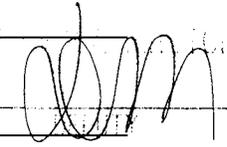


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COURT OF APPEALS

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STATE OF WASHINGTON
BY 

No. 35119-6-II

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

AGENT MARIO TORRES,

Appellant,

vs.

WASHINGTON STATE LIQUOR CONTROL BOARD, *et al.*,

Appellee

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Issue No. 1: The trial court erred in ruling that there was not sufficient evidence from which the jury could find that Agent Mario Torres was retaliated against for lodging a discrimination complaint against his supervisor Senior Agent Mark Keller – subject to *de novo* review.

Issue No. 2: The trial court erred in ruling that there was not sufficient evidence from which the jury could find that Agent Mario Torres was constructively discharged based upon the retaliatory actions on the part of the supervisory agents at the Liquor Control Board – subject to *de novo* review.

II. STATEMENT OF THE CASE

Agent Mario Torres, a Mexican-American, was a law enforcement officer with the Washington State Liquor Control Board from March 26, 1998 until July 11, 2003. For an extended period of time while he was employed as a law enforcement officer, Agent Torres was treated unfairly based upon his race, and he began expressing corresponding concerns to the diversity manager, Ermelindo Escobedo, in early 2001.¹ Agent Torres orally complained to the diversity manager about Senior Agent Keller on February 20, 2001 -- over two weeks prior to the initiation of the purportedly missing mileage report investigation began.²

¹ It is understood that Mr. Escobedo immediately conveyed notice of the complaint to Chief Phillips and the HR director at the time, Bonnie Boyle, in accordance with internal policies on or around February 20, 2001. Thereafter, Mr. Escobedo was told to ask Agent Torres to reduce his complaint to writing. This history of occurrences was just recently relayed from Ms. Escobedo to Agent Torres. The undersigned counsel has also learned that Mr. Escobedo fears retaliation by the Liquor Control Board in that he is still a State employee. (CP 370-71).

² (CP 370-71)

After having already initiated an oral discrimination complaint, on March 8, 2001, Agent Torres reduced to writing the complaint about the discriminatory practices on the part of his supervisor, Senior Agent Mark Keller, in relation to assorted instances related to “jokes about [Agent Keller’s] Giant Sized German Flag he has hanging in his office along with a photo that he used to have of what [Agent Torres] believe[d] was a swastika on the wall.”³ Senior Agent Keller’s ongoing workplace commentary such as that “Blue Eyes and Blond Hair are Excellent Arian Traits” were also part of the concerns giving rise to Agent Torres’s complaint.⁴ Senior Keller was also known to vigorously challenge, during on duty conversations with junior agents, the degree of knowledge that Hitler had about the genocides that “purportedly” occurred during World War II.⁵

After complaining about Senior Agent Keller, Agent Torres was subjected to severe hostile and retaliatory measures, including false accusations and manufactured internal investigations regarding purported criminal conduct, on the part of his supervisors for having complained about the discriminatory practices and hostile work environment.⁶ In a declaration drafted by Agent Torres in support of a different, but related harassment lawsuit filed by another employee within the Liquor Control Board offices, Agent Torres explained:

Kennewick Agent Kent Williams specifically told me that Senior Agent Mark Keller had advised him that any and all “Shit work” that he did not feel like doing were to be assigned to me. During my conversation with Agent Williams our secretary Jodi Comstock

³ (CP 21-71)

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

also agreed with what Williams was saying and she stated that she was also ordered by Senior Agent Keller to give all work that belonged to Agent Williams and assign it to me. I felt that the Kennewick office was a clear hostile work environment. At the time, I was working all these counties with hundreds and hundreds of licensees and the other Agent in the Kennewick office, Kent Williams, had very little to do and hardly any area to cover. It was so bad and I was so stressed that my desk at times was covered in paper work and I had Agent Williams approach me and ask for some of his work back. Agent Williams advised me that he had nothing to do due to me covering his area and doing the majority of his work. This went on for a period of 16 months.⁷

Shortly after the written complaint against Senior Agent Keller was filed, the retaliatory intent on the part of the supervisors at the Liquor Control Board was actually expressed to Agent Mario by and through Chief Phillips, explaining: **“If you pull down your Race Discrimination complaint that you have filed against Senior Agent Keller, I’ll make all this go away.”**⁸ Chief Phillips also made it clear to Agent Torres that “Mark and I have been friends for some time, I just don’t think he’s a racist. Do you want me to fire Mark Keller? Is that what you want, I would have to fire Mark Keller if any of this were true.”⁹ Agent Torres noted:

*...there is a clique among the upper management, including Chief Rick Phillips, The assistant Chief Rex Prout and the Agent in Charge of our region who is Jesse Mack. The Senior Agents, including Mark Keller, who’s my immediate supervisor, and Kevin Starkey, the Senior Agent in the Wenatchee Office, all seem to cover each other and when you complain about anything then you become a target of retaliation. This is what happened to me.*¹⁰

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

It should also be noted that Senior Agent Keller reportedly went so far as to stalk Agent Torres and his family at their home.¹¹

Additionally, Agent Torres's supervisors engaged in an overly zealous and unwarranted internal investigation regarding some missing mileage reports which, to the best of anyone's knowledge, could actually have been disposed of by Senior Agent Keller. During the timeframe that the investigation was conducted contemporaneously as the discrimination complaint, as of March 19, 2001, Officer Torres was prohibited from engaging in any real law enforcement activities.¹² Agent In Charge Jesse Mack explained his purported rationale for curtailing Agent Torres's enforcement abilities:

*...I placed Agent Torres on restricted duty at that time pending the outcome of the investigation. In doing so, I prohibited Agent Torres from working nights as the activities undertaken at night are primarily enforcement related. I did not want Agent Torres engaging in enforcement activities while the investigation was ongoing because there were issues about Agent Torres's credibility raised by the investigation. As a result, did not want to create a situation where an enforcement activity could be challenged based on Agent Torres' credibility.*¹³

Interestingly, Senior Agent Keller admitted that the mileage reports have nothing really to do with any law enforcement activities:

Q. When is the last time a mileage report was introduced as being significant to any law enforcement effort on your part?

A. What do you mean?

Q. When is the last time a mileage report was introduced as being significant to any law enforcement effort on your part?

¹¹ *Id.*

¹² (CP 92-101)

¹³ (CP 92-101)

A. I don't understand how you would introduce a mileage report to a law enforcement effort.

Q. Okay. Has any mileage report ever been significant in any law enforcement efforts on your part?

A. Okay. What do you mean, enforcement to like the public?

Q. Right.

A. Not that I recall.

Q. Okay.

A. I mean I don't know what you would use it for. It's for accountability for the officer.

Q. So it has no relation, really, to law enforcement?

A. It's an internal accountability function. Just like your time sheet, you do a weekly summary that says what hours you worked. It's an accountability. A weekly summary has no impact on what I write as far -- what enforcement action I take. It's an internal audit feature.¹⁴

Agent Torres has always maintained that he did turn in the missing mileage reports and that those reports were turned into Senior Agent Keller.¹⁵ A secretary from the office testified:

Q. How were the mileage reports -- how were they kept track of? Who would handle those?

A. Mark Keller.

* * *

Q. Okay. But it's your understanding that generally when Mark Keller was in the office he would be the one to oversee and manage the --

A. Yes.

¹⁴ (CP 253-339)

¹⁵ Therefore, the inference in this instance is that the mileage reports were indeed turned in properly by Agent Torres.

Q. Okay. And how do you know that?

A. Because he managed everything, I'd say. He was a micromanager. So everything went through him.

* * *

Q. Well, I'd like to know what you witnessed in relation to the allegations.

A. Officer Keller discovered some documents missing. He came and he asked me about them. I did not have them. I did not know where they were at. And my understanding is that then when I was not present he had gone to Mario Torres and they had talked and they could not find these missing documents. Keller came back, and the document was to say that, no, the documents were not in the office.

* * *

Q. And to your recollection the mileage reports referred to in this report were kept in his office. Is that right?

A. That's my understanding.

Q. Okay. So your involvement with relation to identifying missing reports was going in and --

A. Verifying that they were not there.

Q. That they weren't in Mark Keller's office?

A. Right. Or wherever they were supposed to be.

* * *

Q. Would it be like Mark Keller to let someone go without filing a report for four or five, six months?

A. That doesn't sound like Mark Keller.¹⁶

Despite Senior Agent Keller's known propensity to micromanage everything, he purportedly did not notice that Agent Torres had not turned in any mileage reports

¹⁶ (CP 253-339)

for nearly a year and only notice the discrepancy at the same time that the allegations of racism were alleged in March of 2001. Another employee, Agent Kent Williams, has a similar opinion about Senior Agent Keller:

*...What I know is that Mark alleged when Mario wasn't turning in his mileage reports, which, if you know Mark, you've worked under him, you know it's just an absolutely silly thing to say because if your mileage reports weren't there on the 1st or 2nd day, he was saying something. He was at us all the time about making sure we always had them in. I think they alleged Mario didn't have it done for 6 months or a year or something, there's just no way it can happen, because Mario-, or Mark is a very demanding, very perfectionist and everything has to be followed his way was you have those things in. And a couple times I was a couple days late and I got a talking to, you know, "Where are these?" and all this...*¹⁷

It is also worth noting that Senior Agent Keller recalls Agent Torres reporting to him that other items had come up mysteriously missing over the past year.¹⁸

The discrimination complaint against Senior Agent Keller was investigated by the diversity manager, Mr. Escobedo. After conducting an extensive investigation, Mr. Escobedo concluded with the following written findings:

...This Investigator concludes that M. Keller did:

- Make inappropriate racial statements to two employees and one Licensee
- Singled out M. Torres for harassment and retaliation.
- Provide false information about The Sheriff's Office racial profiling complaint.¹⁹

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ (CP 21-71)

It should be noted that Mr. Escobedo's findings were formulated in accordance with Liquor Control Board internal directives:

When the investigator has completed all relevant interviews and reviewed all relevant written statements or other documentation, he or she will conclude the investigation, review evidence, and make a determination as to reasonable cause.²⁰

It is also worth noting that Chief Phillips purported in his deposition that Mr. Escobedo's investigation had to be thrown out because he drew conclusions about the allegations.²¹

After learning about the impending report from Agent In Charge Mack before it was ever disclosed, Senior Agent Keller wrote an email to his supervising agents, Agent In Charge Jesse Mack, Senior Agent Rex Prout, and Senior Agent Rick Phillips, protesting against Mr. Escobedo's investigation and conclusive findings.²² Senior Agent Keller admitted that his concern was based upon the fact that the investigation came out as being adverse to him:

Q. Okay. So you think that his investigation was unfair because it came out against you?

A. I think that could be. I mean I know what happened in this investigation. I know what my actions were, you know. If he says something differently, and I know that's not true, I'd say that's not fair and impartial.²³

And that Senior Agent Keller was upset because Mr. Escobedo did not ask any follow up questions:

²⁰ (CP 253-339)

²¹ (CP 253-339)

²² *Id.*

²³ *Id.*

Q. So because Ermelindo didn't follow up with a half an hour's worth of questions, you think his investigation was improper?

A. Could be flawed.

Q. Okay. Did it ever cross your mind that maybe he thought he didn't need the additional information; he for the information elsewhere?

A. I don't know. I don't remember.

Q. And so based upon the consideration with respect to not asking the additional half an hour's worth of questions, you thought, hey, this isn't a fair investigation?

A. Knowing the facts that I know from the investigation, for him to come out with an adverse result, I knew the investigation would be flawed.²⁴

Upon review of Senior Agent Keller's email, Senior Agent Prout and Senior Agent Phillips decided to simply disregard Mr. Escobedo's findings, and to then hire a new investigator.²⁵ In a telling email, Mr. Escobedo protested the decision to disregard his report:

----- Original Message -----

From: Escobedo, Ermelindo
Sent: Wednesday, July 25, 2001 9:54 AM
To: Perry, Frances E; Phillips, Rick
Subject: CIVIL RIGHTS REINVESTIGATION

Thank you for updating me on the Mario Torres finding. I am very disturbed that the Enforcement division is requesting an independent outside investigator to reinvestigate what has already been investigated. We have an agency policy and procedure to follow, to deviate from that exposes us to major legal liability. **To my knowledge the LCB has never reinvestigated a civil rights complaint, why now?** I am requesting a meeting with you and Rick to discuss this agency precedent setting decision. I am also

²⁴ *Id.*

²⁵ (CP 21-71)

requesting that we consult with our legal staff for their opinion and guidance.²⁶

Thereafter, an investigation ensued with respect to Agent Torres's mysteriously missing mileage reports.²⁷ And while Senior Agent Keller was able to have Mr. Escobedo's report tossed out by sending an email complaining about not being asked follow up questions, Agent Torres was ultimately suspended 10 days based upon missing mileage reports without even having been asked his side of the story by the investigator:

Q. So you never actually interviewed Mr. Torres with respect to the missing mileage report investigation, did you?

A. Right. Not that I remember.

Q. Okay. Why not?

A. Because the State Patrol report, I found that there was -- if I could look at the report probably, but they determined that they couldn't verify the Franklin County hours worked because Mario didn't fill them out. A secretary filled them out for him or something along those lines. So they couldn't verify the hours, if there was any problem there. So it was basically concluded at that point. So I simply compiled what I had and their report and turned it in.

* * *

Q. Okay. Why does it make sense for you not to interview the focus of an investigation, the person of focus, because there's an inadequate -- or a discrepancy as to the reports you're relying on? Why does that make sense?

A. Because they found it was -- because the State Patrol concluded the investigation basically for me. There was no point for me to go any further with it. I'm sure I called Olympia and asked directions and they said just finish your report and send it in.

²⁶ *Id.*

²⁷ (CP 149-180)

Q. Okay. So – I’m unclear on this.

A. Okay.

Q. You didn’t interview Mr. Torres because the Franklin County prosecutor’s office had inaccurate records, and based on those inaccurate records you concluded that you didn’t need to ask Mario Torres about the allegations. Is that right?

A. The State Patrol concluded that they couldn’t prove any wrongdoing as far as overlapping of work times, along those lines. And so at that point the investigation was closed, and I finished it.

Q. Okay. How did you go about finishing it?

A. I wrote down what I had done up to that point and included the State Patrol report and turned it in.

Q. Okay. Did you draw any conclusions?

A. No.

Q. Okay. Well, what was your impression? Was there anything wrong?

A. Yeah. There was -- well, there was missing mileage reports and missing notebooks. And there were times when he stated he worked and drove to a certain city, but yet mileage reports or gas -- mileage or gas records would indicate that he hadn't purchased any gas for – I’m going off memory, but for like a week or so. So he would have been able to like get miles to the gallon or something along those lines if he had actually gone to where he said he'd gone and back.²⁸

And then, even after the Franklin County Prosecutor found no wrongdoing, and even though the investigation was about missing mileage reports, the investigator did nothing to verify what actually happened to the missing reports.²⁹

Immediately before Agent Torres resigned, *i.e.* was constructively discharged, he was threatened with another invasive, yet frivolous, investigation

²⁸ (CP 253-339)

²⁹ *Id.*

that could ruin his employment with the Liquor Control Board and his personal business which included the following written allegations:

You have utilized your state vehicle and official duty time for which you received payment as a liquor control officer to conduct personal business for profit by the service of legal documents for various clients while working on behalf of Casey Investigations, L.L.C., P.O. Box 729, Richland, WA 99352. Such an allegation, if proven, may also include inaccurate/untruthful accounting of time in various official logs, records, and documents which are required for time, activity and vehicle use accounting as well as payroll completion.³⁰

In lieu of being subjected to another unfair and unfounded investigation that could result in more frivolous criminal proceedings, and upon the supervising officers' invitation, Agent Torres resigned the next day.³¹ Senior Agent Starkey received the resignation letter and admitted that no additional investigation was conducted:

Q. Did any investigation occur after he resigned?

A. Not that I'm aware of.

Q. Okay. Why not?

A. Why wasn't an investigation done? Because he resigned.³²

Shortly after being constructively discharged, Agent Torres inquired via a public records request as to the documents contained in whatever investigation had taken place, and learned that the Liquor Control Board had already compiled an internal document that conclusively established that there was no wrongdoing, *i.e.* no cross-over as to on an off duty activities:

³⁰ (CP 149-180)

³¹ *Id.*

³² (CP 253-339)

Served	City	Dated	Time	Weekly
Alverado, Nivea	Moses Lake	3/22/2003	2:59pm	11p-4a Field
Alverado, Lee	Moses Lake	4/17/2003	7:15pm	11:30a-3:30pm Of
Silvers, Laura	Moses Lake	4/17/2003	7:00pm	11:30a-3:30pm Of
Damian	Moses Lake	4/17/2003	6:40pm	11:30a-3:30pm Of
Stacey	Moses Lake	4/17/2003	6:19pm	11:30a-3:30pm Of
Dwyer, Kim	Moses Lake	4/17/2003	6:03pm	11:30a-3:30pm Of
Sebens, Carolyn J	Moses Lake	3/23/2003	1:13pm	off
Ramon	Moses Lake	3/23/2003	2:13pm	off
Bensal, Lisa	Moses Lake	2/10/2003	9:27pm	A/L ³³

Indeed, it was already known that Agent Torres was not double billing anyone at the time that he was threatened with another investigation.

Jodi Comstock, a secretary in the office wherein Agent Torres and Senior Agent Keller were assigned and interacted, explained:

Q. Do you have any understanding as to why Mr. Torres left employment with the Liquor Control Board?

A. Yes.

Q. And what is your understanding of why?

A. My understanding is Mario had an outside business that was approved by the Board. And as his business was growing and improving he -- when his wife was able to quit her job and go work full time at this second job, from that point things escalated and it seemed -- this is my personal opinion -- that Mark Keller didn't like it. And they made it very difficult for Mario. And Mario finally said enough and quit.

Q. And how did Mark Keller make it difficult for Mario?

A. A lot of pressure. A lot of negative pressure. It's hard to work when you're constantly being criticized, and he just said enough.³⁴

³³ (CP 21-71)

³⁴ (CP 253-339)

And furthermore, Ms. Comstock, a white woman, admitted that certain behaviors on the part of Senior Agent Keller bothered her even though she didn't witness that acts first hand:

Q. Ever heard him make any remarks about Naziism?

A. No.

Q. Arian Nation?

A. Not from Mark Keller, no.

Q. Okay. From someone else then?

A. The other officers, yes.

Q. What did the other officers -- what remarks did you hear from them about that sort of thing?

A. They just commented that there was a -- that he had the flag. And just kind of things like you've said where he would make comments. It was hearsay. So that's how I found out about it. But I never saw it.

Q. Did hearing that other officers had witnessed these things make you feel at all uncomfortable?

A. Yes.

Q. Why is that?

A. Because I saw how he treated the other employees and how they felt about it, and I was not treated that way. And I had previously had problems with him, but we were able to resolve them. And the problems weren't resolved with the other employees. So I was left in a boat of waiting for the other shoe to drop type of thing or waiting for my turn to be in the same position. And that didn't happen.³⁵

In addition to Ms. Comstock at least two other Liquor Control Board employees, Agent John Gawlick and Gabe Ramos, were offended by Senior

³⁵ *Id.* Ms. Comstock's testimony is not offered to prove that Agent Keller made the statements but instead to demonstrate the pervasive offensiveness of his actions.

Agent Keller's offensive tendencies that were directed towards Hispanics and Mexicans. Agent Gawlick recalls:

*My experience with Mark was not positive. I have heard him call Hispanics "beaners." It was clear that he did not like them by his mannerism of how he talked to them, which was in a fashion of talking down to them. He also called members of the Yakama Indian Nation "war hoops."*³⁶

And Agent Ramos recalls.

*When I first started working here, I remember Mark Keller frequently use the term "grassy-ass", instead of "gracias", which means thank you in Spanish. To me, it was inappropriate, and he stopped doing that out of the clear blue sky. I don't know if somebody talked to him about it or not.*³⁷

The excerpted comments are portions of sworn declarations from another investigation that was conducted against Senior Agent Keller and determined to be founded:

To show that a hostile condition may have existed for Ms. Ramos and others working with Mark Keller, I've prepared a list of potentially corroborating incidents. In +/- 1995 to 1998, Mark Keller made insensitive remarks about Mexicans and Hispanics..., which created a hostile working environment.³⁸

III. PROCEDURAL POSTURE ON REVIEW

On review, this court engages in the same review (*de novo*) of the record as the trial court to determine whether Agent Torres submitted sufficient evidence from which the jury could find in his favor after the completion of a trial. *Police Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). Of course, all

³⁶ (CP 253-339)

³⁷ *Id.*

³⁸ *Id.*

reasonable inferences are to be drawn in Agent Torres's favor and against the defendants. *Id.* In this instance, the trial court erred in that respect.

IV. ARGUMENT

A. **Mario Torres Has A Strong Claim For Retaliation Stemming From His Complaints Regarding Discriminatory Activity On The Part Of Senior Agent Keller.**

According to RCW 49.60.210, it is unlawful to retaliate against an employee for complaining about unlawful and/or discriminatory conduct.³⁹ Complaining about racial discrimination is a protected act that triggers the protections from retaliation set forth under RCW 49.16.210 which, if contravened, violates public policy. *See* RCW 49.16.180. A prima facie case of unlawful retaliation calls for a showing that the plaintiff (1) engaged in a protected activity, (2) suffered adverse employment action, and (3) based upon the inferences from

³⁹ *See e.g. Hudson v. West Valley Sch. Dist. No. 208*, 123 Wn. App. 116, 97 P.3d 39 (2004). (Summary judgment for the employer on the employee's claim under the Washington Equal Pay Act, RCW 49.12.175, and for retaliation in violation of RCW 49.60.210(1) was improper where questions of material fact existed as to whether the employer actually used a statistical survey to set salaries, whether the survey was a valid gender-neutral basis for setting salaries, and whether the employee's bad evaluations that were rejected by her new supervisor were related to her protected activity of asserting her right to equal pay.); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004). (Although the ministerial exception to Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., precluded a minister who was discharged from her employment at a church from recovering damages because the church modified her duties and terminated her employment, it did not preclude the minister from recovering damages from a pastor who allegedly intimidated and verbally abused her in retaliation for complaints she made, alleging that he sexually harassed her, and the appellate court reversed the trial court's judgment dismissing the minister's lawsuit under Title VII and RCW 49.60.210 and 49.60.220.); *Riccobono v. Pierce County*, 92 Wn. App. 254, 966 P.2d 327 (1998) (An employee alleging that she was discharged in violation of this section need not exhaust her civil service and collective bargaining remedies where she was not alleging that there had been a violation of either the civil service statutes or her union's collective bargaining agreement.); *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 946 P.2d 1242 (1997), review denied, 135 Wn.2d 1006, 959 P.2d 125 (1998) (The plaintiff established a prima facie "unfair practice" where he demonstrated that he was expelled from a credit union because he had assisted credit union employees in their law suit against the credit union for age and gender discrimination.); *Delahunty v. Cahoon*, 66 Wn. App. 829, 832 P.2d 1378 (1992). (Replacement of waitresses who refused to work because of sexual harassment by their manager was unlawful retaliation.)

the evidence there was a connection between the protected activity and the adverse employment act(s).⁴⁰

Based upon the evidence that has been submitted, the jury could, and probably would, conclude that Agent Torres was retaliated against for filing a racial discrimination complaint against Senior Agent Keller. Agent Torres lodged his complaint in February of 2001. Even taking the assertions included in the declarations with regard to when the assorted supervisory agents learned about the discrimination complaint as credible (and while keeping in mind that questions of credibility are for the jury), after learning about the discrimination complaint, it is clear that efforts against Agent Torres were concerted, deliberate, and retaliatory. The *degree* to which the efforts to discredit and disparage Agent Torres after the discrimination complaint was lodged were disproportionate given the circumstances, irrational, and can only be described as deliberate choices on the part of the Liquor Control Board.

After the supervisory agents learned that Agent Torres was asserting a discrimination complaint, an overzealous investigation was conducted against him with respect to a relatively mundane matter, and even though the Franklin County Prosecutor found insufficient evidence to sustain allegations of wrongdoing, the Liquor Control Board continued to investigate without even interviewing Agent Torres or seriously considering the true cause as to the missing mileage reports – such as that Senior Agent Keller was somehow responsible. It should be noted that one of the primary reasons that the Liquor Control Board disciplined Agent

⁴⁰ *Id.*

Torres for the missing mileage reports was because the gas mileage that his vehicle was getting was purportedly *too good* for that type of vehicle. Further, multiple Liquor Control Board employees have admitted that there is no way that Senior Agent Keller would have overlooked the purported notion that Agent Torres failed to turn in mileage reports over time.

Agent Torres contended that the missing mileage report investigation was direct retaliation on the part of his supervisory agents -- as was investigated and concluded by Mr. Escobedo. In accordance with the Liquor Control Board's own internal policies, Mr. Escobedo investigated the allegations of retaliation and concluded that Agent Torres was in fact retaliated against as well as subjected to discriminatory actions on the part of Senior Agent Keller. Upon hearing from Agent In Charge Jesse Mack that Mr. Escobedo's investigation was going to be adverse, the supervising authorities tossed out Mr. Escobedo's investigation and hired an outside agency to conduct essentially the same investigation all over again. The decision to toss out Ms. Escobedo's was prompted by an email from the focus of the investigation, Senior Agent Keller, based upon his concern that the investigation was "biased" because it came out against him.

While the discrimination and missing mileage report investigations were pending, the Liquor Control Board stripped Agent Torres of all law enforcement responsibilities even though, according to Senior Agent Keller, missing mileage reports had almost nothing to do with law enforcement activities. In addition to being stripped of his law enforcement duties, Agent Torres was given all the "shit work" and treated disparately by his supervisors for 16 months thereafter. Agent

Torres was so emotionally distressed during that time period that he sought counseling from a medical professional. Then, after tossing out Mr. Escobedo's investigation that had concluded that Senior Agent Keller was retaliating against Agent Torres, and even though the Franklin County Prosecutor was unable to substantiate any wrongdoing with respect to the missing mileage reports, the Liquor Control Board supervisors continued the investigation against Agent Torres and then suspended him for 10 days. It should not be forgotten that Mr. Escobedo's finding of retaliatory motive essentially disproves the missing mileage report allegations. An email between the disciplinary authorities is telling:

--- Original Message ---

From: Vane, Barb

Sent: Sunday, April 07, 2002 5:11 p.m.

To: Kohler, Pat

Cc: Jolly, Wendi L; Perry Frances E, Key, Ron G

Subject: FW: Investigation Finding

Hi Pat,

I anticipate that Mario's written response to the charges against him as outlined in the pre-disciplinary letter will include references to the allegations of discrimination against his supervisor.

In preparation for you to be able to make a determination as to what action, if any, should be taken against Mario, my response [rejecting his allegations against Senior Agent Keller] is below to Mario might be helpful.

Please let me know if you have any questions on the investigation response.

Barb Vane Human Resources Director

(360) 664-1642

E-Mail: bjv@liq.wa.gov⁴¹

⁴¹ (CP 253-339)

Agent Torres was retaliated against in every form of the word, and there is an abundance of evidence from which the jury could agree.

B. Mario Torres Has A Strong Claim For Constructive Discharge, And Trial Court Erred In Ruling To The Contrary.

Agent Torres was constructively discharged as a result of being threatened with another frivolous internal investigation, and subjected to a discriminatory atmosphere, in an effort to retaliate against him and force him to leave the Liquor Control Board. “To establish a claim for constructive discharge, a claimant must show: (1) that the employer deliberately made the working conditions intolerable for the claimant, (2) that a reasonable person in the claimant’s position would be forced to resign, (3) that the claimant resigned solely because of the intolerable conditions, and (4) that the claimant suffered damages.”⁴² In *Allstot*, the Court held that constructive discharge was a question for the jury after a law enforcement officer voluntarily resigned upon learning that the Chief of Police withheld “information regarding ongoing drug cases” from an officer thereby making his workplace intolerable under the circumstances. *Id.*

In this instance, as is proven from the internal memorandum delineating that the last allegations against Agent Torres were already found to be frivolous, the Liquor Control Board threatened another internal investigation that would inevitably lead to additional harassment and exclusion from law enforcement activities. Additionally, the Liquor Control Board asserted that all of Agent Torres’s clients from his private business would be contacted which was likely to

lead to him losing those same clients if the validity of the work he was doing for them as a process server was called into question. Agent Torres was faced with the option of undergoing what he knew to be another frivolous investigation and possibly losing his only means of backup support for his family, or to voluntarily resign to save his alternative means of support and preserve the ability to continue a law enforcement career elsewhere.

Even the secretary from the office within which Agent Torres and Senior Agent Keller worked was of the understanding that Agent Torres was forced out of his position as a result of Senior Agent Keller's animus. The threatened investigation was of the same nature and basis as was the prior missing mileage report investigation for which the supervisory officers unsuccessfully sought criminal charges from the Franklin County Prosecutor's Office. Based upon the evidence, the jury could, and probably would, find that Agent Torres was constructively discharged stemming from a concerted retaliatory effort to use and abuse unfair internal investigations to harass Agent Torres out the front door of the Liquor Control Board. Objectively, no reasonable person would allow themselves to be subjected to another frivolous and unfair internal investigation as that which was already experienced by Agent Torres. Therefore, this portion of the defendants' motion should have been denied by the trial court.

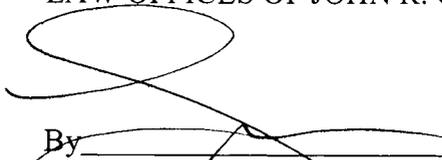
⁴² *Allstot v. Edwards*, 116 Wn. App. 424, 434, 65 P.3d 696 (2003).

V. CONCLUSION

Based upon the evidence of record, there is an abundance of evidence from which the jury probably would find that Agent Mario Torres was retaliated against and then constructively discharged.

RESPECTFULLY SUBMITTED this 29 day of October, 2006

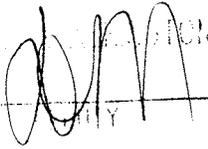
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By 

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Attorney for Appellant Mario Torres

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BY 

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

MARIO TORRES,

Plaintiff,

vs.

WASHINGTON STATE LIQUOR CONTROL
BOARD; RICHARD PHILLIPS and JANE
DOE PHILLIPS, and their marital community;
MARK KELLER and JANE DOE KELLER,
and their marital community; KEN STARKEY
and JANE DOE STARKEY and their marital
community,

Defendants.

Court of Appeals No. 35119-6-II

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THE UNDERSIGNED, pursuant to CR 5(b), affirms that on the 30th day of October,
2006, she sent by ABC Legal Messenger a copy of Appellant's Opening Brief to the
following at the respective address set forth below:

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Attorney General of Washington/Torts Division
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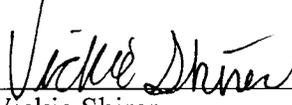
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DATED this 30th day of October, 2006.



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Law Offices of John R. Connelly, Jr.



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