

No. 72344-8-I

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

AARON SWANSON,

Interested Party/Appellant/Cross-Respondent,

v.

CITY OF SEATTLE,

Petitioner/Respondent/Cross-Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Jeffrey M. Ramsdell)

Case No. 13-2-35992-8

REPLY BRIEF OF APPELLANT / CROSS RESPONDENT

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I. INTRODUCTION

The order of the ALJ got it right. The Washington legislature enacted the Local Government Whistleblower Protection Act, RCW 42.41, *et seq.*, to prohibit adverse changes in the “terms and conditions of employment” based on whistleblowing by municipal employees, and subsequently amended the Act to ensure that whistleblowers would even be protected from “hostile acts” encouraged by supervisors. The application of law in the ALJ’s order honored the intent of the legislature concerning RCW 42.41, and avoided the City’s ordinance being applied in such a manner that it impermissibly conflicted with the state law protecting local government whistleblowers.

In the administrative order, ALJ Dublin made numerous findings of fact, which are not challenged on appeal, establishing a pattern of hostile and retaliatory acts toward Swanson that Ron Allen, Swanson’s supervisor, either encouraged or committed himself. As King County Superior Court Judge Jeffrey Ramsdell previously found in regards to ¶ 5.10 of the ALJ’s order, “[g]iven the historical context and Mr. Allen’s prior dealings with Mr. Swanson, a reasonable inference can be drawn that the poster [of the *Seattle Times* comment disparaging Swanson] was a City Light insider who was encouraged to act by the behavior and conduct of Mr. Allen.” *See* CP 685. It is not the role of the reviewing court to weigh the competing

inferences. Furthermore, even if the finding in ¶ 5.10 of the ALJ's order concerning the genesis of the *Seattle Times* comment was found to have not been based on substantial evidence, such error (if any) did not substantially prejudice the City, as numerous other findings of the ALJ that are treated as "verities" on appeal support the ALJ's finding of unlawful retaliation. Thus, the order of the ALJ should be affirmed.

II. REPLY ARGUMENT

A. Swanson preserved his objection below as to whether the City's ordinance conflicts with the intent of state law.

An issue is preserved for appellate review any time a party "advanced the issue below, thus giving the trial court an opportunity to consider and rule on the relevant authority." Bennett v. Hardy, 113 Wn.2d 912, 917, 784 P.2d 1258, 1260 (1990). "[I]t is not necessary to cite all supporting authority in the trial court in order to preserve a substantive issue for appeal. It is only necessary that the issue be raised." Nickerson v. City of Anacortes, 45 Wn. App. 432, 437, 725 P.2d 1027 (1986).

Both at the administrative level and on appeal to the Superior Court, Swanson argued that the City retaliated against him, creating a hostile work environment, "in violation of RCW 42.41 and the Seattle Municipal Code". *See* AR 836 ("Complaint of Retaliation pursuant to SMC 4.20.860[,] RCW 42.41.040") (Appx. 59); *id.* at AR 838 (seeking "[p]rotection from the **hostile work environment** which now exists owing to my report of

improper governmental action”) (Appx. 61). *See also, e.g.*, Post-Hearing Brief, AR 432, at n.3; AR 434 (The issue is whether the City retaliated “as alleged in the Complaint in violation of RCW Chapter 42.41 and the Seattle Municipal Code”); AR 437 (“retaliation was a substantial factor ... in the hostile work environment he endured since 2010, but especially in the month before he filed his complaint to the mayor”). *Accord* Swanson Resp. to City’s Trial Brief, CP 631-32 (“[R]ead together, the ‘...terms and conditions of employment’ language and the ‘but not limited to’ language [in the former ordinance] combine to at least mean the same as the ‘hostile actions’ language of RCW 42.41.020(3)(b).”).¹

Contrary to the City’s claims, Swanson’s brief to this Court is not the first time he has argued that the City’s ordinance failed to meet the intent of RCW 42.41, *et seq.* *See* Resp.’s brief, 23-24; *cf.* CP 692. After Judge Ramsdell reversed the decision of the ALJ, ruling that Swanson’s allegations were actionable under the definition of “retaliatory action” included in RCW 42.41.020(3)(b), but not under the definition of “retaliatory action” in former SMC 4.20.850(D) (CP 684), Swanson filed a motion for reconsideration of the Superior Court’s order, raising the issue of whether former SMC 4.20.850(D) “**failed to meet the intent**” of RCW

¹ Because Swanson was the prevailing party before ALJ Dublin, he was entitled to argue to the reviewing court any grounds in support of the order that were supported by the record. *See, e.g., McGowan v. State*, 148 Wn. 2d 278, 287, 60 P.3d 67, 72 (2002).

42.41, *et seq.* and was “void because it fail[ed] to meet the requirements of RCW 42.41.050.” CP 692. Such legal argument made in support of a motion for reconsideration is properly raised before the lower court and preserves the issue for appeal. *See Anderson v. Farmers Ins. Co. of Washington*, 83 Wn. App. 725, 730, 923 P.2d 713 (1996).²

Swanson’s argument before this Court, that the City’s former ordinance violates Art. XI, § 11 of the Washington Constitution based on contravening RCW 42.41, *et seq.*, is directly related to the issue in his motion for reconsideration (*i.e.*, whether the ordinance was “void” owing to the state law). The Court may consider a newly-articulated theory that is “arguably related” to the issues raised in the trial court. *See Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), *aff’d*, 166 Wn.2d 264, 208 P.3d 1092 (2009). Additionally, “[c]onstitutional issues may initially be raised on appeal, provided that the record is adequate to permit review.” *In re Marriage of Akon*, 160 Wn. App. 48, 59, 248 P.3d 94, 100 (2011), *citing* RAP 2.5(a).

“[T]his court has inherent authority to consider all issues necessary to reach a proper decision.”³ In appeals from an administrative agency

² *Accord Reitz v. Knight*, 62 Wn.App. 575, 581, n. 4, 814 P.2d 1212 (1991); *Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986).

³ *Heidgerken v. State, Dep’t of Natural Res.*, 99 Wn. App. 380, 387, 993 P.2d 934 (2000), *citing Shoreline Community College Dist. No. 7 v. Employment Sec. Dep’t*, 120 Wn.2d 394, 402, 842 P.2d 938 (1992). *See also State v. Klinker*, 85 Wn. 2d 509, 514, n. 4, 537

decision, the Court may affirm the decision on any basis established by the pleadings and supported by the record. Pac. Land Partners, LLC v. State, Dep't of Ecology, 150 Wn. App. 740, 208 P.3d 586 (2009); Heidgerken v. State, Dep't of Natural Res., 99 Wn. App. 380, 388, 993 P.2d 934, 939 (2000) (“We may affirm on any theory supported by the record and legal authorities even if the lower tribunal did not consider such grounds”).

For all of these reasons, the Court should consider Swanson’s argument that the City’s former ordinance fails to meet the intent of RCW 42.41, *et seq.*, in contravention of state law, and to the extent that it does, the ordinance is unconstitutional and void.

B. ALJ Dublin’s application of RCW 42.41.020(3)(b) to define the scope of unlawful whistleblower retaliation was proper.

1. The scope of protection provided in the City’s former ordinance did not meet the intent of RCW 42.41, *et seq.*

This Court reviews questions of statutory interpretation *de novo*. The Washington legislature enacted the Local Government Whistleblower Protection Act in 1992.⁴ The law’s stated purpose declares in relevant part:

It is the policy of the legislature that local government employees should be encouraged to disclose... improper governmental actions of local government officials and employees. The purpose of this chapter is to protect local government employees who make good-faith reports to appropriate governmental bodies and to provide

P.2d 268 (1975) (deciding the case primarily based on constitutional issue that the “trial court did not consider, and the parties did not address”)

⁴ Laws of 1992, ch. 44.

remedies for such individuals who are subjected to retaliation for having made such reports.

RCW 42.41.010.

Well established canons of statutory construction apply here in interpreting the Act: “(1) that the entire statute should be liberally construed to advance the remedy provided by the act (Peet v. Mills, 76 Wn. 437, 136 P. 685 (1913)); (2) to conform to the spirit as well as the letter of the act (Alderwood Water Dist. v. Pope & Talbot, Inc., 62 Wn.2d 319, 382 P.2d 639 (1963)); and (3) that any doubt as to the meaning of the statute should be resolved in favor of the claimant for whose benefit the act was passed....” See Gaines v. Dep’t of Labor & Indus., 1 Wn. App. 547, 552, 463 P.2d 269 (1969). There can be no dispute that Swanson is within the class of persons that the legislature sought to protect in enacting RCW 42.41, *et seq.*

Originally, the Local Government Whistleblower Protection Act lacked express language prohibiting “hostile actions” encouraged by a supervisor. See Laws of 1992, ch. 44, § 2. The statute was amended in 1994 to add the prohibition on “hostile” acts language. Laws of 1994, ch. 210 § 1. The Senate Bill Report on the 1994 amendment notes that the State Government Whistleblower Protection Act (RCW 42.40) already contained a “similar specific prohibition” on hostile acts encouraged by supervisors. SHB Senate Bill Report (1994). See RCW 42.40.050(1)(b)(xii) (City’s

Appx., A-7).⁵ The Senate Bill Report summarized the testimony against amending RCW 42.41 to parallel the language of RCW 42.40 as follows: “Existing law is working. Changes are not necessary. Already covered by existing language.” SHB Senate Bill Report (1994). Nevertheless, the legislature amended RCW 42.41 and explicitly prohibited local government supervisors from encouraging employees to behave in a hostile manner towards whistleblowers. *See* Laws of 1994, ch. 210 § 1.

It is true that the Local Government Whistleblower Protection Act includes a “conditional exemption” for local governments that adopt “a program for reporting alleged improper governmental actions and adjudicating retaliation resulting from such reporting... [conditioned on] the program meet[ing] the intent of this chapter.’ RCW 42.41.050.”⁶

In the Superior Court, the City admitted that the state statute is “**materially different**” from the former Seattle Municipal Code. CP 662 (City’s Reply Brief Re: Judicial Review). The City should be judicially estopped from now claiming that “RCW 42.41.020(3) is substantially similar to the ... definition adopted by the Seattle Municipal Code.” *See* Resp.’s brief, at 30-31.⁷ In any case, the City still acknowledges that the

⁵ *See also* RCW 74.34.180(3)(b) (protecting whistleblowers of abuse of vulnerable adults from “hostile” acts encouraged by a supervisor); RCW 43.70.075(2)(b) (same protection from harassment to persons who report quality of care concerns to Dept. of Health).

⁶ *Keenan v. Allan*, 889 F. Supp. 1320, 1365 (E.D. Wash. 1995) (italics added), *aff’d*, 91 F.3d 1275 (9th Cir. 1996)

⁷ “Judicial estoppel is an equitable doctrine that precludes a party from asserting one

statute's scope of protection includes retaliatory actions "not connected to a change in terms and conditions of employment"—a level of protection that the City's former ordinance fails to provide. *See* Resp.'s brief, at 31.

In spite of the admitted "material difference" in the level of protection the former ordinance provided, the City maintains that RCW 42.41.050 exempts it from application of the definition of "retaliatory action," as amended in 1994. It is the City's position that despite the addition of plain language prohibiting "hostile" acts, as long as the "stated purpose" of the ordinance mirrors the "stated purpose" of the statute, the City can permit supervisors to encourage employees to behave in a hostile manner toward whistleblowers and still "meet the intent" of RCW 42.41, *et seq.* *See* Resp.'s brief, 26-27.

The City's position defies common sense. The Court must "construe statutes as a whole to give effect to all the language and to harmonize all provisions." Edmonds Shopping Ctr. Associates v. City of Edmonds, 117 Wn. App. 344, 356, 71 P.3d 233 (2003), *citing* City of Seattle v. Fontanilla, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). "A statute should be construed to effect its purpose, and 'unlikely, absurd or strained consequences should be avoided.'" State v. Akin, 77 Wn. App. 575, 580, 892 P.2d 774, 776 (1995) (*quoting* State v. Stannard, 109 Wn.2d

position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538 (2007).

29, 36, 742 P.2d 1244 (1987)).

Given the statutory text, it defies logic that the legislature intended for employees protected by the Local Government Whistleblower Protection Act to have no protection from either a retaliatory “hostile work environment” or individual acts of retaliatory harassment. Surely, the City cannot enact an ordinance that deviates from the statute by allowing whistleblowers to be terminated for their whistleblowing—another form of behavior the legislature explicitly prohibited in RCW 42.41—and still claim the ordinance meets the intent of the statute simply because *an* ordinance was passed that includes a similar “stated purpose” as the state law. For the same reason, the City’s prior ordinance fails to meet the intent of the statute if it permits hostile acts against a whistleblower, encouraged by a supervisor, which the legislature has acted to specifically prohibit.

There is a paucity of published cases that apply either the Local Government Whistleblower Protection Act or the Seattle Whistleblower ordinance. Research by Swanson’s counsel has found no case that has analyzed or reviewed the definition of “retaliatory action” in the context of either the state statute, RCW 42.41.020(3), or the City’s former ordinance, SMC 4.20.850(D). The City provides no such authority.

The City does cite to a number of cases in which courts found that the existence of a whistleblower program exempted a local government

from RCW 42.41. One such case was Dewey v. Tacoma School Dist. No. 10, 95 Wn. App. 18, 974 P.2d 847 (1999). Dewey is inapposite. Unlike this case, the government in Dewey “adopted [a] Policy..., which **mirror[ed]** **RCW 42.41.**” 95 Wn. App. at 29. Cf. Keenan v. Allen, 889 F. Supp. 1320, 1365 (E.D. Wash. 1995), *aff’d* 91 F.3d 1275 (9th Cir. 1996) (County’s program protected whistleblowers by “paralleling much of [the statute’s] language”).

The City also relies on Wilson v. City of Monroe, 88 Wn. App. 113, 123, 943 P.2d 1134 (1997). In Wilson, the court’s analysis hinged on the fact that the remedies provided by the City’s policy were “*not substantially weaker* than under the statute” and guaranteed employees all “appropriate relief provided by law.” Id.⁸ In contrast, in Swanson’s case, the City’s ordinance is “materially different” from the statute,⁹ narrowing the scope of prohibited conduct and weakening the scope of protection for whistleblowers. The law enacted by the legislature prohibits retaliatory “actions that are not connected to a change in terms and conditions of employment.” *See* Resp.’s brief, at 31. The City’s former ordinance fails to

⁸ The City also discusses Yakima v. Yakima Police and Fire Civil Service Comm., 29 Wn. App. 756, 762, 631 P.2d 400 (1981), which applied a standard for exemption from civil service provisions based on whether city regulations “substantially accomplished” the purpose of RCW 41.08. The court in Yakima took the “substantially accomplished” standard directly from the language of RCW 41.08.010. *See id.* As the legislature chose to omit similar “substantially accomplished” language in the text of RCW 42.41.050, there is no basis to apply the “substantially accomplished” standard in this case.

⁹ CP 602 (City’s Reply Brief Re: Judicial Review).

provide whistleblowers a similar level of protection. *See id.*

The City urges the Court to ignore the fact that the City has now seen the error of its ways and amended the ordinance to prohibit “hostile actions” against whistleblowers encouraged by supervisors.¹⁰ *See* Resp.’s brief, 27-28. Swanson advised the Court of the amended definition of “retaliatory action” in the new ordinance for two reasons. First, so that the Court is informed that this case addresses whether to strike down a formerly enacted law—not the law currently in effect. Second, so that the Court could infer from the fact the City revised the scope of conduct prohibited by the ordinance that the City had recognized that the prior law was deficient and needed to be revised to comply with the statutory intent. *See* current SMC 4.20.800 (Swanson Appx. 23) (the purpose of the amended ordinance includes “to comply with RCW 42.41”).

The City argues that in Woodbury v. City of Seattle, 172 Wn. App. 747, 292 P.3d 134 (2013) “[t]his Court ... found that the relevant Seattle Municipal Code’s provisions meet the intent of Chapter 42.41.” Resp.’s brief, at 27. Such argument distorts the holding in Woodbury, which included no discussion of SMC 4.20.850(D), the code provision at issue in this case. *See generally* Woodbury, 172 Wn. App. 747. In Woodbury, the Court was not presented with any issue about whether the definition of

¹⁰ *See* current SMC 4.20.805 (Swanson Appx. 24).

retaliatory action in the City’s former ordinance “met the intent” of RCW 42.41, *et seq.*, and the Court made no decision on such issue. The question presented in this case is a matter of first impression.

For the reasons stated, the Court should find that the definition of retaliation in the former ordinance failed to meet the intent of RCW 42.41, *et seq.* and it was therefore not error for the ALJ to apply the definition that the Washington legislature adopted in 1994.

2. The level of protection provided to whistleblowers in former SMC 4.20.850(D) is less than that afforded by state law, in violation of the Washington Constitution.

Again, this Court reviews questions of statutory interpretation *de novo*,¹¹ and may affirm the ALJ “on any theory supported by the record and legal authorities even if the lower tribunal did not consider such grounds.”¹²

In response to Swanson’s claim that the City’s ordinance is in conflict with state law, the City now contends there is only a “slight difference” in the two law’s definitions of retaliation. *See* Resp.’s brief, 32-33. The City should be judicially estopped from making such an argument, where it argued below that the state statute was “*materially different*” from the former municipal code. *See* CP 662; and fn. 7.

¹¹ Johnson, 132 Wn. App. at 406.

¹² Heidgerken, 99 Wn. App. at 388. *See also* Klinker, 85 Wn.2d at 514, n. 4 (deciding the case primarily based on constitutional issue that the “trial court did not consider, and the parties did not address”)

The cases that the City relies on in arguing that the former ordinance does not “conflict” with RCW 42.41, *et seq.*, and thus is constitutional, are distinguishable. *See* Resp.’s brief, at 32-33, *citing* City of Seattle v. Eze, 111 Wn.2d 22, 33, 759 P.2d 366 (1988), and City of Bellingham v. Schampera, 57 Wn.2d 106, 111, 356 P.2d 292, 294 (1960).

In Schampera, the Supreme Court found that the City’s “*ordinance [went] farther* in its prohibition—but not counter to the prohibition under the [State] statute. The City does not attempt to authorize by this ordinance what the Legislature has forbidden....” Schampera, 57 Wn.2d at 111, *quoted in* Eze, 111 Wn.2d at 33. In Eze, the Court similarly found that the “*ordinance prohibit[ed] a wider range* of activity than does the state statute.” 111 Wn.2d at 33. No similar situation is presented in this case.

In its effort to claim that the City has the power to enact laws that dilute the prohibitions adopted by the state legislature (and thus the power to “permit” City supervisors and managers to engage in conduct that the state legislature has outlawed), the City quotes language from City of Seattle v. Eze, 111 Wn.2d 22 (1988) and attempts to stretch the holding of that case by ignoring Eze’s factual context (*i.e.*, that the “Seattle ordinance prohibit[ed] a *wider range* of activity than [did] the state statute”). *See* Resp.’s brief, at 32. *Compare* Brown v. City of Yakima, 116 Wn. 2d 556, 562, 807 P.2d 353 (1991) (“This court has repeatedly stated that a local

ordinance does not conflict with a state statute in the constitutional sense merely because the ordinance prohibits a wider scope of activity. Seattle v. Eze, 111 Wn.2d 22, 33, 759 P.2d 366 ... (1988)... Where both the ordinance and the statute are prohibitory, and *the difference between them is that the ordinance goes further in its prohibition*, they are not deemed inconsistent because of mere lack of uniformity in detail. Eze, 111 Wn.2d at 33.”) (emphasis added).

The City’s brief offers no case in which a Washington court upheld a municipal ordinance like the one here, which is admitted to *lessen* the scope of activities prohibited by the legislature. The ordinance’s deviation from the scope of activities prohibited by the state statute, in effect, “permits or licenses that which the statute forbids,” placing the ordinance squarely in conflict with the state statute in violation of the Constitution. See Bellingham v. Schampera, 57 Wn.2d 106, 111, 356 P.2d 292 (1960); Const. art. VI, § 11. As a result, the Court should find that the definition of retaliation provided in the City’s former ordinance is void and that the ALJ properly applied the definition of retaliation and scope of protection intended by the legislature when it enacted RCW 42.41.020(3)(b).

C. The Court may also affirm the administrative decision based on the “terms and conditions” language in the ordinance and statute, which is a phrase broad enough to prohibit a retaliatory “hostile work environment.”

The City now contends that case law analyzing identical “terms and conditions of employment” language found in the WLAD is irrelevant to analyzing Swanson’s claim for whistleblower retaliation. *See* Resp.’s brief, 33-34 (“What the City [] does dispute is that any analysis under the WLAD is relevant to Swanson’s whistleblower retaliation claim.”) Such position is inconsistent with the City’s briefing to ALJ Dublin. *See* City’s Post-Hearing Brief, AR 456-57 (arguing comments of Kennedy that “occurred on just one day” and were overheard by Swanson rather than directly made to him were “insufficient to rise to the level of harassment”), *citing* “*Cf. Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406 (1985) (in the context of the law against discrimination... [t]he harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.’).”

It should not be in dispute that jurisprudence analyzing the WLAD is appropriate for analyzing a whistleblower retaliation claim, and vice versa. The “substantial factor” standard for causation, which is fundamental to the review of all WLAD claims, originates from the jurisprudence for wrongful discharge in violation of public policy claims—the common law

tort based on whistleblower retaliation.¹³

In its brief, the City correctly states that a plaintiff must prove an “adverse employment action” to establish a retaliation claim under the WLAD. Resp. brief, at 35, *citing* Estevez v. Faculty Club of the Univ. of Wash., 129 Wn. App. 774, 797, 120 P.3d 579 (2005). The brief then claims: “Retaliation claims are based on **discrete events** under the WLAD....” Resp. brief, at 35. The City cites no authority for this proposition, id., and Swanson is aware of none. To the contrary, under the WLAD, it is well established that “a hostile work environment ... may ... amount to an adverse employment action.”¹⁴

The Court should not “pars[e] a hostile work environment claim into component parts ‘for statute of limitations purposes.’” Loeffelholz v. Univ. of Washington, 175 Wn.2d 264, 273, 285 P.3d 854 (2012). The claim “cannot be said to occur on any particular day. It occurs over a series of days....” Antonius v. King County, 153 Wn.2d 256, 264, 103 P.3d 729 (2004). Even if the Court considered only those acts occurring within 30

¹³ See Allison v. Housing Auth., 118 Wn.2d 79, 85–96, 821 P.2d 34 (1991) (adopting “substantial factor” standard from common law wrongful discharge claim for whistleblowers), *citing* Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 821 P.2d 18 (1991). See also Dicomes v. State, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989) (stating wrongful discharge in violation of public policy claim usually arises where the employer discharges the employee for, *inter alia*, “engaging in ‘whistleblowing’ activity.”)

¹⁴ See Alonso v. Qwest Commc’ns Co., LLC, 178 Wn. App. 734, 746, 315 P.3d 610, 617 (2013), *citing* Kirby v. City of Tacoma, 124 Wn.App. 454, 465, 98 P.3d 827 (2004), *review denied*, 154 Wn.2d 1007, 114 P.3d 1198 (2005); Boyd v. State, Dep’t of Soc. & Health Servs., _ Wn. App. _, _ P.3d _, 2015 WL 1945252 (2015).

days of Swanson filing his whistleblower complaint to be actionable, the “established facts” of the ALJ concerning Ron Allen’s prior conduct is part of “the totality of circumstances” and gives “context” to the timely filed, recoverable conduct. *See* Loeffelholz, 175 Wn.2d at 278.

The legislature is presumed to know the existing state of case law. Renner v. City of Marysville, 145 Wn. App. 443, 453, 187 P.3d 283 (2008) (citing Bundrick v. Stewart, 128 Wn.App. 11, 17, 114 P.3d 1204 (2005)), *aff’d*, 168 Wn. 2d 540, 230 P.3d 569 (2010). It only stands to reason that the legislature (and the City Council) used the same “terms and conditions of employment” statutory language from which all hostile work environment jurisprudence derives, intending to permit the same right to be free from harassment that is “sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.” *See* Glasgow, 103 Wn.2d, at 406–07. The City effectively conceded as much below. *See* AR 456-57, *quoting* Glasgow, 103 Wn.2d at 406

One federal statute that prohibits adverse changes in “terms and conditions of employment” because of whistleblowing is the Energy Reorganization Act (“ERA”), 42 U.S.C. § 5851. Courts have consistently interpreted the “terms and conditions” phrase in the ERA to provide a claim for retaliatory harassment or hostile work environment. *See* CP 700-702; *accord* Williams v. Admin. Review Bd., 376 F.3d 471, 476-77 (5th

Cir. 2004) (collecting cases); English v. Whitfield, 858 F.2d 957, 963-64 (4th Cir.1988) (analyzing issue as matter of first impression and holding that ERA permits “hostile work environment” claims based on Congress’ use of identical “terms, conditions, or privileges of employment” language in Title VII), *discussing* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

For all of these reasons, the prohibition on adverse changes in the “terms and conditions of employment” in the City’s former ordinance (and the state statute) would be violated by the creation of a retaliatory hostile work environment. The “established facts” and findings of ALJ Dublin support Swanson’s claim for hostile work environment, or adverse change in the “terms and conditions” of employment, in violation of the City’s ordinance and the state statute. For discussion, *see infra*, section III.A.2.

III. RESPONSE TO CROSS-APPEAL

A. ALJ Dublin’s finding of actionable retaliation is supported by “substantial evidence.”

1. Standard of Review

“The test for substantial evidence is modest” and “highly deferential” to the administrative fact finder.¹⁵ Nw. Pipeline Corp. v. Adams County, 132 Wn. App. 470, 475, 131 P.3d 958, 960 (2006). It is a “burden of production”—not a burden of persuasion. Id. “Whether the

¹⁵ Motley-Motley, Inc. v. State, 127 Wn. App. 62, 72, 110 P.3d 812, 818 (2005).

burden of persuasion has been met is for the finder of fact.” Id. “[This court’s] application of the substantial evidence test is not influenced by the burden of persuasion.” Id. “Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations.”¹⁶ This court is to “accept the fact finder’s determinations of witness credibility and the weight to be given reasonable but competing inferences.”¹⁷

“It is sufficient if [Swanson’s evidence] ‘would convince an unprejudiced thinking mind of the truth of the fact’ to which the evidence is directed.” Nw. Pipeline Corp., 132 Wn. App., at 475.¹⁸ “[I]t does not matter that a reviewing court would likely have ruled differently had it been the trier of fact.”¹⁹ The reviewing court is not to “substitute [its] judgment” for that of the ALJ.²⁰

“The reviewing court is to view the evidence and the reasonable inferences therefrom in the light most favorable to the party who

¹⁶ Gibson v. Washington State Dep’t of Employment Sec., 185 Wn. App. 42, 53, 340 P.3d 882 (2014).

¹⁷ Alpha Kappa Lambda Fraternity v. Washington State Univ., 152 Wn. App. 401, 418, 216 P.3d 451, 460 (2009), citing, City of Univ. Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

¹⁸ Id., citing Davis v. Microsoft Corp., 149 Wn.2d 521, 531, 70 P.3d 126 (2003) (quoting Thomson v. Virginia Mason Hosp., 152 Wn. 297, 300–01, 277 P. 691 (1929)).

¹⁹ Callecod v. Washington State Patrol, 84 Wn. App. 663, 676, 929 P.2d 510 (1997), review denied, 132 Wn.2d 1004, 939 P.2d 215 (1997).

²⁰ See Brighton v. State Dep’t of Transp., 109 Wn. App. 855, 862, 38 P.3d 344, 348 (2001), citing US W. Commc’ns, Inc. v. Util. & Transp. Comm’n, 134 Wn.2d 48, 62, 949 P.2d 1321 (1997).

prevailed at the administrative proceeding below.”²¹ Thus, the court takes Swanson’s evidence “as true,” and draws all inferences in his favor.²²

In considering the presentation of evidence, “[i]t ... must be kept in mind that the employee must prove the wrongful conduct... generally without the access to proof which the employer has.”²³ “Proof of the employer’s motivation may be difficult for the employee to obtain. ‘Ordinarily the prima facie case must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as his motive.’”²⁴ “Evidence of an actual pattern of retaliatory conduct is, of course, very persuasive” evidence.²⁵

2. Nearly all of ALJ Dublin’s findings are left unchallenged and are now treated as verities.

“[T]his court’s function is to review the record and order of the administrative tribunal—not that of the superior court.” Brown v. State, Dep’t of Health, Dental Disciplinary Bd., 94 Wn. App. 7, 13, 972 P.2d 101, 105 (1998); *see also* RAP 10.3(g)-(h). In the Findings of Fact, Conclusions of Law & Final Order, ALJ Dublin ultimately determined, “The City of Seattle unlawfully retaliated against Mr. Swanson under SMC 4.20.860 and

²¹ Gibson v. Washington State Dept. of Employment Sec., 185 Wn. App. 42, 51, 340 P.3d 882 (2014).

²² *See* Faghih v. State Dep’t of Health, 148 Wn. App. 836, 850, 202 P.3d 962 (2009), *citing* Ancier v. State, Dep’t of Health, 140 Wn. App. 564, 573, 166 P.3d 829, 833 (2007).

²³ Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn. 2d 46, 72, 821 P.2d 18 (1991).

²⁴ Id., at 69.

²⁵ Id.

RCW 42.41.040 for engaging in protected whistleblower activity.” Id., ¶ 2.1 (AR 508). The City has not challenged or sought review as to whether this decision is “arbitrary and capricious.” *See, e.g., Rios v. Washington Dep't of Labor & Indus.*, 145 Wn.2d 483, 504, 39 P.3d 961 (2002) (“[N]either the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious.”)

Instead, the City’s lone assignment of error in the cross-appeal challenges whether there is adequate evidence to support the “ALJ’s factual finding in C.L. 5.10.” *See* Resp.’s brief at 5.

Fifty-four (54) separate paragraphs were entered as “Findings of Fact” supporting the ALJ’s decision. *See id.*, ¶¶ 4.1-4.54. The City does not assign error to any of these Findings of Fact. *See* Resp.’s brief, at 5. If a party does not formally assign error to a finding of fact that the party wishes to challenge, the finding becomes a verity.²⁶ Thus, ¶¶ 4.1-4.54 of the administrative order are “verities” and the “established facts” on appeal.²⁷ The City also made no assignment of error as to the factual findings made under the label of Conclusion of Law (“C.L.”) 5.6, or to part

²⁶ State v. Ross, 141 Wn.2d 304, 311, 4 P.2d 130 (2000) (holding that “failure to challenge findings of fact is *not* a technical flaw” within the meaning of State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995), such that the Court can disregard it); *see also* RAP 10.3(a)(3); RAP 10.3(g)-(h)

²⁷ Tapper v. Employment Sec. Dep’t, 122 Wn.2d 397, 407, 858 P.2d 494 (1993); Brown v. State, Dep’t of Health, Dental Disciplinary Bd., 94 Wn. App. 7, 13, 972 P.2d 101 (1998).²⁷

of the factual findings in C.L. 5.10, which should be treated as findings of fact and also included in the “established facts” under review.²⁸ As a result, the ALJ’s factual findings that the City failed to challenge and which are now the “established facts,” include but are not limited to:

- (a) ‘[R]ather than working with Mr. Swanson to get him the resources he needed to improve quicker, Mr. Allen encouraged Mr. Swanson to drop out. When Mr. Swanson did not drop out, Mr. Allen then failed to provide Mr. Swanson with individualized training as his ITP required, bullied Mr. Swanson, and continued trying to persuade him to leave his apprenticeship, all of which undoubtedly impacted Mr. Swanson’s confidence and the rate at which he learned and progressed in his apprenticeship.’ (See ¶ 5.6, AR 503).
- (b) One month after Swanson reported Allen’s misconduct involving the alcohol incident, Allen more likely than not told Swanson, ‘You’re just a fucking squeak.’ (¶ 4.25, AR 494).
- (c) ‘Swanson observed Mr. Allen with a copy of [his] report in hand, showing it to groups of lineworkers on the dock.’ (*Id.*; accord CP 1328).²⁹
- (d) ‘After Mr. Swanson reported improper governmental activity by Mr. Allen, ... Mr. Allen lobbied line workers and crew chiefs to downgrade Mr. Swanson’s performance evaluations in an attempt to cancel his apprenticeship.’ (See ¶ 4.50, AR 501; accord ¶ 5.6,³⁰ AR 503). Outside investigator Ron Knox found on a more probable than not basis that this conduct appeared retaliatory in nature. (See ¶ 4.49, AR 522; AR 1316).
- (e) A ‘poster of [Swanson] with the word ‘RAT’ written on his

²⁸ See, e.g., *Hoke v. Stevens-Norton, Inc.*, 60 Wn.2d 775, 778, 375 P.2d 743 (1962) (holding that “conclusion of law [that] partakes of the nature of a finding of fact ... may be treated as such”); *Brown*, 94 Wn. App. at 13; compare AR 504-05, at ¶ 5.6, and portions of ¶ 5.10 for which the City raises no objection.

²⁹ Such clerk’s papers are Administrative Report of Proceedings (Apr. 25, 2013), at 731.

³⁰ See fn. 28, *supra*.

chest, hung in the hallway of the North Service Center' from at least January to July 2012. (¶¶ 4.28, 4.36; AR 495).

- (f) Swanson reported that Allen called him a 'fuck stick' and a 'piece of shit' in the middle of the union hall, accusing Swanson of stabbing him in the back, and inciting a fight with Swanson by asking Mr. Swanson to 'step outside' immediately before a union meeting began. Allen's uncle, Joe Simpson, hindered an investigation of the incident. (¶ 4.34, n.2; AR 496).
- (g) '[S]omeone removed a sticker with the acronym PAL ['Pre-Apprentice Lineworker'] on it from a nearby locker and stuck it on the locker [Swanson] was using,' where it remained between September and October 2012. (¶ 4.38, AR 497). *The placement of the PAL sticker on Swanson's locker was 'undoubtedly [a] hostile action[] taken by [an] SCL employee[] ... that Mr. Allen either vocally or tacitly encouraged, if not performed himself.'* (¶ 5.10, AR 504).
- (h) 'On or around [November 6], Mr. Swanson overheard Mr. Kennedy mutter to another worker, while gesturing at Mr. Swanson, 'I was just sent to Ethics by your buddy.' (¶ 4.46, AR 521).
- (i) On November 7, 2012, "someone claiming to be Mr. Swanson posted a response online to the November 5, 2012 *Seattle Times* article," stating: "Hi my name is Arron (sic) Swanson I was the one that brought all this up to save my job. I have not been doing well here at the city and this is my way of proving a point and saving my job that I might not have for much longer. I am saddened for what I have done to my union brother but it is already done. Sincerely Arron Swanson" (¶ 4.47, AR 500).
- (j) "On or around November 7, 2012, while working on a crew, someone took pictures of text messages on Mr. Swanson's cell phone, without [his] knowledge or authorization. These text messages ... discussed the newspaper article response and Mr. Swanson's retaliation claims. These photos ended up at Local 177; Mr. Simpson then sent them to SCL Human Resources." (¶ 4.48, AR 500).

The foregoing facts taken alone support Swanson's claim for unlawful retaliation of a whistleblower under both the adverse change in "terms and conditions" provision of former SMC 4.20.850(D) and the "hostile acts" provision of RCW 42.41.020(3)(b). Thus, any error in the ALJ's finding in a portion of ¶ 5.10, addressing the likely source of the *Seattle Times* comment, is harmless. See section III.A.5., *infra*.

Additionally, the foregoing verities establish a "pattern of retaliation" that give the fact-finder a basis upon which to reasonably infer the facts stated in ¶ 5.10 about the likely source of the *Seattle Times* online comment that disparaged Swanson. See *Wilmot*, 118 Wn.2d at 69.

3. There is a difference between pure conjecture and reasonable inference from established facts. In this case, it is reasonable to infer from the facts that Allen or a City employee he encouraged posted the *Seattle Times* comment.

In its cross-appeal, the City argues that only "speculation" supports the ALJ's finding in ¶ 5.10 (AR 504) that the impersonation of Swanson to the *Seattle Times* was a hostile action taken by a City employee that Allen either vocally or tacitly encouraged, if not performed himself. See Resp.'s brief, 36-37, 41-49.

The City's argument "loses sight of the clear distinction between pure conjecture and reasonable inference." *Nelson v. W. Coast Dairy Co.*, 5 Wn.2d 284, 297, 105 P.2d 76 (1940). The finding the City challenges, "like any other fact, may be proven by circumstantial evidence." *Id.* Here, it is

already “established” that there was a pattern of retaliation by Allen and City employees who Allen encouraged, providing “circumstantial evidence [that] can be as probative as direct evidence and [that] may create a chain of facts from which the [fact-finder] may draw reasonable inferences” concerning the source of the harassing *Seattle Times* impersonation of Swanson. *See Boguch v. Landover Corp.*, 153 Wn. App. 595, 614, 224 P.3d 795 (2009).³¹

Again, the verities on appeal include, among other things, that: (i) Allen showed a group of lineworkers Swanson’s complaint; (ii) Allen lobbied others to downgrade Swanson’s performance; (iii) a poster of Swanson was hung in the workplace with the word “RAT” written on it; (iv) a sticker was placed on Swanson’s locker that “undoubtedly [was] [a] hostile action[] taken by [an] SCL employee[] ... that Mr. Allen either vocally or tacitly encouraged, if not performed himself”; and (v) while Swanson was working on a crew on or about November 7, “someone took pictures of text messages on Mr. Swanson’s cell phone, without Mr. Swanson’s ... authorization,” to document text message conversations he had discussing the newspaper article response. *See supra*, section III.A.2.

“[I]t is clear that the individual who posted the comment had ‘insider’ information not known to the general public and was aligned with

³¹ *Accord State v. Ong*, 88 Wn. App. 572, 576, 945 P.2d 749 (1997) (“Circumstantial and direct evidence are equally reliable.”).

Mr. Allen.” CP 685. “Given the historical context and Mr. Allen’s prior dealings with Mr. Swanson, a reasonable inference can be drawn that the poster was a City Light insider who was encouraged to act by the behavior and conduct of Mr. Allen.” Id. On appeal, this court is required to “accept the fact finder’s determination[] of ... the weight to be given reasonable but competing inferences.”³² See also Frescoln v. Puget Sound Traction, Light & Power Co., 90 Wn. 59, 64, 155 P. 395, 397 (1916) (“plaintiff was not required to prove her case beyond a reasonable doubt, ... it was only ‘necessary that she show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable”); Attwood v. Albertson’s Food Centers, Inc., 92 Wn. App. 326, 331, 966 P.2d 351, 353 (1998) (“The plaintiff need not establish causation by direct and positive evidence, but only by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable”); St. Germain v. Potlatch Lumber Co., 76 Wn. 102, 109-10, 135 P. 804 (1913) (holding plaintiff is not required to “establish[] to such absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause”).

It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a *greater probability* that the [event]

³² Alpha Kappa Lambda Fraternity v. Washington State Univ., 152 Wn. App. 401, 418, 216 P.3d 451 (2009), *citing* City of Univ. Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

causing the injury happened in such a way as to fix liability upon the person charged with such liability, than it is that it happened in a way for which the person so charged would not be liable.

Andrews v. Del Guzzi, 56 Wn.2d 381, 386, 353 P.2d 422 (1960).

That “evidence was in dispute” is not determinative. *See* Letres v.

Washington Co-op. Chick Ass’n, 8 Wn. 2d 64, 71, 111 P.2d 594 (1941).

Likewise, “[t]he bare possibility of the existence of a cause other than that relied upon does not preclude a preponderance of the evidence in its support.” Lynch v. N. Life Ins. Co., 22 Wn. 2d 912, 918, 158 P.2d 90 (1945). Here, it is established that Allen and other employees encouraged by him previously engaged in hostile acts against Swanson, including lobbying to downgrade Swanson’s performance; hanging a poster of Swanson with the word “RAT” in the workplace; and posting the demeaning “Pre-Apprentice Lineworker” sticker on his locker at work, approximately one month before the *Seattle Times* comment was posted. Such “[e]vidence of an actual pattern of retaliatory conduct” by City employees is very persuasive evidence that Allen or another SCL employee encouraged by him posted the harassing comment impersonating Swanson on the *Seattle Times* website.³³

³³ *See* Wilmot, 118 Wn.2d at 69.

4. The City is limited to the specific “substantial evidence” challenge to ¶ 5.10 of the ALJ Order that it asserted in its petition below and may not augment its objection on appeal.

In the Petition for Review filed below in the Superior Court, the City specified its “substantial evidence” challenge as follows: “Judge Dublin’s factual finding in paragraph 5.10 that the *Seattle Times* website comment was ‘undoubtedly hostile action taken by SCL employees toward Mr. Swanson that Mr. Allen either vocally or tacitly encouraged, if not performed himself’ is not supported by substantial evidence in the record.” *See* CP 509.

In paragraph 5.10 of the administrative order, ALJ Dublin had also found that “at the time the impersonation of Mr. Swanson to the *Seattle Times* took place, Mr. Allen was in a secondary supervisory position with the City over [Swanson] because of his participation with the JATC, a City committee with authority to negatively impact [Swanson’s] apprenticeship.” AR 525. The City failed to challenge this finding in its petition for review, as required by the WAPA. *See* CP 509; *cf.* RCW 34.05.546(7). Nor did the City challenge the finding about Allen’s supervisory position in the pre-hearing brief the City filed in support of its petition for judicial review. *See* CP 202-206; CP 444-49; *cf.* Brief of Respondent, at 40-46.

The Court should find that the City failed to preserve any objection to the ALJ's finding that Allen had a "supervisory" role and should disregard the new claim that Allen was "[n]ot Swanson's Supervisor." *See* Resp.'s brief, 46-48; *see also* State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) ("[E]rrors not raised in the trial court may generally not be raised for the first time on appeal..."), *citing* RAP 2.5(a); In re Martin, 154 Wn. App. 252, 262, 223 P.3d 1221, 1226 (2009) ("[A]n appellate court may refuse to review any claim of error that was not raised in the trial court and that does not involve an issue of constitutional magnitude. RAP 2.5(a).")

5. Even if the ALJ erred in making factual finding 5.10, the error was harmless, as the other findings sustained Swanson's claim.

Under the APA, the burden of demonstrating the invalidity of the agency action is on the party asserting invalidity, and the reviewing court 'shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.' RCW 34.05.570(1)(a), (d).

In re Martin, 154 Wn. App. at 260; *accord* City of Vancouver v. State Pub. Employment Relations Comm'n, 180 Wn. App. 333, 357, 325 P.3d 213 (2014).

"[A]n erroneous finding of fact not materially affecting the conclusions of law is not prejudicial and does not warrant a reversal." *See* State v. Caldera, 66 Wn. App. 548, 551, 832 P.2d 139, 141 (1992).

The ALJ's plethora of findings, nearly all of which are undisputed on appeal, support the ALJ's ultimate conclusion that, "The City of Seattle unlawfully retaliated against Mr. Swanson under SMC 4.20.860 and RCW 42.41.040 for engaging in protected whistleblower activity." "Where the findings are supported by substantial evidence [or are left unchallenged on appeal], the question is whether they support the conclusions of law." *See Nejin v. City of Seattle*, 40 Wn. App. 414, 418-19, 698 P.2d 615, 618 (1985), *citing Hoke v. Stevens-Norton, Inc.*, 60 Wn.2d 775, 776, 375 P.2d 743 (1962).

The City cannot show prejudice from the error it alleges was made in a portion of the factual finding in ¶ 5.10. The ALJ's ultimate conclusion of unlawful retaliation was supported by substantial evidence even without the factual finding it challenges in part of ¶ 5.10. *See* "established facts" described *supra*, in section III.A.2 (including as part of the hostile acts and hostile work environment, Allen showing Swanson's complaint to a group of lineworkers; lobbying others to downgrade Swanson's performance, which appeared to be retaliation; the "poster" of Swanson with the word "RAT" on his chest being hung in the workplace for more than six months; the sticker placed on Swanson's locker that 'undoubtedly [was] [a] hostile action[] taken by [an] SCL employee[] ... that Mr. Allen either vocally or tacitly encouraged, if not performed himself'; the November 6 comment of

co-worker Kennedy about being sent to “Ethics” because of Swanson; and the November 7 invasion of Swanson’s privacy through the unauthorized access of his cell phone text messages while he was busy with his crew at work.³⁴) These undisputed facts meet Swanson’s minimal burden of production to show that “[t]he City of Seattle unlawfully retaliated against Mr. Swanson under SMC 4.20.860 and RCW 42.41.040 for engaging in protected whistleblower activity.” *See id.*, ¶ 2.1 (AR 508).

IV. ATTORNEY’S FEES

A. The Court should remand this matter to the ALJ under RCW 34.05.570(3)(f) for a determination of the attorney’s fees.

The City agrees with Swanson that the current whistleblower code, SMC 4.20.865(D)(1)(c) (amended Dec. 9, 2013) (Appx. 47), “should have no effect on any determination of reasonable attorney fees by the ALJ.” Resp.’s brief, at 37. Thus, Swanson asks that the Court affirm ALJ Dublin’s decision and remand this matter to the ALJ with an instruction that she determine Swanson’s attorney’s fees under the provisions of former SMC 4.20.860(C) (Appx. 18) and RCW 42.41.040(7) (Appx. 3).³⁵

³⁴ The Washington Supreme Court has held that cell phone text messages are a “private communication” subject to the protections afforded by the Privacy Act, RCW 9.73, *et seq.* State v. Roden, 179 Wn. 2d 893, 903, 321 P.3d 1183 (2014).

³⁵ Alternatively, the Court might remand the matter to the Superior Court for determination of the fee award, as was recently done in Arnold v. City of Seattle, ___ Wn. App. ___, 345 P.3d 1285 (2015) (remanding to Superior Court for determination of fees incurred before the Seattle Civil Service Commission).

V. CONCLUSION

Based on the legislative intent underlying RCW 42.41, *et seq.*, and the established facts and record in this case, the Court should affirm ALJ Dublin's finding of actionable retaliation. The ALJ's award of attorney's fees and costs to Swanson should be reinstated and this matter should be remanded for a determination of the exact amount of such award.

RESPECTFULLY SUBMITTED this 22nd day of June, 2015.

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DECLARATION OF SERVICE

Jodie Branaman states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by the Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On June 22, 2015, I caused to be delivered via email addressed to:

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a copy of REPLY BRIEF OF APPELLANT / CROSS RESPONDENT.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of June, 2015 at Seattle, King County, Washington.

s/ Jodie Branaman
Jodie Branaman
Legal Assistant

2015 JUN 22 PM 2:03
CLERK OF APPEALS DIV 1
STATE OF WASHINGTON