

74265-5

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No. 74265-5

COURT OF APPEALS DIVISION I OF THE STATE OF
WASHINGTON

In the Matter of
DENISE SMITH

DENISE SMITH, a single woman,

Plaintiff - Appellant,

v.

SONITROL PACIFIC,

Defendant - Defendant.

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS DIV I
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STATUTES

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RCW 49.60.180; Pg. 10

I. CR 8

Argument is made that the holdings in *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn.App. 18, 974 P.2d 847 (1999) and *Kirby v. City of Tacoma*, 124 Wn.App. 454, 98 P.3d 827 (2004), reject the notion that pleading a claim in one general category is sufficient if a plaintiff plans to assert any other type of claim within that category in opposition to a motion for summary judgment. Res. Op. Br., Pg. 21. Neither of these cases supports that stated argument.

Both *Dewey* and *Kirby* are factually distinguishable from the present circumstances. In both *Dewey* and *Kirby* those Appellants' sought to add entirely new constitutional causes of action in response to a motion for summary judgment. These Appellants were not seeking to add additional facts; they were arguing entirely new and separate constitutional causes of action.

In the present case Smith is not arguing a new legal cause of action, or theory. She has simply identified during discovery additional facts unknown at the time of filing the original complaint which support the retaliation cause of action. The retaliation cause of action, which is the legal theory, was clearly pled in the original complaint and remains unmodified.

Conspicuously missing in the Response to Opening Brief is any discussion of the language quoted from *Bryant v. Joseph Tree*, 119 Wn.2d 216, 221, 829 P.2d 1099 (1992), that Washington’s notice pleading rule *does not* require parties to state all the facts supporting their claims in their initial complaint. Further, the comment by the Supreme Court in that case that “A court should thus be reluctant to impose sanctions for factual errors or deficiencies in a complaint before there has been an opportunity for discovery” is similarly ignored. *Id.* at 221. All of the facts surrounding this case and the statutory activities within which Smith engaged for which she was in turn retaliated had not been fully developed at the time the original Complaint was filed. This does not make the Complaint deficient, however, as the very purpose for discovery is to develop additional facts supporting litigation. *Id.* at 221.

The court in *Kirby* stated that the City should not be required to guess against which claims they will have to defend. *Id.* at 470. This is not disputed, but under the present circumstances this Defendant does not have to guess at either the cause of action and theory of law, retaliation, or the factual basis for this cause of action. As outlined in the Opening Brief all of these factual circumstances were identified months before this trial occurred and were discussed, in detail, during

depositions including the deposition of Jeff LaMont who was specifically questioned at length regarding his misdemeanor conviction as well as the impact this conviction has upon his ability to properly monitor the Oregon accounts. LaMont Dep. Pg. 4-5. CP 1152. Moody Decl. Exhibit 5. CP 1297.

Language from *Dewey and Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), is misquoted by these Defendants stating that if litigants were permitted to advance legal theories without specifically identifying the source of law on which the legal theories rested, “a litigant could simply await trial and surprise their adversary with a [] claim so long as enough facts were intermixed in the complaint.” *Dewey*, supra at 25. Further, “[I]n hindsight it is easy to view facts and agree they support a [] claim.” “It is a much more difficult, if not an impossible task, to predict whether a plaintiff will raise such a claim when it is not alleged in the complaint.” *Id.* at 25. What is not noted by the Defendant from this language however is that the court in *Trask* was specifically addressing the cause of action under the Consumer Protection Act. What the Court actually said was:

[A] litigant must plead more than general facts in a complaint to properly allege a CPA[Consumer Protection Act] cause of action. If no reference is required to the CPA, a litigant would not have to amend their complaint to assert a violation. If this were the rule, a litigant could

simply await trial and surprise their adversary with a CPA claim so long as enough facts were intermixed in the complaint. In hindsight it is easy to view facts and agree they support a CPA claim. It is a much more difficult, if not impossible task to predict whether a plaintiff will raise such a claim when it is not alleged in the complaint. *Trask*, supra at 846; *Dewey*, supra at 25.

The Court was not making such a broad general statement as is alluded in the argument made by this Defendant.

In *Dewey* the Court noted that Dewey's amended complaint explicitly identified seven separate causes of action. The Court also noted Dewey's complaint did not identify a free speech or First Amendment theory, nor did it fairly imply such a theory. "The trial court did not err in finding Dewey's complaint failed to state a First Amendment claim as a legal theory of recovery." *Id.* at 25.

The clear implication of this language is that when the court is referring to a "theory of recovery" the Court is referring to the legal cause of action being alleged, not the facts which support the legal theory. Ms. Smith in her original Complaint clearly identified the legal theory for seeking recovery as that of retaliation. As noted by the Court in *Bryant*, Smith quite properly used the discovery process to further develop the factual basis of the stated retaliation cause of action. For this Smith should not be sanctioned with the ultimate sanction of dismissal. Smith has fully complied with CR 8.

The argument by this Defendant attempts to extrapolate the argument that a new legal theory cannot be argued in reply to a motion for summary judgment into an argument that developed facts, not legal theories, cannot be argued. No case cited by the Defendant, or for that matter which has been located, supports that extrapolation.

II. L&I NOTIFICATION

Argument is made that Smith's "newest legal theory", alleged for the first time on appeal, asserts that her allegations related to drinking during the workday are protected by WISHA. This argument is baseless. The original complaint in paragraph 3.10 and 3.11 form the factual basis regarding Smith's observation of her managers consuming alcohol during the workday and making business-related decisions while under the influence of alcohol as discussed. Paragraph 6.2 of the Complaint specifically states that the Plaintiff brought to the attention of HR the fact that several managers at this office location were consuming alcohol during the workday. Further, it was alleged that she brought to the attention of HR that the consumption of alcohol is a widely tolerated practice within the office. In *Cudney vs. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011) the Court agreed that the WISHA regulations apply to a circumstance where an employee files numerous complaints to his supervisor about the alcoholic use of a branch general

manager. Clearly the facts alleged in the original Complaint placed this Defendant on notice of the retaliation claim for violation of a WISHA regulation applied in this cause of action.

Argument is made that support of Smith's retaliation claim for the WISHA violation fails because she never filed a complaint with the Washington State Department of Labor and Industries, "a necessary statutory prerequisite." Res. Op. Br., Pg. 23. This is not a necessary statutory prerequisite and the assertion to the contrary is simply wrong as a matter of law.

In *Wilson v. City of Monroe*, 88 Wn.App. 113, 943 P.2d 1134 (1997), this Court when addressing RCW 49.17.160 specifically stated, "[I]nclusion of the term "may" in the same provision as the term "shall" has been considered strong evidence that the Legislature did not intend the statute to provide exclusive procedures remedies to address retaliatory discharge." "Both Policy # 92-39 and RCW 49.17.160 use the term "shall" regarding what must be done in response in the employee's complaint, but use "may" in reference to the employees initiation of the process of obtaining relief." "Neither Policy # 92-39 nor RCW 49.17.160 (2) express an intent to provide an exclusive remedy." Id. at 125.

Simply put, the argument advanced by this Defendant is legally misplaced. Smith was not required pursuant to RCW 49.17.160 to first file a complaint with L&I.

III. OREGON REGULATIONS

Respectfully, these arguments advanced by the Defendant are irrelevant. It cannot be seriously argued that Smith even if she were within the proper time frame would have no standing to file a complaint or raise the issue regarding the failure of Sonitrol to require proper licensing of its employees. The question is not whether Smith filed her Complaint within one year regarding some alleged violation over which she had no standing to complain, but whether her employment was terminated in retaliation for her raising these issues with her employer.

Smith met with Sonitrol's owner, Beau Bradley on January 15, 2013. Smith Decl. ¶ 10. CP 1174. She had a subsequent telephone conversation with him two days later. His notes clearly reflect that she told him of the risk to his company by allowing unlicensed operators to continue to operate the Oregon accounts. She was terminated approximately one week later. These are the relevant facts and clearly demonstrate a prima facie case for retaliation exists. Moody Decl. Exhibit 4. CP 1295-1296.

IV. SEXUAL ORIENTATION

There is no question but that RCW 49.60.180 as a matter of public policy protects employees right to be free of discrimination because of one's sexual orientation. It is not disputed that in section 6.2 of the Complaint for Damages Smith stated the claim for retaliation was based on the consumption of alcohol. It is equally true, however, that in paragraphs 3.19, 3.20, 3.21, 3.22, 3.23, and 3.24 Smith clearly outlined the sexualized conduct which she experienced as an employee including the numerous complaints that she made to her immediate supervisor, Ms. Evans, regarding this unwelcome behavior. As the court has consistently stated, although inexpert pleading is permitted, insufficient pleading is not. *Dewey*, supra at 23. This Memorandum has already identified how Smith fully complied with the pleading requirements of CR 8.

The Defendant may view this as inexpert pleading but there is little question but that the factual section of this Complaint detailed clearly the sexual orientation and retaliatory conduct to which the Smith was being subjected.

Further, in the Declaration of Denise Smith which was offered in response to the motion for summary judgment Smith detailed once again her sexual orientation as lesbian and the experiences that she had in the employment environment forced upon her by her immediate supervisor,

Ms. Evans. Smith Decl. ¶ 11. CP 1175. As such this Defendant was clearly placed on notice of the basis for the retaliatory action.

Defendants have stated that that self-serving testimony is insufficient to survive a motion for summary judgment, citing to *Taylor v. Bell*, 185 WnApp. 270, 290, 94, 340 P.3d 951, (2014). Once again this Defendant through Counsel misrepresents the authority cited. In *Taylor* the Court noted that when a party gives clear answers to unambiguous questions such as in a deposition which negate the existence of any genuine issue of material fact, the party thereafter cannot create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony. *Id.* at 94. The Court also stated, however “this rule is a narrow one.” *Id.* at 94. This is rule that the testimony of the self-serving affidavit must “directly contradict” defense “unambiguous sworn testimony” previously given. *Id.* at 294. Finally, the Court stated “moreover, if the subsequent affidavit offers an explanation for previously given testimony, whether the explanation is plausible is issue to be determined by the trier of fact.” *Id.* at 294.

Such is the present case. While the Defendant relies upon the narrow language contained in paragraph 6.2 of the Complaint as well as the testimony from Smith in a deposition, the Defendant chooses to ignore the balance of the Complaint as well as the Declaration of Denise Smith

offered in response to the motion for summary judgment. This Declaration as well as substantial evidence presented in response to the motion for summary judgment clearly outlined the sexual orientation issues experienced by Smith in the work environment directly from her supervisor as well as other employees who called her names such as “dyke” and “fag.” Smith Decl. ¶ 11. CP 1175. While a more general statement could have been included in paragraph 6.2 there can be no serious question but that the evidence presented by Smith clearly addresses a greater variety of issues on retaliation other than simply the allegation of reporting alcohol consumption.

Argument is then made that the decision-making maker to terminate her employment, Beau Bradley, cannot be tied to sexual orientation because Mr. Bradley allegedly had no information regarding Smith’s concerns. As a matter of law this is incorrect. “It is well settled under Washington law that “the principle is chargeable with, and bound by, the knowledge of or notice to his agents received while the agent is acting as such within the scope of his authority and in reference to a matter over which is authority extends.”” *Kimbrow v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989); *Zwink v. Burlington Northern, Inc.*, 13 WnApp. 560, 566, 536 P.2d 13 (1975). Ms. Evans as the direct supervisor for Smith as well as the second level supervisory person within the Everett

branch clearly is an agent for Sonitrol and was acting within the scope of authority when she was addressing an employee concern expressed to her regarding the manner in which Smith was being treated because of her sexual orientation. This information reported to Ms. Evans is chargeable both to Mr. Bullis, the overall supervisor in the Everett Branch, as well as Mr. Bradley, the owner of Sonitrol.

V. PRETEXT

The test for Court's consideration of pretextual arguments in response to motion for summary judgment is well-established. In the context of employment discrimination and retaliation cases an employee can show that the employers proffered reason for termination or discriminatory conduct is pretextual. This can be accomplished by demonstrating: "(1) the company's reasons have no basis in fact; or (2) if they have a basis in fact, by showing that they were not really motivating factors; or (3) if they are factors, by showing they were jointly insufficient to motivate the adverse employment decision . . ."

Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 89, 272 P.3d 865.

The Defendant states a long list of facts each of which have been testified to at length and demonstrated to be either out of context or simply incorrect. For example, argument is made that after Smith took 17 minutes to respond to a fire alarm at an elementary school that she

“attempted to hide her error.” Res. Op. Br., Pg. 33. This argument of course ignores the fact that Smith during the 17 minutes was distracted by another operator demanding her attention while her immediate supervisor that should have been responsible for monitoring Smith’s monitor while she was distracted assisting her fellow employee failed to do so. Smith Decl. ¶ 5. CP 1173. It also ignores the fact later during the shift Joe Bullis contacted law enforcement who came in and took Smith off the floor and questioned her regarding the gun incident with Jeff LaMont and Robin Goings. Smith Decl. ¶ 6. CP 1174. It also ignores the fact that Smith immediately after this interview with law enforcement was distressed and asked to be permitted to leave work for that day, leave which was granted. Smith Decl. ¶ 6. CP 1174. This argument also ignores the fact that Smith has testified on multiple occasions that the report was not complete at the time that she was called off the floor by law enforcement or completed before she left for the day as a result of the emotional distress she experienced during the police interview. Smith Decl. ¶ 5-6. CP 1173-1174.

Once again, in response to motion for summary judgment Smith has a burden of production, not persuasion. Her burden of production is more than amply met and with all due respect, this argument is disingenuous and the Defendant simply chooses to ignore significant

factual elements which are equally true and acknowledged by all parties. A reasonable jury could certainly find that given the lack of factual veracity concerning the claimed basis for termination that this in fact covers the true retaliatory motivation of the Defendant's decision to terminate Smith's employment.

VI. CONCLUSION

The granting of summary judgment on the cause of action for Retaliation was legal error. Defendant's Reply Memorandum conspicuously ignores the authority of *Bryant v. Joseph Tree* which clearly *does not* require Smith to state every fact supporting her claims in the initial complaint. Of course the very purpose of discovery is to develop the facts of litigation so that both sides are amply prepared should the matter proceed to trial.

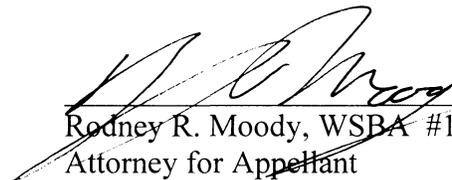
The Defendant attempts to extrapolate the argument that every legal theory must be identified in the original or amended complaint into an argument that the supporting factual basis for each identified cause of action must be stated in the original or amended complaint. This is not the law in the state of Washington.

Smith has amply demonstrated the statutorily protected activities in which she engaged. Smith was fired because she raised and continued to press safety issues which the Defendant did not want

to address. These include both alcohol related issues as well as the rampant sexual bias discrimination and retaliation to which Smith was subjected. She was terminated immediately after bringing to the attention of the HR representative, Ms. Mackenzie, and the Everett Sonitrol Co-Owner, Mr. Bradley, her concerns regarding the work environment.

The undisputed fact is that the Defendant possessed direct knowledge of her protected activities prior to Smith's termination. A prima facie case has been established. The cause of action for retaliation was clearly identified in the original complaint. All that was developed was additional facts to support this cause of action. There is no requirement that the Complaint be amended to include these additional facts under the circumstances and the dismissal of this cause of action on summary judgment is an extraordinary remedy unsupported by any authority in the State of Washington.

RESPECTFULLY SUBMITTED this 16th day of June, 2016.


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CERTIFICATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I caused to be delivered via US Mail and Personal Service the foregoing to:

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DATED this 16th day of June, 2016,



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