaction receipt and the electronic record from the cash register, as well as the events that occurred after the sale took place, are similarly based on speculation or innuendo, and fail to controvert or create a dispute regarding evidence in the form of sworn testimony that defendants have presented.”

After the federal district court’s filed its order, Ms. Weston initiated this action in King County Superior Court and also appealed the district court’s order to the Ninth Circuit.⁸³ On December 10, 2009, the

⁷⁹ CP at 445 ll. 2-4.

⁸⁰ CP at 445 ll. 5-7.

⁸¹ CP at 447 ll. 8-10.

⁸² CP at 447 ll. 11-16.

⁸³ Appendix B (CP at 450-54).

trial court issued an order staying proceedings pending the outcome of Weston's federal appeal.⁸⁴

The Ninth Circuit issued a memorandum decision affirming the district court's on December 22, 2009⁸⁵. The memorandum decision was based upon the following findings:

- The use of an altered license is not a “fact in issue” because the record is devoid of any evidence that the underage operative produced an altered license when asked for her identification.⁸⁶
- There is no evidence in the record that the Officers affirmatively participated in Weston's termination or knew or reasonably should have known that their actions would cause Weston's employer to terminate her before providing an opportunity to be heard.⁸⁷
- Weston's “two-buy” theory is inconsistent with the evidence in the record – Weston could not produce an electronic record of the alleged second buy although it is undisputed that such a record is made for every transaction.⁸⁸
- There is no evidence to support Weston's allegations that Harrigan or Benavidez purposely selected Weston's store because they knew she would be terminated if she sold liquor to a minor.⁸⁹
- The uncontroverted evidence establishes, as a matter of law, that the Officer's conduct does not ... evidence a purpose to harm.⁹⁰

Ms. Weston did not seek en banc review of the Ninth Circuit's memorandum decision or file a writ of certiorari with the United States

⁸⁴ Appendix B (CP at 450-54).

⁸⁵ Appendix B (CP at 450-54).

⁸⁶ CP at 451.

⁸⁷ CP at 453.

⁸⁸ CP at 454.

⁸⁹ Appendix B (CP at 450-4).

⁹⁰ CP at 454-55.

Supreme Court. The findings made by the federal courts regarding Ms. Weston's factual allegations are final.

The final section of Ms. Weston's opening brief relies upon assertions, characterizations, and conspiracy theories similar to those she put forward in the federal litigation. The unsupported assertions remain the core of her affirmative argument that WSLCB and its officers tortiously interference with Ms. Weston's employment. Weston Opening Brief at 37-47, *see, e.g.*, 43. For example:

It should not take a Sunday Sermon to convince anyone of the common feel for the state of community mores that the *harassment and the instillation of fear* in a sales clerk by *using an altered ID* while trying to do her duty of entering the proper date of birth into a computer to check its validity for the sale of alcohol to a young customer that a *robbery was about to take place by two thugs bracketing the customer* showing nervousness herself, was wrongful conduct and improper.

Weston's Opening Brief at 40 (emphasis added).

The federal courts have found this Orwellian view of the WSLCB compliance check to be unsupported by the evidentiary record. Because the determinative facts of the case have been conclusively established in the federal litigation, the WSLCB will not be addressing Ms. Weston's continuing misrepresentations regarding the tone and character of the compliance check in its opposing brief.

IV. ARGUMENT

A. Standards Of Review

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). In particular, res judicata (the argument relied upon by Ms. Weston) and collateral estoppel are legal issues that require de novo review. *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 125 P.3d 202 (2005). Although the denial of a partial motion for summary judgment is generally not an appealable order (RAP 2.2(a)), the de novo standard applies to both the award and denial of summary judgment once final judgment has been entered by the trial court. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment under the legal principles that govern the underlying case. *Berrocal v. Fernandez*, 155 Wn.2d 585, 121 P.3d 82 (2005).

Ms. Weston also appeals the trial court's denial of her motion for reconsideration and her motion to compel discovery (although her appeal of the motion to compel was not specifically included in her notice of appeal). This court reviews the trial court's ruling on a CR 59 motion for reconsideration under the abuse of discretion standard. *Rivers v. Wash.*

State Conf. of Mason Contractors, 145 W.2d 674, 41 P.3d 1175 (2002)

This court also reviews the trial court's denial of Ms. Weston's motion to compel discovery under an abuse of discretion standard. *Wash. State Physicians Ins. Exch. Assn. v. Fisons Corp.*, 122 Wash.2d 299, 858 P.2d 1054 (1993) (Discovery rulings and discovery sanctions are reviewed for an abuse of discretion.). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

B. The Trial Court Correctly Found That Weston Is Unable To Make A Prima Facie Case For Tortious Interference With Her Employment

The federal courts have found that the determinative facts Ms. Weston relies upon to establish the essential elements of her tortious interference claim are not supported by competent evidence. Without those facts, Ms. Weston cannot establish the essential elements of her remaining claim.

1. Weston's Burden Of Proof

To establish a prima facie case for tortious interference Ms. Weston must prove de novo: 1) the existence of a valid contractual relationship or business expectancy that was known to the defendants; 2) that the defendants intentionally induced or caused a breach or

termination of the relationship or expectancy for an improper purpose or by improper means; and 3) that the defendants' intentional and improper interference was the proximate cause of the claimed damages. *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 137, 139, 839 P.2d 314 (1992); *Calbom v. Knudtson*, 65 Wn.2d 157, 396 P.2d 148 (1964). If Ms. Weston establishes a prima facie case the burden shifts to the WSLCB to prove the interference was justified or privileged.⁹¹ *Please v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989).

In order to withstand summary judgment, Ms. Weston must come forward with competent evidence sufficient to raise a genuine issue of material fact regarding the WSLCB's intent, motive and purpose or means. Here, Weston seeks to meet her burden of proof by using two different strategies.

2. Weston's Strategies For Satisfying Her Burden of Proof

a. Weston alleges that the dismissal of her citation under RCW 66.44.270 defeats any defense WSLCB might put forward to her tortious interference claim

The core argument in Ms. Weston's opening brief (as it was in her motion for partial summary judgment) is that any defense the WSLCB might make to her tortious interference claim was shattered when a King

⁹¹ The theory of Weston's partial summary judgment is flawed. Proving Weston guilty is not and never has been WSLCB's defense to her tortious interference claim. Weston has admitted throughout this case that she sold liquor to a minor.

County district court prosecutor dismissed Ms. Weston's citation for violating RCW 66.44.270. Weston's Opening Brief at 24-33. But, as will be discussed in detail below, such an argument cannot prevail under the circumstances of this case. Relitigation of an issue in a subsequent action between two parties is not precluded: (1) when party against whom preclusion is sought (the State) had a significantly heavier burden of proof persuasion with respect to the issue in the initial action than in its defense to this action or (2) (as in this case) *the burden has shifted to his/its adversary*. Rest. 2d Judg. § 28 (emphasis added). In this case, both of those factors are present.⁹² The dismissal of Ms. Weston's citation under RCW 66.44.270 does not destroy the WSLCB's ability to defend against her tortious interference claim.⁹³

⁹² For the purposes of this discussion, WSLCB accepts: (1) that the unauthenticated hearsay evidence presented on this issue (the district court docket) is admissible (CP at 129-30) without testimony from someone present at the hearing, and, in particular, that a district court clerk on a busy calendar would hear and understand the difference between "with prejudice" and "without prejudice" and (2) that viewing the State of Washington (as a plaintiff in Weston's criminal case, and as a defendant in this civil case) as "the same party" for purposes of establishing the elements of res judicata does not work an injustice under the fourth prong of the res judicata test. WSLCB does not concede either of these arguments. But these factual issues are irrelevant to the legal issue that is central to dismissal of Ms. Weston's argument. As a matter of law, she is not entitled to have the dismissal of her citation satisfy her burden of proof on her tortious interference claim, nor to maintain that dismissal by a criminal court defeats the WSLCB's ability to defend against that claim.

⁹³ Denial of Ms. Weston's res judicata argument by the trial court is discussed in detail in Section IV, C, supra.

b. Weston alleges that the WSLCB officers had the intent, motive, and means to tortiously interfere with Weston's employment

As in her federal case, Ms. Weston attempts to meet her prima facie burden with the following allegations: 1) Harrigan and Benavidez had knowledge of facts giving rise to the existence of Plaintiff's employment relationship with Albertsons;⁹⁴ 2) the officers knew in advance of the "sting" that Albertsons had a no tolerance policy concerning the sale of liquor to a minor;⁹⁵ the officers used improper means (outside what is permitted under WSLCB regulations) to conduct the sting;⁹⁶ they used an altered driver's license to induce Ms. Weston to enter the wrong birth date;⁹⁷ they used an erroneous sales receipt;⁹⁸ they engaged in distracting and harassing behavior;⁹⁹ and they attempted two different sales and switched receipts.¹⁰⁰ See Weston's Opening Brief at 37-47.

Neither of these strategies satisfies Ms. Weston's burden of proof.

⁹⁴ Weston's Complaint (King County Superior Court Case No. 09-2-13951-2 SEA) ¶ 4.5. CP at 1-23.

⁹⁵ Weston's Complaint, CP at 1-23, ¶4.5.

⁹⁶ CP 1-23, ¶ 4.6

⁹⁷ CP 1-23, ¶¶ 4.8, 4.11

⁹⁸ CP 1-23, ¶¶ 4.10, 4.11

⁹⁹ CP 1-23, ¶ 4.11

¹⁰⁰ CP 1-23, ¶ 4.9

3. The Trial Court Correctly Found That The Doctrine Of Collateral Estoppel Precludes Relitigation Of Weston's Factual Allegations Regarding The WSLCB's Intent, Purpose, Motive And Methods

The factual issues central to Ms. Weston's tortious interference claim include whether the defendants acted intentionally, knowing that the Ms. Weston would be fired and whether they used fraudulent means to induce the sale such as an altered driver's license or an erroneous sales receipt.¹⁰¹ These factual issues were also central to Ms. Weston's claims in her prior federal case, which also initially included a claim for tortious interference with her employment.¹⁰² The trial court correctly found that because the federal courts found no evidence to support these factual allegations, Ms. Weston's case must be dismissed, given established Washington law regarding claim and/or issue preclusion.

Washington preclusion law is analyzed in terms of claim preclusion and issue preclusion: "The general term res judicata encompasses claim preclusion, (often itself called res judicata) and issue preclusion, also known as collateral estoppel." *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987).

¹⁰¹ CP 1-23, ¶¶ 4.5 – 4.11.

¹⁰² CP 146-49, ¶¶ 3, 3-3.6, 3.10, 6.5-6.9; CP 150-60.

In *Christensen v. Grant County Hospital Dist. No. 1*,¹⁰³ the Washington Supreme Court discussed claim and issue preclusion at length. Relying upon *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n*,¹⁰⁴ the *Christensen* court stated: “[C]ollateral estoppel is intended to prevent retrial of one or more of the crucial issues or *determinative facts* determined in previous litigation (emphasis added).” In the present case, Ms. Weston is attempting to relitigate the facts that were determined in her federal litigation. She is barred from doing so by collateral estoppel.¹⁰⁵ The factual finding that Ms. Weston has completely failed to produce evidence that the actions she alleges actually *occurred* must, necessarily, have collateral estoppel effect on subsequent proceedings.

Ms. Weston’s claims for violation of her civil rights and tortious interference in her federal case were predicated on the same factual allegations she relies upon here. She has had a full and fair opportunity to litigate these “determinative facts” in the federal courts, and, therefore, cannot avoid issue preclusion on the grounds of injustice. *Christensen*, 152

¹⁰³ 152 Wn.2d 299, 306-7, 96 P.3d 957 (2004).

¹⁰⁴ 72 Wn.2d 887, 894, 435 P.2d 654 (1967).

¹⁰⁵ The doctrine of issue preclusion or collateral estoppel, prohibits re-litigation of an issue when the following elements are established: “(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.” *Christensen*, 152 Wn.2d at 307. Under *Christensen*, the term “issue” in the first prong of the collateral estoppel test includes “determinative facts.”

Wn.2d at 309; *see also Reninger v. State*, 134 Wn.2d 437, 453, 951 P.2d 782 (1998). It is undisputed that Ms. Weston was represented by counsel throughout the course of her federal case (by the same counsel who represents her in this appeal), had a full and fair opportunity to litigate the facts and issues decided in the federal courts, and vigorously did so. Thus, all four elements of collateral estoppel are satisfied here.

As the *Christensen* court also stated:

The collateral estoppel doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties. *Reninger v. Dep' t of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). Also implicated are principles of repose and concerns about the resources entailed in repetitive litigation. Tegland, *Civil Procedure* § 35.21, at 446. Collateral estoppel provides for finality in adjudications. Trautman, *Claim and Issue Preclusion*, 60 WASH. L.REV. at 806.

Christensen, 152 Wn.2d at 307.

Ms. Weston has been continuously litigating her allegations against WSLCB and the individual defendants since 2007. WSLCB is entitled to finality.

4. The Trial Court Also Correctly Found That Ms. Weston Cannot Establish A Prima Facie Tortious Interference Case

There is no evidence in the extensive evidentiary record for this case that the WSLCB or the officers intentionally set out to interfere with Ms. Weston's employment relationship. This is true, even if this court

were to consider the “determinative facts” it is collaterally estopped from considering under *Christensen*. See Section II B, above, and the supporting documents.

Officer Harrigan randomly selected Albertsons for a liquor compliance check on the night of September 29, 2005. There is no evidence that either he or Officer Benavidez knew of or about Ms. Weston before the liquor compliance check occurred. There is no evidence that the officers had any knowledge of her employment relationship with Albertsons, or that an illegal sale would cause her to lose her job.

Similarly there is no evidence that the WSLCB or its officers initiated the liquor compliance check with an improper purpose or used improper means to induce the sale. The liquor compliance check at Albertsons 410 was one of ten random checks they performed on the evening of September 29, 2005. Louise Carey was instructed to follow appropriate protocols and use her valid Washington State Driver’s license if asked for ID. When Ms. Weston asked for an ID, Ms. Carey provided her valid driver’s license. The license clearly indicated that Ms. Carey was underage. Ms. Weston admitted on the evening she sold wine to Ms. Carey that she simply made a mistake and typed the date Ms. Carey would be 21 into the POS system, instead of her birth date. It was this

mistake, and not the fact of the liquor compliance check, that caused Ms. Weston to lose her job.

Finally, Ms. Weston cannot establish that the conduct of the WSLCB or its agents was the proximate cause of her job loss. Following ¶the liquor compliance check Ms. Weston was summarily suspended. Albertsons Inc. conducted its own independent investigation. The investigation demonstrated that Ms. Weston sold alcohol to a minor on September 29, 2005. The investigation also determined this was Ms. Weston's second violation of established store policies. In 2002, she sold tobacco to a minor. Following the sale in 2002, she signed a "Last and Final Warning" notice indicating that any further sales in violation of established store policies would result in immediate termination.

Albertsons decided to terminate Ms. Weston, based on the results of its investigation. She was terminated on October 1, 2005. Subsequently, Albertsons offered to reinstate her and she declined that offer. Albertsons initial decision to terminate the Ms. Weston and her subsequent decision to decline Albertsons offer of reemployment are the proximate cause of her job loss and resulting damages.

There is no evidence in the extensive record of this case that the WSLCB or its officers tortiously interfered with Ms. Weston's employment.

C. The Trial Court Did Err When It Denied Ms. Weston’s Motion for Partial Summary Judgment

Ms. Weston argues that the trial court was required to apply res judicata principles to find the WSLCB and its officers had no defense against her claim for tortious interference with her employment because a King County deputy prosecutor dismissed her charge for selling liquor to a minor under RCW 66.44.270. This argument ignores the rule that a shift in the burden of persuasion defeats preclusion.¹⁰⁶

The dismissal of a criminal charge, even with prejudice,¹⁰⁷ means nothing more than that the State could not meet its burden of proof beyond a reasonable doubt. Ms. Weston has the burden of proof in her tortious

¹⁰⁶ The State of Washington has been held to be a single sovereign entity under Washington case law (and thus WSLCB and the King County Prosecutor in her role as enforcer of the Revised Code of Washington are acknowledged to be the “same party” for res judicata purposes). See *State v. Williams*, 132 Wn.2d 248, 257, 937 P.2d 1052 (1997) (DSHS in administrative proceeding and prosecutor in criminal proceeding are in privity because they both represent the State); see also *State v. Dupard*, 93 Wn.2d 268, 273, 609 P.2d 961 (1980) (State is the same party in two related proceedings even when represented by prosecutor in one action and by attorney general in the other). As in all such cases, the WSLCB does not concede that the fourth prong of the res judicata test (a grave injustice to one of the parties) is satisfied because of the great disparity in purpose between these two State entities. Public policy argues against applying res judicata to Weston’s claim against WSLCB. See *State v. Williams*, 132 Wn.2d at 257. The case relied upon by Weston (*Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402 (1940)) has no relevance to the question of whether WSCLB and the King County Prosecutor should be considered the same party under Washington law. As the Washington Supreme Court makes clear in *Williams*, the individual defendants in this case were not in privity with (or the same party as) the State of Washington (as prosecutor of the criminal case). The second prong of the res judicata test is not satisfied, as a matter of law, for the individual WSLCB officers. As noted above, whether or not the State of Washington is a single sovereign has no relevance to the burden of proof case law that controls the outcome of this case.

¹⁰⁷ WSCLB assumes, for the purposes of argument, that the district court’s dismissal of Ms. Winston’s charge under RCW 66.44.270 was with prejudice. The burden of proof case law also makes argument on this issue irrelevant as a matter of law.

interference case. The standard of proof in her civil case is preponderance of the evidence. The WSLCB's defense, should one have been required, also would have required a lesser standard of proof—certainly no more than a preponderance. Of primary importance to a determination of whether the initial decision may have res judicata effect is the question of who carries the burden of proof and whether the burden of proof in the initial case was higher. A shift in the burden of proof is sufficient to defeat the application of res judicata:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . . *The party against whom preclusion is sought had a significantly heavier burden of proof persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action....*

Rest. 2d Judg. § 28 (emphasis added).

This section of the Restatement was cited with approval in *State v. Jones*, 110 Wn.2d 74, 79, 750 P.2d 620 (1988), where the Court wrote, “[W]e agree with the concept that ‘[t]he rule that a shift in the burden of persuasion defeats preclusion should apply even if the first action went beyond a negative finding that the burden was not carried.’” *Jones*, 110 Wn.2d at 79 (internal citations omitted). Res judicata does not apply in

any case where a plaintiff attempts to have the dismissal of a case with a high burden of proof control the decision in a case with a lower standard of proof. *See also Young v. City of Seattle*, 25 Wn.2d 888, 894-5,172 P.2d 222 (1946).

In this case, the trial court correctly interpreted Washington law when it denied Ms. Weston's argument that res judicata precluded any defense by the WSLCB to Ms. Weston's tortious interference claim. Because the standard of review for the Ms. Weston's RCW 66.44.270 case was significantly heavier and because the State of Washington (rather than Ms. Weston) carried the burden of proof in her criminal case, the dismissal of that case—even if it were done with prejudice—defeats any application of a preclusion doctrine like res judicata.

The most significant weakness of Weston's res judicata argument is that it focuses on WSLCB's defense, but does nothing to make (or support) the tortious interference argument that would *require* a defense by WSLCB. *See, generally, Ang v. Martin*, 118 Wn. App. 553, 76 P.3d 787 (2003) (a plaintiff in a civil trial must prove innocence in fact in a civil trial by a preponderance of the evidence; she may not merely present evidence of the government's inability to prove guilt).

Ms. Weston's reliance on *Coffey v. United States*, 116 U.S. 436, 442-4 (1886) is misplaced.¹⁰⁸ In *Coffey*, the United States Supreme Court found that an acquittal in a criminal prosecution of a distiller for violation of the internal revenue laws was conclusive in favor of the defendant in a subsequent suit *in rem* filed by the United States.¹⁰⁹ In the present case, the WSLCB has filed no civil litigation against Ms. Weston, rather, the reverse has occurred. Ms. Weston has filed this case and has the burden of proving her tortious interference claim. Rest. 2d Judg. § 28, and the related Washington case law including *Jones*, *Young*, and *Ang*, properly controlled the trial court's decision in this case.

D. The Trial Court Did Not Act Unreasonably, Nor Did It Act On Untenable Grounds, Or For Untenable Reasons When It Made the Discretionary Decisions In This Case

Ms. Weston contests the trial court's decision on her motion to compel and its denial of her CR 59 Motion for Reconsideration. The parties appear to agree, in theory, upon the standards of review applicable to these discretionary issues. See, Weston Opening Brief at 24, 33. In practice, however, WSCLB questions whether Ms. Weston has actually

¹⁰⁸ *Coffey* (and the *Coffey* Doctrine) is generally recognized to have been overruled by *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), which held that neither collateral estoppel nor double jeopardy bars a civil forfeiture proceeding following acquittal on related criminal charges.

¹⁰⁹ Under post 1984 case law, this bar no longer exists.

applied the abuse of discretion standard to her analysis of the trial court's discretionary decisions.

1. Motion to Compel

Ms. Weston argues that the trial court abused its discretion when it denied her motion to compel additional responses to her interrogatories and requests for production. Weston Opening Brief at 33-4. In particular, she states that denial of her motion to compel impaired her ability to determine whether Ms. Carey's Washington Driver's License was altered, an issue that had been definitively determined by the federal district court. Appendix A (CP 439-48); Appendix D (CP 300).

Ms. Weston neglects to discuss the timing of her motion to compel, which was filed on April 10, 2010, six days before the trial court was to hear her own partial motion for summary judgment (filed February 23, 2010). It is unclear why Ms. Weston would have filed a summary judgment on liability (a decision she believed could be made by the court as a matter of law) and then find the trial court's denial of her motion to compel to be unreasonable, or made on untenable grounds, or for untenable reasons. By filing her motion for summary judgment, Ms. Weston presented herself to the court as a party for whom there were no material issues of fact that would disturb the court's ability to award

her judgment as a matter of law. Under the circumstances, the trial court could only have found her motion moot.

Additionally, in its response to Ms. Weston's motion to compel, WSLCB had informed the trial court of the extensive discovery completed in the federal case (which included the depositions of all parties and all additional witnesses), of the supplemental discovery undertaken in the State case, and of WSLCB's response to the issue on which Ms. Weston sought discovery. CP at 686-91. WSLCB had also filed its own motion for summary judgment in which it argued that the question of whether Ms. Carey's driver's license was altered (and all of the other factual allegations relied upon by Ms. Weston in her tortious interference action) had been definitively determined in the federal action and, under Washington's collateral estoppel law, could not be re-litigated in the State case.

Under these circumstances, the trial court's decision to deny Ms. Weston's motion to compel was not an abuse of discretion. It was a reasonable decision, based upon tenable grounds and reasons.

2. Motion for Reconsideration

Throughout her brief, Ms. Weston argues that the trial court erred when it denied her motion for reconsideration. Nowhere does she acknowledge that the trial court's decision on reconsideration is measured

against a higher standard than its initial denial of her motion for summary judgment or its initial award of summary judgment to WSLCB.

But, measured against any standard, it is clear that the trial court acted reasonably, and was on tenable grounds, when it denied Ms. Weston's motion for reconsideration.

The trial court accepted Ms. Weston's motion (although the WSLCB objected that it did not meet CR 59 standards) and accepted both a response from WSLCB and a reply from Ms. Weston (CP 809-14).

The opinion issued by the trial court was made on reasonable grounds. CP at 823-24. It examined Ms. Weston's arguments on reconsideration and once again reexamined the evidence in support of her tortious interference claim. CP at 823. It accurately found that there was no issue of fact "regarding Plaintiff's sale of alcohol to a minor." CP at 823. Ms. Weston admitted the fact in her motion for partial summary judgment as she has throughout this case. CP at 823. The trial court also found that the officers were not acting for an improper purpose and had not targeted Ms. Weston as an individual. CP at 823. In short, the trial court paired the evidence in the case with the elements required to prove tortious interference and found, as a matter of law, that Ms. Weston could not prove her allegation. CP at 823.

The trial court then re-examined Ms. Weston's partial summary judgment argument (as restated in her motion for reconsideration) and accurately found that a finding in a proceeding where the standard was "beyond a reasonable doubt" did not preclude a finding that the liquor sale had been made in a civil action applying a preponderance standard. CP at 824. In reaching this decision, the trial court relied upon 14A Washington Practice Sec. 35.50. CP at 824. This section of Washington Practice correctly relied upon *Ang v. Martin*, discussed above, in advising practitioners of the Washington rule.

The trial court's denial of reconsideration, like its other discretionary rulings, was not an abuse of discretion. Those rulings should be affirmed by this court.

V. ATTORNEYS' FEES

The WSCLB requests costs attorneys' fees under RAP 18.1 for the fees attributable to this appeal. Although WSCLB recognizes that it dismissed its counterclaims for violations of RCW 4.84.185 (frivolous action) and RCW 4.24.350 (abuse of process) after discretionary review in order to reach finality in this case, Ms. Weston's repeated assertions of misconduct on the part of WSLCB and its officers in her opening brief (after these issues have been definitively determined by the federal courts

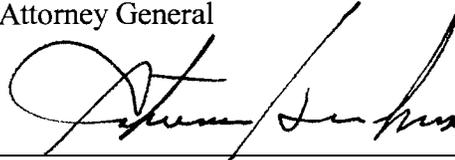
to be unsupported by any competent evidence) serve as the basis of this request for costs and fees. Weston Opening Brief at 37-47.

VI. CONCLUSION

The WSLCB and its officers respectfully request that this court affirm the trial court's award of summary judgment in this case.

RESPECTFULLY SUBMITTED this 5th day of April, 2011.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Catherine Hendricks", written over a horizontal line.

CATHERINE HENDRICKS, WSBA #16311
KATHRYN BATTUELLO, WSBA #13416
Assistant Attorneys General
Attorneys for Respondent Washington State
Liquor Control Board, et al.

CERTIFICATE OF SERVICE

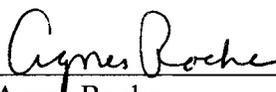
I certify under penalty of perjury in accordance with the laws of the State of Washington that I arranged for the original of the preceding State Respondents' Brief and this Certificate of Service to be filed, by legal messenger, in Division I of the Court of Appeals at the following address:

Court of Appeals of Washington, Division I
One Union Square
600 University Street
Seattle, WA 98101

And, that I arranged for a copy of the preceding State Respondents' Brief and this Certificate of Service to be served on counsel for appellant at the address below, by legal messenger:

John E. Woodbery
800 Bellevue Way N.E., Suite 300
Bellevue, WA 98004-4273

DATED this 5th day of April, 2011, at Seattle, WA.



Agnes Roche

APPENDIX A

**U.S. DISTRICT COURT ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT**

FILED MARCH 20, 2009

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAULETTE WESTON, a single woman,

Plaintiff,

v.

BERNARD JOSEPH HARRIGAN, a single person; and CARLOS D. BENAVIDEZ and KINDA R. BENAVIDEZ, husband and wife and their marital community; and WASHINGTON STATE LIQUOR CONTROL BOARD, a Division of the State of Washington,

Defendants.

CASE NO. C08-469RSM

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Plaintiff Paulette Weston filed this civil rights action pursuant to 42 U.S.C. § 1983, alleging that the individual defendants unlawfully deprived her of a constitutional right. She also asserts state law claims against all defendants for negligence and for intentional interference in a contract. Dkt. # 1. All defendants have moved for summary judgment, and plaintiff has opposed the motion. The Court deems oral argument on the motion unnecessary as the matter has been well and fully briefed. For the reasons set forth below, the Court shall grant the motion for summary judgment as to the civil rights claims, and decline jurisdiction over the state law claims.

BACKGROUND

This action arises from a liquor law compliance check conducted by agents of the Washington State Liquor Control Board ("WSLCB"). Plaintiff was a longtime employee of Albertson's grocery and was working as a cashier on the night of September 29, 2005. Shortly after she returned from a break that evening, a young woman brought a bottle of wine to her register for purchase. The young woman, Louise Carey, was an agent of the WSLCB with instructions to attempt to purchase alcohol at various

ORDER - 1

1 stores in an attempt to test store compliance with the law regarding sales to underage persons. Ms.
2 Carey was nineteen on that date and was instructed to use her actual driver's license in the attempted
3 "buy." She was accompanied by two other agents, the named defendants here, who posed as unrelated
4 customers and witnessed the transactions attempted by Ms. Carey. This was one of ten compliance
5 checks they performed that evening. During this "buy," defendant Harrington stood in line behind Ms.
6 Carey, and defendant Benavidez stood nearby. Plaintiff alleges that they were both acting in a disruptive
7 and intimidating manner, moving around with "quick and agitated motions," and shuffling magazines.
8 Complaint, ¶3.6.

9 When plaintiff "scanned" the bottle of wine—a Kendall-Jackson Chardonnay priced at
10 \$14.99—the register alerted her to check the customer's identification to verify age. She asked Ms.
11 Carey for her driver's license, and Ms. Carey handed it to her. The driver's license was a "vertical"
12 license, the type issued by the State of Washington to persons under the age of twenty-one. This vertical
13 license has a "portrait" format instead of the horizontal "landscape" format used for adults over the age
14 of twenty-one. The license has three dates on it. The topmost date, just beneath the license number, is
15 the expiration date, which in this case was 12-05-2006. Dkt. # 25, Exhibit D-2. Farther down, to the left
16 of the photograph, is the licensee's date of birth, which in this case read "DOB 12-05-1985". Below that
17 was the "age 21 on" date, which was 12-05-2006. *Id.* A cashier is supposed to check the expiration
18 date of the license, verify the photograph, and then key in the date of birth into the register. The register
19 will then verify that the customer is of legal age to purchase the alcohol, or will alert the cashier to the
20 fact that the customer is not.

21 On this occasion, plaintiff verified the expiration date, confirmed the photograph, and then
22 mistakenly keyed the birth date into the register as 12-05-06. Although the date of December 5, 2006
23 was actually **after** the date of the incident, making the date invalid as a date of birth, the register accepted
24 the date because only the last two digits of the year (06) are keyed in. That is, the register read the date
25 as December 5, 1906 instead of December 5, 2006, indicating that the customer was ninety-eight years
26 old on September 29, 2005. As a ninety-eight-year-old customer would be of legal age to purchase the
27 wine, the register did not alert plaintiff that Ms. Carey was underage, and plaintiff continued with the
28

ORDER - 2

1 transaction. She told Ms. Carey the amount due—\$16.31 with tax included—accepted the twenty dollars
2 she offered as payment, and returned the \$3.69 in change along with the receipt. That receipt indicates
3 that the time of the transaction was 7:21 p.m., although it actually occurred later than that, around 7:30
4 p.m. or later. Ms. Carey walked away from the register with the wine in hand, and left the store. She
5 met agent Benavidez outside to hand over the wine. Defendant Harrington, who had been standing in
6 line behind Ms. Carey, then showed plaintiff his badge and told her she had just sold alcohol to a minor.

7 At this point a supervisor was called over to plaintiff's register. The supervisor, Dawn Sedowsky,
8 was shown the receipt for the transaction, and the consequences of the violation were explained.
9 Plaintiff's register was closed down, and after she gave a statement she was sent home pending an
10 investigation. The electronic journal for the cash register was run later, and the record matched the
11 transaction receipt that Ms. Carey was given for the buy, including the 7:21 p.m. time. This confirmed
12 that the register's internal clock was not set properly, accounting for the error on the time of the receipt.

13
14 Albertson's has a "zero tolerance" policy for sales of alcohol to minors. Plaintiff had previously
15 (in 2002) sold cigarettes to a person under age, and had been informed of this policy. After the alcohol
16 sale, plaintiff was immediately terminated from her position, and her union filed a grievance. Albertson's
17 offered plaintiff her job back, but she declined the offer because it did not include back pay. Her
18 termination was upheld in arbitration.

19 On these facts, plaintiff alleges two federal claims against the individual defendants: a claim of
20 deprivation of her constitutional right to employment, a protected property interest; together with
21 conspiracy to deprive her of that constitutional right. Complaint, ¶¶ IV, V. Defendants have moved for
22 summary judgment on these federal claims on the basis of their qualified immunity. Defendants have also
23 moved for summary judgment as to plaintiff's state law claims. These will be addressed separately.

24 DISCUSSION

25 I. Legal Standard

26 Summary judgment is appropriate "if the pleadings, deposition, answers to interrogatories,
27 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
28 material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

ORDER - 3

1 An issue is “genuine” if “a reasonable jury could return a verdict for the nonmoving party” and a fact is
2 material if it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby,*
3 *Inc.*, 477 U.S. 242, 248 (1986). The evidence is viewed in the light most favorable to the non-moving
4 party. *Id.* “[S]ummary judgment should be granted where the nonmoving party fails to offer evidence
5 from which a reasonable jury could return a verdict in its favor.” *Triton Energy Corp. v. Square D Co.*,
6 68 F. 3d 1216, 1221 (9th Cir. 1995). It should also be granted where there is a “complete failure of
7 proof concerning an essential element of the non-moving party’s case.” *Celotex Corp. v. Catrett*, 477
8 U.S. 317, 323 (1986). “The mere existence of a scintilla of evidence in support of the non-moving
9 party’s position is not sufficient” to prevent summary judgment. *Triton Energy Corp.*, 68 F. 3d at 1221.

10 II. Section 1983 Claims

11 Plaintiff’s civil right claims are brought under 42 U.S.C. § 1983. In order to state a claim under
12 § 1983, a complaint must allege that (1) the defendants acted under color of state law, and (2) their
13 conduct deprived plaintiff of a constitutional right. Section 1983 is the appropriate avenue to remedy an
14 alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F. 2d 1350, 1354 (9th
15 Cir. 1985)(en banc); *cert. denied*, 478 U.S. 1020 (1986).

16 Here, there is no dispute that the defendant agents acted under color of state law, so the first
17 prong is met. As to the second prong, the constitutional right which plaintiff alleges the defendants
18 violated is her protected property interest in continued employment. She alleges that the agents deprived
19 her of that interest without due process of law, by employing a “sting” operation. As to this claim,
20 defendants have raised the defense of qualified immunity.

21 III. Qualified Immunity

22 Qualified immunity shields government actors from a suit for damages if a reasonable official
23 could have believed that his or her conduct was lawful, in light of clearly established law and the
24 information possessed by the official. *Anderson v. Creighton*, 483 U.S. 635, 637-39, 641 (1987).
25 Because qualified immunity is immunity from suit, rather than “a mere defense to liability,” the Court
26 should rule on the issue early in the proceedings so that defendants avoid the costs and expenses of trial
27 where the defense is dispositive. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Thus, at the summary
28 judgment stage, a court necessarily decides qualified immunity if it turns on issues of law. *See Torres v.*

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1 *City of L.A.*, 540 F.3d 1031, 1044 (9th Cir.2008).

2 Traditionally, in assessing whether an officer is entitled to qualified immunity, a court would first
3 inquire whether the facts alleged, taken in the light most favorable to the plaintiff, establish a
4 constitutional violation. *Saucier*, 533 U.S. at 200. If the court found a constitutional violation, the court
5 would next consider “whether the right was clearly established.” *Id.* at 202. This decisional sequence
6 was recently modified by the Supreme Court, such that now the courts are “permitted to exercise . . .
7 sound discretion in deciding which of the two prongs of the qualified immunity analysis should be
8 addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, 129
9 S.Ct. 808, 77 USLW 4068 (2009).

10 With respect to law-enforcement actions by state officers, the Supreme Court has made it clear
11 that only official conduct that “shocks the conscience” is cognizable as a due process violation. *County of*
12 *Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Whether the
13 defendant agents committed a constitutional violation under the first step of *Saucier’s* qualified immunity
14 analysis presents two issues. First, the Court must decide the appropriate standard of culpability to apply
15 to defendants’ conduct to determine whether it “shocks the conscience” under the Fourteenth
16 Amendment’s Due Process Clause. *Lewis*, 523 U.S. at 846. Second, it must be determined whether
17 defendants’ conduct met that standard of culpability.

18 The Ninth Circuit Court of Appeals recently clarified the standard of culpability which would
19 “shock the conscience” in a case such as this, in which the *Lewis* circumstances of a high-speed chase and
20 resultant death are not present. *Porter v. Osborne*, 546 F. 3d 1131 (9th Cir. 2008). The relevant
21 question on the facts here is whether the “shocks the conscience” standard is met by showing that the
22 agents acted with deliberate indifference or requires a more demanding showing that they acted with a
23 purpose to harm plaintiff for reasons unrelated to legitimate law enforcement objectives. *Lewis*, 523 U.S.
24 at 836. The appellate court noted that “[i]n our cases following the Supreme Court’s enunciation of the
25 shocks the conscience test in *Lewis*, we have distinguished the “purpose to harm” standard from the
26 “deliberate indifference” standard, recognizing that the overarching test under either is whether the
27 officer’s conduct “shocks the conscience.” *Porter v. Osborne*, 546 F. 3d at 1137. Guided by *Porter*, the
28 Court finds that here, viewing the facts in the light most favorable to plaintiff, she must demonstrate that

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1 defendants acted with a purpose to harm her that was unrelated to legitimate law enforcement objectives.

2 *Id.*

3 The actions by the agents which plaintiff identified in her complaint as depriving her of due
4 process were random and suspicious movements which she interpreted as threatening.

5 Agent Harrigan, bearded and disheveled in appearance, maintained from his position
6 behind agent Louise Carey a continuous movement consisting of moving in and away
7 from the attention of Weston, leaning over the area where a customer would usually write checks,
8 made quick and agitated motions designed to detract [sic] Weston from her duty
9 to properly test the age of Louise Carey, acting as if he were trying to catch the attention
10 of Weston, speak to her and then withdraw before any communications ensued. He
11 repeated the process all during the time of Weston's presence in the checker stand while
12 Weston completed her assigned tasks as a checker, left to obtain the cigarettes and her
13 return to complete the transaction. Agent Benavidez from his position behind Weston
14 was intentionally grabbing and replacing magazines from a rack and making noise in the
15 process with the intended purpose of adding to the confusion and distraction of Weston.

16 Complaint, ¶ 3.6. In her deposition, she explained why this bothered her:

17 Q. All right. So what was unusual about Mr. Harrigan being in line behind Louise Carey?

18 A. He was acting in a hurry and he was agitated, and I thought that he was a crack-head or
19 a meth-head. He was picking up magazines and slamming them down, and then he'd
20 move over here and he'd move over here, then he'd lean up like he was going to talk to
21 me and then he'd go back.

22 And there's a little check-writing area right here, he was leaning up on that and get the
23 magazines that were right next to me and he'd bang them up and down. He was leering at
24 me over his glasses and at her the whole time.

25 Q. Did he say anything?

26 A. No.

27 Q. It sounds as if he was making you very uncomfortable?

28 A. Oh yes. I thought he was going to rob me or something. He kept putting his hands in
his pockets, too, and pulling them out, and I was like is he going to pull out a gun any
minute here.

Q. Did Louise Carey seem to know who he was?

A. No. I didn't — I thought she was just afraid because he was acting that way right there,
like he was going to do something bad.

Deposition of Paulette Weston, Dkt. # 26, Exhibit C, p. 13. Plaintiff also described the behavior of Agent
Benevidez, stating that he was standing in the empty check stand behind her, looking at magazines. *Id.* p.

14.

ORDER - 6

1 Viewing these facts about the agents' behavior in the light most favorable to plaintiff, the Court
2 finds that they do not, without more, rise to the level of conduct which "shocks the conscience." Agent
3 Harrigan's random motions, while distracting to plaintiff, were not so threatening or egregious as to
4 demonstrate a purposeful intent to harm plaintiff unrelated to legitimate law enforcement concerns.
5 *Porter v. Osborne*, 546 F. 3d at 1137. Further, plaintiff has presented no evidence that defendants even
6 knew that their "sting" operation would cause her to lose her job. Thus, even if the agents' conduct
7 could be viewed as outrageous (which it cannot), it cannot be said that there was any purposeful intent to
8 harm her by depriving her of her job. To the contrary, plaintiff stated in her deposition that when she told
9 Agent Harrigan that she would be fired for selling alcohol to a minor, he responded "No, you won't.
10 You'll get a warning." Weston Deposition, Dkt. # 26, Exhibit C, p. 5.

11 The balance of plaintiff's contentions supporting her claims, particularly the claim of conspiracy,
12 are all based on conjecture and speculation. She initially alleged in her complaint that there were actually
13 two separate "buy" attempts.

14 She was approached no sooner than 7:15 PM and no later than 7:45 PM by a young female
15 customer, twice purchasing a bottle of white wine. Upon information and belief the young female
16 on both purchases was blond and similar in appearance to enforcement agent Louise Carey,
17 making the same type of wine purchase each time as to color (generic white) and
18 quantity (one bottle). . . .

19 On the occasion of the second of the two wine purchases, Louise Carey in addition to and
20 contrary to Defendant WLCB policies to test compliance with a single product only in such
21 tests, requested to purchase a package of cigarettes from Weston. The tobacco inventories
22 for sales at Albertson's were so located that Weston had to leave her checker stand to obtain
23 the package of cigarettes and return before scanning the wine product being purchased. . . .

24 The actual transaction in which Weston was distracted by the "sting" participants Harrigan,
25 Benavidez and Carey took place between 7:30 and 7:45 PM and not 7:21 as reflected on the
26 sales receipt produced.

27 Upon information and belief, Defendants Harrigan and Benavidez acting in concert with
28 Louise Carey made a test run at 7:21 PM without witnesses and ran it again with witnesses
on which the alleged violation of law occurred and in which the cigarette sale purchase was
recorded in violation of the WLCB's operating procedures for testing only a single item. The
purpose of the distraction was to insure that a violation would occur.

Complaint, Dkt. # 1, ¶¶ 3.3, 3.5, 3.17-3.18.

The evidence produced during discovery demonstrated that the internal clock in the cash register
was off, accounting for the 7:21 time on the register receipt. The electronic transaction record was run
later and displayed the same time for the transaction, confirming that the internal clock was improperly

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1 set. Plaintiff accordingly abandoned her "two purchases" assertion in opposing summary judgment, but
2 continues to assert that the cigarette purchase and purchase time discrepancies create issues of fact which
3 preclude summary judgment. They do not.

4 The complaint alleges, and plaintiff testified in her deposition, that Ms. Carey asked for a pack of
5 cigarettes to purchase along with the wine, and that plaintiff left the check stand to go get them. Ms.
6 Carey testified, on the other hand, that she did not ask for or purchase cigarettes. The receipt of the
7 transaction does not indicate that cigarettes were purchased, and plaintiff cannot recall scanning the
8 cigarettes or remember what happened to them after she retrieved them. Nevertheless, in viewing the
9 facts in the light most favorable to plaintiff, the Court will assume (without deciding) that Ms. Carey did
10 ask for cigarettes. The Court took this allegation, including the allegation that plaintiff was distracted by
11 this request, into account when it concluded, above, that defendants' conduct does not "shock the
12 conscience."

13 In opposing summary judgment, plaintiff has pointed to other areas in which she contends that
14 there is a factual dispute which precludes summary judgment. As her first three contentions all relate to
15 her theory that Louise Carey carried an altered driver's license, they shall be listed and then addressed
16 together.

17 The facts which plaintiff contends are disputed are:

18 A. "That Louise Carey only carried her valid Washington Drivers License in the sale that was
19 witnessed by Officers Harrigan and Benavidez." Plaintiff's Response, p. 2.

20 B. "That Ms. Weston in the sale transaction looked at the license and observed two different
21 dates." *Id.*, p. 4.

22 C. "That the 12-05-06 birth date on the sales slip was entered when the sale to Carey was
23 witnessed by the WLCB officers." *Id.* p. 5.s

24 Plaintiff asserts that these facts are in dispute. She testified at her deposition that she knew she
25 entered the "date of birth" on Ms. Carey's license into the register because she always entered the "top
26
27
28

1 date.”¹ ² Weston Deposition, Dkt. # 26, Exhibit C, p. 89. She opposes summary judgment by advancing
2 the theory that Louise Carey showed her an altered driver’s license with the date of 12-05-06 in the “date
3 of birth” position, near the top of the license, and that this was why she entered the incorrect date into the
4 cash register. In essence, she contends that she was tricked by an altered license.

5 In support of this theory, she offers the testimony of her father, Paul Weston, who created an
6 altered driver’s license for demonstration purposes. Declaration of Paul Weston, Dkt # 26, Exhibit 9.
7 Defendants have moved in their reply to strike Mr. Weston’s testimony and the exhibit. Dkt. # 27. This
8 motion to strike is GRANTED. Mr. Weston is not qualified as an expert witness, his opinion in drivers’
9 licenses is not based on the facts of record in this case, and is otherwise inadmissible. His demonstration
10 of an altered driver’s license is irrelevant.

11 Ms. Carey testified at her deposition that she carried only her actual Washington State driver’s
12 license on the compliance test. Deposition of Louise Carey, Dkt. # 25, Exhibit D, p. 16. She also
13 specifically denied that she carried a driver’s license with a “date of birth” showing 12-05-2006. *Id.*, p.
14 21. These statements were made under oath. Plaintiff has presented no evidence whatsoever so
15 controvert this sworn evidence. Her conclusory allegations made on an unsupported theory are wholly
16 insufficient to create an issue of fact on this point.

17 Plaintiff’s remaining factual contentions regarding the transaction receipt and the electronic record
18 from the cash register, as well as the events that occurred after the sale took place, are similarly based on
19 speculation or innuendo, and fail to controvert or create a dispute regarding the evidence in the form of
20 sworn testimony that defendants have presented. Plaintiff’s Response, pp. 5-10. The undisputed

21
22 ¹At her deposition, the following colloquy took place:

23 Q: And you knew that the birth date was the top date and the date the person would be 21 was
24 the bottom date?

25 A: Yes.

26 Q: Okay. Now which date did you enter?

27 A: I entered the top date, the date of birth.

28 Q: And how do you know that?

A. Because I always do. I have never entered the lower date.

Weston Deposition, Dkt. # 26, Exhibit C, p. 89.

²As noted above, the actual “top date” on a vertical license is the expiration date, which in this
case was the same as the “age 21” date, or 12-05-06—the date that plaintiff entered into the register.

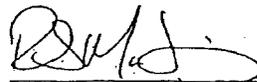
ORDER - 9

1 evidence in the record demonstrates that agents Harrigan and Benavidez observed plaintiff complete a
2 transaction involving the sale of alcohol to a person under the age of twenty-one. Plaintiff asked to see a
3 driver's license, was shown a "vertical" license which alerted her to the fact that the customer was likely
4 to be underage, and then keyed in the wrong date from that license into the register. Even if one or both
5 agents acted in an agitated or disruptive manner as described by plaintiff, that behavior does not rise to
6 the level of "conscience shocking" conduct so as to constitute a deprivation of plaintiff's Fourteenth
7 Amendment right to due process. *Lewis*, 523 U.S. at 846; *Porter v. Osborne*, 546 F.3d at 1137. As the
8 facts alleged, taken in the light most favorable to the plaintiff, do not establish a constitutional violation,
9 defendants are entitled to qualified immunity on both the civil rights and conspiracy claims. *Saucier*, 533
10 U.S. at 200.

11 CONCLUSION

12 The individual defendants have demonstrated that they are entitled to qualified immunity from
13 plaintiff's § 1983 claims. Their motion for summary judgment on plaintiff's federal claims is accordingly
14 GRANTED on that basis, and those claims are hereby DISMISSED. The Court declines supplemental
15 jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c)(3), and those claims are
16 accordingly DISMISSED without prejudice.

17 DATED this 20th day of March 2009.

18 

19 RICARDO S. MARTINEZ
20 UNITED STATES DISTRICT JUDGE
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APPENDIX B

**NINTH CIRCUIT COURT OF APPEALS MEMORANDUM
AFFIRMING DISTRICT COURT DECISION**

FILED DECEMBER 22, 2009

FILED

NOT FOR PUBLICATION

DEC 22 2009

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAULETTE WESTON, a single person,

No. 09-35243

Plaintiff - Appellant,

D.C. No. 2:08-cv-00469-RSM

v.

MEMORANDUM*

BERNARD JOSEPH HARRIGAN, a
single person; CARLOS D. BENAVIDEZ;
KINDA R. BENAVIDEZ, husband and
wife and their marital community;
WASHINGTON STATE LIQUOR
CONTROL BOARD, a Division of the
State of Washington,

Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Submitted December 11, 2009**
Seattle, Washington

Before: BEEZER, GOULD and TALLMAN, Circuit Judges

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without
oral argument. See Fed. R. App. P. 34(a)(2).

Plaintiff-Appellant Paulette Weston (“Weston”) appeals the district court’s grant of summary judgment to Defendants-Appellees Bernard Harrigan and Carlos Benevidez (collectively “Officers”) and the Washington State Liquor Control Board. The parties are familiar with the facts and procedural history of this case so they are not repeated here.

We have jurisdiction under 28 U.S.C. § 1291 and affirm.

The district court did not abuse its discretion in excluding Paul Weston’s testimony because it would not have helped determine a fact in issue. *See Head v. Glacier Northwest Inc.*, 413 F.3d 1053, 1062–63 (9th Cir. 2005) (upholding district court’s evidentiary determination because the testimony at issue would not have assisted in determining a fact in issue). The use of an altered license was not a “fact in issue” because the record is devoid of any evidence that the underage operative produced an altered license when asked for her identification.

The Liquor Control Board Officers are entitled to qualified immunity. Under *Saucier v. Katz*, 533 U.S. 194, 200–02 (2001) and *Pearson v. Callahan*, 129 S. Ct. 808 (2009), we exercise our discretion to first determine whether a public official violated the complaining party’s constitutional rights. We do not reach the second step because we find that there are no genuine issues of material fact and the Officers’ conduct did not violate Weston’s constitutional right to due process.

The Officers did not violate Weston's procedural due process rights. There is no evidence in the record that the Officers affirmatively participated in Weston's termination or knew or reasonably should have known that their actions would cause Weston's employer to terminate her before providing an opportunity to be heard. See *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978) (finding that a public official can deprive an individual of a protected property interest by either affirmatively participating in the deprivation or "setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury"). The facts of this case do not establish the type of public official involvement presented in *Merritt v. Mackey*, 827 F.2d 1368, 1372 (9th Cir. 1987) (finding a violation of procedural due process when the government had "coercive dealings" with the plaintiff's employer).

The Officers also did not violate Weston's constitutional rights to substantive due process. Official conduct violates a party's substantive due process rights when the conduct "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998). There are two standards of culpability for determining if conduct shocks the conscience: deliberate indifference and purpose to harm. *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). Weston argues that the lower standard of culpability, deliberate indifference, applies in this case.

We need not decide the appropriate standard, however, because we hold that even under the lower standard, summary judgment is appropriate.

We reject Weston's attempt to create a genuine issue of material fact by alleging that there were two liquor purchases. A court does not have to accept as true allegations that are contradicted by the record and which no reasonable jury would believe. *Scott v. Harris*, 550 U.S. 372, 380 (2007). Weston's "two-buy theory" is inconsistent with the evidence in the record—Weston could not produce an electronic record of the alleged second buy although it is undisputed that such a record is made for every transaction. The district court properly rejected the two-buy theory. We next examine the Officers' conduct during the liquor compliance check to determine if they acted with deliberate indifference to Weston's constitutional rights. *See Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991).

There is no evidence to support Weston's allegations that Harrigan or Benavidez purposely selected Weston's store because they knew she would be terminated if she sold liquor to a minor. Weston admitted that Harrigan reassured her that she would not be fired and Harrigan stated that the store was selected for the liquor compliance check based on the length of time since the previous check or a failed previous check. There is no evidence to support the argument that

Harrigan's or Benavidez's behavior while Weston was conducting the sale to the underage operative was deliberately indifferent to Weston's constitutional rights. Even if the Officers were acting in a distracting manner, it was reasonable for them to do so. The possibility that a person may engage in distracting behavior while a minor is purchasing liquor does not stretch the imagination. The Officers were not acting with deliberate indifference to Weston's constitutional rights; they were simulating a possible real-life situation to evade the liquor laws.

The uncontroverted evidence establishes as a matter of law that the Officers' conduct does not constitute deliberate indifference to Weston's constitutional rights; nor does it evidence a purpose to harm. The Officers did not engage in conduct that "shocks the conscience" and Weston was not deprived of her substantive due process rights. Qualified immunity was properly invoked.

AFFIRMED.

APPENDIX C

**COMMISSIONER'S RULING DENYING
DISCRETIONARY REVIEW**

FILED JULY 30, 2010

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

PAULETTE WESTON,)
)
 Petitioner,)
)
 v.)
)
 BERNARD JOSEPH HARRIGAN, a)
 single man and CARLOS D.)
 BENAVIDEZ and KINDRA)
 BENAVIDEZ, husband and wife and)
 their marital community, and)
 WASHINGTON LIQUOR CONTROL)
 BOARD, a Division of the State of)
 Washington,)
)
 Respondents.)

No. 65522-1-I

COMMISSIONER'S RULING
DENYING DISCRETIONARY
REVIEW

RECEIVED

AUG 02 2010

ATTORNEY GENERAL'S OFFICE
TORTS DIVISION
SEATTLE

Paulette Weston seeks discretionary review of the trial court summary judgment that the defendants Washington Liquor Control Board (collectively "WLCB") have no liability for intentional interference with business expectancy. The trial court denied Weston's motion to dismiss WLCB's counterclaims for a frivolous lawsuit, abuse of process and malicious prosecution, and those counterclaims remain for trial.

Weston contends there are genuine issues of material fact whether WLCB intentionally interfered with her employment by virtue of a WLCB compliance check resulting in her sale of liquor to a minor. Because she fails to establish any obvious or probable error, she does not satisfy the strict criteria for discretionary review. The motion for discretionary review is denied.

FACTS

On September 29, 2005, two WLCB compliance officers accompanied 19-year-old Louise Carey to conduct compliance checks at several randomly selected stores, including an Albertson's where Paulette Weston was a cashier. Carey selected a bottle of wine and randomly selected a check-out line. When she got to the register, Carey handed the bottle of wine to Weston, who scanned the bottle using the Albertson's Point of Sale (POS) system. The POS system required the input of the date of birth of the purchaser. The system accepts the month and date of birth, but only two digits for the year of birth.

Weston asked Carey for her ID, and looked carefully at Carey's Washington driver's license. The license was a vertical license, consistent with the driver being a minor at the time the license was issued. The license included "DOB 12-05-85" as well as "AGE 21 on 12-05-2006". Weston made an entry on the computer system, and the system accepted the transaction. Carey provided Weston a \$20 bill, and Weston gave \$3.69 in change back to Carey.

One of the compliance officers was standing behind Carey in the checkout line. The other was standing nearby where he could monitor the attempt to purchase the wine. Weston alleges that the agent standing in line behind Carey was scruffy and "acting in a hurry and he was agitated, and I thought that he was a crack-head or a meth-head. He was picking up magazines and slamming them down, and then he'd move over here and he'd move over here, then he'd lean up like he was going to talk to me and then he'd go back... [h]e was leering at me over his glasses..."

No. 65522-1-1/3

After the sale of the wine was completed, the officer in line displayed his badge and told Weston she had just sold wine to a minor and demanded that she provide her ID. Weston told the officer she had put the date of birth into the computer system and the computer accepted the transaction.

A receipt reflects that on September 29, 2005 at 7:21 p.m. at the register #140 where Weston was working, a sale was made of wine for \$16.31, a \$20 was tendered and change of \$3.69 was given to the purchaser. The receipt also includes the indication "BIRTHDATE - 120506." Albertsons's system also generated an Electronic Journal Report and that report reflects a transaction that corresponds precisely to all of the information listed in the receipt including the [7:21] p.m. time and "BIRTHDATE = 120506"

The store manager became involved and had Weston prepare a written statement. In her statement, Weston indicated that she "did key in 120506 and the computer accepted it."

Weston later explained her written statement was made while she was still in shock and was based on the allegations made by one of the agents at the time. She contends she entered the correct date of birth (DOB) on the driver's license because she always types in the date of birth as listed on the identification.

Albertson's terminated Weston's employment.

Weston appeared for an arraignment on charges of selling alcohol to a minor, but the criminal charges were dismissed with prejudice at the arraignment.

Weston sued WLCB in federal court alleging federal civil rights claims together with state law claims for intentional interference in contract or expectation of continued employment and negligence. The federal trial court granted summary judgment dismissing the federal claims. The court declined supplemental jurisdiction on the state law claims and dismissed those without prejudice.

Weston then filed this lawsuit in King County Superior Court for intentional interference with contract or expectation of continued employment. The WLCB filed counterclaims alleging a frivolous lawsuit, abuse of process and malicious prosecution.

The trial court granted summary judgment in favor of WLCB dismissing Weston's lawsuit and denied Weston's motion for summary judgment to dismiss the WLCB counterclaims, which remain to be tried. The trial court denied Weston's motion for reconsideration.

Weston seeks discretionary review.

CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review is available only:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a

difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

DECISION

Although several arguments are offered, the core question is whether Weston has demonstrated a genuine issue of material fact requires a trial on her theory of an intentional interference with her employment contract with Albertsons.

Tortious interference occurs where the plaintiff can show (1) the existence of a valid contractual relationship or business expectancy; (2) the defendant had knowledge of that expectancy; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) the defendant interfered for an improper purpose or used improper means; and (5) damage resulted. Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Washington has accepted the formulation that interference can be "wrongful" by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession. Therefore, plaintiff must show not only that the defendant intentionally interfered with her business relationship, but also that the defendant had a "duty of non-interference; *i.e.*, that he interfered for an improper purpose ... or ... used improper means ..." Pleas v. Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989).

Weston has not established a genuine issue of material fact. First, Weston provides no compelling authority that a government agency conducting a

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compliance check for individuals selling alcohol to minors has interfered with any contract.

Second, the undisputed evidence is that the selection of the stores for compliance checks and of the cashier was random, there is no evidence that the officers knew Weston or that in 2002 she had signed a Last and Final Agreement with Albertsons that any future violations would result in immediate termination. There is no evidence that the officers knew of a no tolerance policy when they selected the store. Carey indicated that after the buy, the officers "said that the clerk was upset and they had to call the manager over and that Albertson's had a no sale policy, of selling to minors policy and that there was a possibility that the clerk would get fired" but there is no evidence or reasonable inference that when they selected the store, the officers were aware of a policy that employees would be automatically terminated when they arrived to conduct the compliance check occurred. Contrary to Weston's argument, there is no inference of improper selection. There is no genuine issue of material fact that the compliance check was undertaken for an improper purpose.

Third, Weston's strongest theory of improper means depends upon her testimony that one officer appeared scruffy, and he was agitated and in a hurry and he leered at her over his glasses, and that both of the officers distracted her and made her nervous. She argues that such conduct was contrary to WLCB guidelines that officers merely observe the compliance checks and thus is the equivalent of a violation of an established standard of a trade. Weston cites comments to RESTATEMENT (SECOND) OF TORTS § 767 (1979), to support her

argument that the officers violated the equivalent of an industry standard or recognized standards of community conduct. But none of the comments to the Restatement go so far as to implicate the type of agitated and impatient conduct identified by Weston. Weston relies on Pleas to support her contention that a question of fact of wrongful conduct exists. But in Pleas, city officials intentionally prevented, blocked, and delayed issuing a building permit despite a court decision that the City's actions were arbitrary and capricious. Pleas, 112 Wn.2d at 798-99. Here, unlike Pleas, WLCB's actions were not arbitrary and capricious. Weston provides no compelling authority that engaging in irritating or distracting behavior is the equivalent of the violation of an industry standard or a recognized standard of community conduct.

Fourth, Weston challenges the trial court's "improper means" analysis because the trial court noted that Weston had not demonstrated she was compelled by the officers to sell the bottle of wine to Carey. But the trial court did not rule that Weston must prove she was compelled to sell the wine to Carey, just that there was no showing the officers violated rules or laws or compelled her to make the sale. The logical extension of Weston's argument is that anyone who perceives that someone else has violated a "community standard" has a genuine issue of material fact requiring a trial under the improper means alternative. The requirements for intentional interference are not obviously or probably so broad. It was not an obvious or probable error to reject distracting conduct as improper means.

Fifth, Weston's other theories of improper means, include conspiracy theories that WLCB used a false ID with a 2006 birth date, a false receipt, or engaged in dual sales. But these theories are speculative with no basis in the record.

Finally, Weston argues at length that the dismissal of the criminal charge of selling liquor to a minor, is res judicata as to claim of an intentional interference tort. "Since the purpose of the res judicata doctrine is to ensure the finality of judgments and eliminate duplicitous litigation, dismissal on the basis of res judicata is appropriate where the subsequent action is identical with a prior action in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made." Landry v. Luscher, 95 Wn. App. 779, 783, 976 P.2d 1274 (1999). Weston distinguishes her argument from collateral estoppel, or issue preclusion, which applies when (1) the issues are identical; (2) the prior adjudication ended with a final judgment on the merits; (3) the party against whom the plea is asserted was a party to the prior adjudication; and (4) application of the doctrine does not work an injustice. Hanson v. City of Snohomish, 121 Wn.2d 552, 561-62, 852 P.2d 295 (1993). But even an acquittal under the criminal "beyond a reasonable doubt" standard of proof in the criminal proceeding, does not bind the parties to a subsequent tort action under the less demanding civil standard of proof. Leavy, Taber, Schultz & Bergdahl v. Metro. Life Ins. Co., 20 Wn. App. 503, 507, 581 P.2d 167 (1978); See Young v. Seattle, 25 Wn.2d 888, 894-95, 172 P.2d 222 (1946) ("A criminal charge must be proven beyond a reasonable doubt. A

charge of negligence in a civil case can be proven by a mere preponderance of the evidence. It, therefore, follows that one may be properly acquitted on a charge of criminal negligence and yet be properly held responsible for negligence in a civil case on the very same evidence. How, then, can the acquittal in the criminal case be *res judicata* in this action?"). Weston argues that here, both the criminal and tort action depend on a showing that a sale of the alcohol to a minor occurred, so the difference in the burden of proof is of no consequence. But she cites no persuasive authority for that proposition and fails to establish an obvious or probable error.¹

WLCB seeks an award of attorney fees on the theory that the motion for discretionary review is frivolous. There are at least some debatable questions whether the conduct of the officers constituted improper means. The request for attorney fees is denied.²

¹ The WLCB offers the alternative argument that the findings made by the Federal court in its ruling granting summary judgment dismissing the civil rights action are binding under the doctrine of collateral estoppel or issue preclusion. But the essence of a summary judgment motion is a determination as a matter of law based on undisputed facts. Weston provides no compelling authority, that "findings" issued in the course of a summary judgment ruling rejecting a civil rights action, are entitled to collateral estoppel effect in an intentional interference tort claim.

² WLCB's motion to file an overlength response to the motion for discretionary review is granted.

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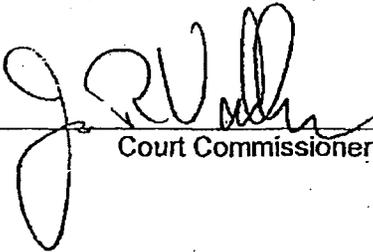
The strict criteria for discretionary review are not satisfied.

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is denied. It is further

ORDERED that the respondents' request for an award of attorney fees is denied..

Done this 30th day of July, 2010.



Court Commissioner

FILED
COURT OF APPEALS, 10th JUDICIAL DISTRICT
STATE OF COLORADO
2010 JUL 30 PM 3:02

APPENDIX D

WASHINGTON STATE DRIVER'S LICENSE

L. CAREY

New search

Views

Photo

Card

Data

Close

WASHINGTON

DRIVER LICENSE

LIC #: CAREYLA152RE

EXP 12-05-2006

CAREY, LOUISE A

1223 SW 124TH ST

SEATTLE WA 98146-0000

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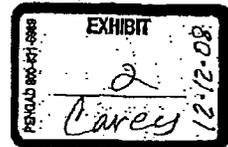
DOB
12-05-1985

AGE 21 ON
12-05-2006



PIC #: CAREYLA152RE
 Control #: 33040993H1144
 Name: CAREY, LOUISE A
 Production status: Mailed
 Issue date: 4/8/2004
 Mailed date: 4-12-2004

Photo Verification v 0.4 ©2002 Digimarc Corporation



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<http://dolwbolycis01.dol.wa.gov/asp/card-view.asp?id=CA...> 11/13/2008