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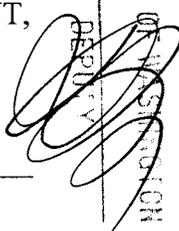
WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

DAVID N. SMITH,
Petitioner-Appellant,

vs.

STATE OF WASHINGTON
EMPLOYMENT SECURITY DEPARTMENT,

Defendants-Appellees.

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DIVISION II
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STATE OF WASHINGTON
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BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignment of Errors

- A. The lower court erred in Finding of Fact IV when it claimed the entire record of the contested proceedings under review was before the court.
- B. The lower court erred in Conclusion of Law II wherein it stated Petitioner has failed to establish that the final order of the Commissioner is not supported by evidence that is substantial when viewed in light of the whole record before the court.
- C. The lower court erred in Conclusion of Law III wherein it stated the Petitioner has failed to establish that the final order of the Commissioner is based upon an erroneous interpretation or application of law.
- D. The lower court erred in Conclusion of Law IV wherein it stated the final order of the Commissioner correctly determined that the Petitioner was discharged from his employment with Kitsap County Due to disqualifying misconduct, consisting of recording private conversations in violation of RCW 9.73.030 and removing materials from his assigned, county-operated laptop computer after being told not to do so.
- E. The lower court erred in Conclusions of Law V wherein it stated the decision of the Commissioner of the Employment Security Department of the State of Washington entered in this matter on February 2, 2007, is proper and should be upheld.
- F. The lower court erred in ordering, decreeing, and adjudging the decision of the Commissioner of the Employment Security Department of the State of Washington in the matter affirmed.

Issues Pertaining to Assignment of Errors

- A. Did the lower court err in Finding of Fact IV when it claimed the entire record of the contested proceedings under review was before the court?
- B. Did the lower court err in Conclusion of Law II wherein it stated Petitioner has failed to establish that the final order of the Commissioner is not supported by evidence that is substantial when viewed in light of the whole record before the court?
- C. Did the lower court err in Conclusion of Law III wherein it stated the Petitioner has failed to establish that the final order of the Commissioner is based upon an erroneous interpretation or application of law?
- D. Did the lower court err in Conclusion of Law IV wherein it stated the final order of the Commissioner correctly determined that the Petitioner was discharged from his employment with Kitsap County Due to disqualifying misconduct, consisting of recording private conversations in violation of RCW 9.73.030 and removing materials from his assigned, county-operated laptop computer after being told not to do so?
- E. Did the lower court err in Conclusions of Law V wherein it stated the decision of the Commissioner of the Employment Security Department of the State of Washington entered in this matter on February 2, 2007, is proper and should be upheld?
- F. Did the lower court erred in ordering, decreeing, and adjudging the decision of the Commissioner of the Employment Security Department of the State of Washington in the matter affirmed?

III. STATEMENT OF THE CASE

Defendant, David Smith, began working for the Kitsap County Department of Public Works in May of 1990. CR¹ at 132. At the time he was hired, Randy Casteel was the Director of Public Works. Mr. Casteel's cousin, Ron Yingling was the Assistant Director of Public Works, and Ron's brother Mel was third in command a Public Works. CR at 76. The Public Works Department was referred to as a "family business" by Mr. Casteel and Mr. Yingling, as well as others in the department.

Charles Shank worked for Kitsap County in Public Works from November of 1992 through June of 2006. CR at 63. Mr. Smith was his supervisor. Mr. Shank testified that he was never notified that there was a policy against recording other employees or citizens during the performance of duties. Further, he testified that when he previously worked at the Department of Transportation, the WSF director recorded "everything all the time". CR 64-65.

Shank testified that director Casteel's cousin, assistant director Ron Yingling, was going to be "allowed to come back to work at Public Works after he retired with retirement pay and get in his old position with his old position pay, under a loophole that was in the PERS retirement system." CR at 75. Yingling was planning to collecting retirement pay and salary

¹"CR" stands for the Commissioner's Record. The page numbers refer to the page numbers of the Commissioner's record not the exhibit's (verba-

simultaneously. This conflict of interest was leaked to the press in an “expose” article that was published in a local newspaper. Casteel and Yingling suspected that Mr. Shank was the “deep throat”. As a result, retaliatory action was taken against Mr. Shank. His staff was subject to reduction, his duties were reduced and he was denied an anticipated salary increase. CR 65-66.

Because Smith was Shank’s supervisor, Smith was coerced by Casteel and Brand to lie about the retaliation. Smith complained to Ms. Aufderheide the Civil Deputy Prosecutor for Public Works about the coercion. CR at 156. Aufderheide did nothing about it.

Shank testified that he was harassed by Mr. Yingling and that Mr. Smith was threatened by Mr. Yingling. CR at 66. After the expose articles were published Mr. Yingling subjected Shank to threats of physical harm. CR at 77. Shank notified his immediate supervisor, Mr. Smith, about the harassment. He did not complain up through the chain command (Mr. Brand, Casteel or Yingling) because he did not trust them since they were all persons harassing him. He did not complain to any other County agencies because he “considered them to be corrupt.” CR 80.

Mr. Shank was advised by his attorney that it would be legal to record conversations with his coworkers and management. CR 64, 66. In

tim RP’s page number).

order to prove that he was being subjected to retaliatory harassment, Mr. Shank started recording conversations with coworkers and management without their knowledge. CR at 74. Mr. Shank notified his supervisor Jon Brand that he was recording coworkers conversations on December 12, 2001. CR at 78. Shank was not subjected to discipline for recording county employees and he was never advised by anyone at Public Works not to record other employees. CR 70-71. There is no county policy against recording coworkers. CR at 58-59.

Charles Shank filed a civil rights action against Kitsap County claiming retaliation for exercising his freedom of speech. His complaint was settled in January of 2006. CR at 26.

Dave Smith testified that he started recording conversations with management, coworkers and clients around Halloween of 2001 and that he stopped doing so in November of 2004.

On February 9, 2004, Mr. Smith filed an administrative whistleblower complaint with Jacquelyn Aufderheide, who was the Civil Deputy Prosecutor for Public Works. CR at 172. Smith told Aufderheide: "I was basically being railroaded by my supervisors to lie about the retaliation of Chuck Shank." CR at 138. On February 11, 2004, Mr. Smith notified Jacquelyn Aufderheide, counsel for the Kitsap County Commissioners, that he had recordings containing incriminating statements by his superiors. At

no time did Ms. Aufderheide, or any other county official, advise Mr. Smith to stop recording. CR 141.

After Smith filed his whistle blower complaint with Aufderheide, Smith was told by Assistant Director Brand that he was going to “mark him down” at his next evaluation because he filed a whistle blower complaint. Mr. Smith recorded the conversation on November 7, 2004, and it was the last recording that he made. CR 142. Mr. Smith called Aufderheide to report the retaliation and offered to provide her with a copy of the recording, but she told Smith to “follow the chain of command”. Again, Ms. Aufderheide did not advised Smith that it was against County policy or unlawful to record county employees. CR 148-149.

The county became interested in Smith’s records after they discovered that Mr. Shank’s attorney subpoenaed them for Shank’s civil rights action against the county. On or about March 10, 2005. Mr. Casteel asked Smith to bring in his laptop and not to delete any files. CR 141. Smith only took off one program which was an audio program that he needed to play his audio files stored on his PC at home. He had a license for the program that only authorized him to use the program on one computer at a time. He feared that the laptop would never be returned and he would have to buy a new program. CR 148-149.

Thereafter, Ms. Sutherland made a complaint to Mr. Smith about her supervisor, Mr. Cioc, about sexual harassment. CR 150-151. Carlee Sutherland worked at Kitsap County Public Works from April of 1996 to December of 2004 as an office assistant. Ms. Sutherland was sexually harassed by her supervisor Mr. Cioc.

Smith reported Sutherland's complaint to the assistant director of Public Works Mr. Brand. Brand "did not accept it [the complaint] because she was a problem employee." CR at 151. Accordingly, Mr. Cioc was not reprimanded for the harassment. CR at 90. There was no investigation regarding the harassment by Public Works.

Previously in 1999, Ms. Sutherland applied for a professional position and Mr. Smith supported her reclassification. CR at 91. Ms. Sutherland submitted her application to Mr. Yingling. However, no action was taken upon her application and it was found discarded on a shelf many years later. CR at 92. Mr. Smith supported Ms. Sutherland's attempt to reclassify and with her sexual harassment complaints. CR 93. Sutherland filed a civil rights action for sexual harassment and retaliation against the County that was in progress at the time of the OAH hearing. CR 90.

Smith was Cioc's supervisor and he received sexual harassment complaints about Cioc from other female employees. Id. Shortly after Sutherland's harassment complaint, Mr. Cioc had a pending evaluation by

Mr. Smith. Assistant director Brand encouraged Smith to “negotiate” Cioc’s evaluation and keep the sexual harassment claim out of his evaluation. Smith made “some changes”, but Brand was not satisfied. Smith refused to make the omissions and false statements of fact in the evaluation that Assistant Director Brand wanted. CR at 153.

Assistant Director Brand was upset that Smith supported the sexual harassment claims. Mr. Smith objected to Ms. Sutherland’s termination because she was fired for the same conduct routinely engaged in by her male peers who incurred no reprimands for the same alleged “misconduct.” Assistant director Brand told Smith that his memory “was too long for his own good.” CR at 155.

Due to the retaliatory harassment by his superiors, Smith started recording conversations with his supervisors and coworkers from 2001 through November of 2004. This was necessary because assistant director Yingling, assistant director Brand and director Casteel routinely lied to protect themselves and the county. Yingling told Smith it would not do any good to complain because there were 30 prosecutors across the street and it’s their job to defend him. Assistant director Yingling told Smith that the key to his success was that he lies and the director swears to it. CR 175. Consequently, Smith recorded his superiors on tape to break their credibility.

On or about the second week of March, 2006, Mr. Smith filed an EEOC complaint alleging that he suffered retaliation because he supported his female subordinates who had filed sexual harassment complaints. Five weeks later he was terminated. CR at 153-154.

At the time he was terminated, Mr. Smith was Senior Program Manager for the Transportation Traffic Division. CR at 21. His immediate supervisor was assistant director Jon Brand who reported to director Randy Casteel. CR at 21-23. Mr. Smith received a notice of pre termination on April 14, 2006. Prior to his receipt of the pre termination letter, Smith never received a verbal or written warning about any of the alleged misconduct prior to issuance of the pre termination letter, nor was a staff meeting held with Mr. Smith regarding such. CR at 59. He was terminated on April 19, 2006. CR at 26-27.

Mr. Smith was not able to find work and filed an unemployment claim with the Washington Employment Security Department. A notice of determination was entered on May 20, 2006, which granted ESD benefits to Mr. Smith. Kitsap County filed a request to appeal the determination on May 30, 2006. An OAH hearing was held on September 19, 2006, before Jon Loreen, Administrative Law Judge ("ALJ"). The ALJ affirmed the Notice of Determination in his initial order entered on November 3, 2006. On November 15, 2008, Kitsap County petitioned the ESD Com-

missioner for a review of the ALJ's Decision. The Decision of Commissioner was entered on January 5, 2007. The Commissioner's Decision reversed the ALJ judge's decision and entered additional findings of fact and an additional conclusion of law.

Mr. Smith filed a Notice of Appeal to Kitsap County Superior Court contesting the Decision of the Commissioner on January 29, 2007. On November 28, 2007, an administrative review hearing was held in Kitsap County Superior Court before the Honorable M. Karlynn Haberly. Judge Haberly entered a Memorandum Opinion that affirmed the Decision of the Commissioner on December 10, 2007. On February 15, 2008, Judge Haberly entered her Findings of Fact and Conclusion of Law. On March 14, 2008, Mr. Smith filed a Notice of Appeal contesting Judge Haberly's Findings of Facts and Conclusions of Law.

IV. STANDARD OF REVIEW

The Appellate Court reviews the findings of a commissioner under chapter 34.05 RCW, the Administrative Procedure Act (APA). *Rasmussen v. Dep't of Employment Sec.*, 98 Wn.2d 846, 849, 658 P.2d 1240 (1983). The findings and decision of the commissioner, not the underlying ALJ order are subject to review. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 405-06, 858 P.2d 494 (1993). The Appellate Court performs a de novo review of the commissioner's decision. *Safeco Ins. Cos. v. Meyering*,

102 Wn.2d 385, 390, 687 P.2d 195 (1984). The commissioner's decision is presumed to be prima facie correct and the petitioner has the burden of proving otherwise. *Safeco Ins.*, 102 Wn.2d at 391. The Appellate Court has the ultimate responsibility to see that the rules are applied consistently with the policy underlying the statute. *Safeco Ins.*, 102 Wn.2d at 392.

Factual findings are reviewed under the 'substantial evidence' standard as described in RCW 34.05.570(3)(e). Relief is granted from an agency order only where the Appellate Court determines that the order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court pursuant to this chapter. 'Substantial evidence' is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premises.' *Price v. Kitsap Transit*, 125 Wn.2d 456, 464, 886 P.2d 556 (1994) (citing *World Video, Inc. v. Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), *cert. denied*, 503 U.S. 986, 112 S. Ct. 1672, 118 L. Ed. 2d 391 (1992)).

V. ARGUMENT

- A. **The lower court erred in Finding of Fact IV when it claimed the entire record of the contested proceedings under review was before the court.**

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Appellant no longer contests this and no longer alleges that the Commissioner's record before Judge Haberly was incomplete.

B. The lower court erred in Conclusion of Law II wherein it stated Petitioner has failed to establish that the final order of the Commissioner is not supported by evidence that is substantial when viewed in light of the whole record before the court.

The verbatim report of the OAH hearing clearly shows that the Commissioner's Decision was not support by substantial evidence.

The Additional Finding of Fact II in the Decision of Commissioner states:

Competent evidence of record establishes, and we find as fact, that the claimant was aware his recording of conversations with said parties was impermissible. Competent evidence of record establishes, and we find as a fact, that the claimant was aware the recording of said conversations was not in the best interests of his employer. Competent evidence of record establishes, and we find as fact, that the claimant's assertion he concealed the making of said recordings out of fear of one Ron Yingling is not credible.

The claim that "competent evidence of record establishes . . . That the claimant was aware his recording of conversations was impermissible" is simply ludicrous. (*See also*: Additional Findings of Fact IV which repeats the same finding of fact.)

Dale Wiley testified that he is a Traffic Signal and Operations Supervisor and that he has worked for the Kitsap County Department of

Public Works for 38 years. CR at 37. He testified that he had never been told that it was against County policy to record public officials in the course of their duties. CR at 46. Carrel Sutherland testified at the OAH hearing that during her employment she was never advised that recording other employees was against County policy. CR 89. Elisa Galusha works for Kitsap County as a financial analyst in the department of public works in 1997 and Randy Casteel was her direct supervisor between 1997 and 2002. Galusha testified that during the time she has worked for the County she was never advised that one could not record the conversations of other employees or private individuals. CR 100. Bill Zupancic testified that he has worked for Kitsap County Public Works as a Transportation Planner for fourteen years. Zupancic testified that he had never attended a seminar that stated it was not allowed to tape other county employees or private individuals. CR 100-101. Scott C. Murphy testified that he works for Kitsap County as an Engineer 2 concurrence manager. Mr. Murphy testified that in all the years he had worked for the county he had never attended a training seminar where he was told not to record other employees or private individuals. CR 111-112.

All of this testimony was unrefuted by the County. The County's only witness had to admit that there was no County policy against recording county employees.

The termination of Mr. Smith was also irregular because other coworkers were not punished for the same or similar conduct. Mr. Shanks testified that he recorded coworkers, that the County knew about it and he was never advised it was improper nor was he reprimanded for such.

Mr. Smith also testified that he was never advised that there was a county policy against recording without consent. He gave Ms. Aufderheide the Civil Deputy Prosecutor notice that he was doing such in February of 2004 and she did not advise him to stop or that it was unlawful. Mr. Smith also testified that an attorney advised him the recording without consent was lawful. There was no evidence in rebuttal.

Consequently, the Commissioner's Additional Finding of Fact II regarding the claim that Mr. Smith knew his recordings were impermissible does not have any evidence in support, let alone substantial evidence.

Additional Finding of Fact II also alleges that claimant's assertion that he concealed his recording device because of fear of Mr. Yingling misconstrues Mr. Smith's testimony. Mr. Smith was trying to obtain admissions and confessions from Director Casteel, Assistant Director Brand and Yingling (who was previously an Assistant Director of Public works) concerning their attempts to coerce him into filing false evaluations and to perjure himself at depositions in lawsuits against the County. He also

wanted to document retaliation from these conversations. That could not occur if they knew they were being recorded.

Mr. Smith needed the recordings to corroborate his claim because all of the directors and assistant directors for Public Works were dishonest and routinely present self serving false testimony even under oath. As Mr. Yingling had told Mr. Smith he has 30 attorneys across the street whose job is to protect him and the secret of his success was that he lies and Randy Casteel swears to it. CR 175.

Likewise, the claim that Lingling was threatening Mr. Smith and his family was supported by testimony by Mr. Smith (CR at 145-47, 157-58) and corroborated by Mr. Shank and Mr. Wiley. Mr. Wiley testified that he told Mr. Smith that "Mr. Yingling was checking up on him, or something; the he better make sure everything's in order." CR at 42. Shank testified that he was harassed by Mr. Yingling and that Mr. Smith was threatened by Mr. Yingling. CR at 66. Yingling also had motive to harass and threaten Mr. Smith because Smith supported Shank was a friendly witness with respect to Shank's grievances and lawsuit against the County.

There was no rebuttal evidence and the Commissioner was not present to evaluate the demeanor and credibility of the witnesses. The Commissioners finding regarding Yingling was, therefore, unsubstantiated and an abuse of discretion.

There also was no evidence to support the allegation in Additional Fact Finding IV that Mr. Smith violated an order to bring in the laptop by Mr. Casteel. Mr. Smith testified that he was ordered not to remove any files; whereas, he removed a program what was his private property. CR at 142-143. On cross examination, Mr. Casteel admitted that he was not sure whether he told Mr. Smith not to remove “files” or “anything.” Hence, Mr. Smith’s claim that he was only told not to remove files is unrebutted. CR at 34.

As argued below in section D(2), there was no substantial evidence supporting the allegation in Additional Fact Finding III that conversations recorded by Mr. Smith were “private conversations” because there are no specific details set forth in the OAH verbatim report of the proceedings about any conversations that occurred such as what was said, where, who was present, was it a public or private place, where there passersby, were the conversations with the public, were threats involved, were there passersby etc. The Commissioner’s Record also contains no specific details regarding any conversations.

In order to prevail, the County should have proven by a preponderance of the evidence at least one specific instance where a recording was made under specific circumstances that could be determined to be a “private communication or conversation.” The record below does not contain

sufficient evidence to support a claim that Mr. Smith ever recorded a single solitary private conversation.

C. The lower court erred in Conclusion of Law III wherein it stated the Petitioner has failed to establish that the final order of the Commissioner is based upon an erroneous interpretation or application of law.

1. The Commissioner's Review Judge failed to make a specific finding of fact that Mr. Smith recorded a "private conversation" without consent as required by RCW 9.73.030.

Additional Finding of Fact III states "The work-related conversations secretly recorded by the claimant while acting on behalf of Kitsap County were "private conversations", as that term is contemplated by RCW 9.73.030 and interpreted in *State of Washington v. Clark*, 129 Wn.2d 211, 224-230, 916 P.2d 384 (1996). [sic] However, there is nowhere to be found in the Memorandum Opinion or the Findings of Facts, Additional Finding of Facts or the Additional Opinions that identifies a specific conversation that was determined to be a "private conversation".

Additional Finding of Fact III is conclusory in nature and the commissioner's Review Judge failed to make a case specific analysis of any particular conversation (possible because there is insufficient evidence in the record to do so).

Additional Finding of Fact II makes no reference to the term "private conversation" whatsoever and infers that the knowing recording of

any conversation without consent is always unlawful per se. This argument was presented erroneously by the County at the OAH hearing.

Likewise, the Additional Conclusions of Law identifies the alleged misconduct stating "In his capacity as an official representative of Kitsap County, a governmental entity, the claimant intentionally, and without notice, recorded private conversations with individuals seeking to deal with his employer." What conversations? Where are they in the record and why are they "private conversations?"

The problem with this application of law is that there is no fact specific analysis point to a single solitary conversation or conversations that can be determined on a case by case basis to be "private conversations" which is what the law requires. The "intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case" controls whether a conversation is private. (emphasis added) *Kadoranian v. Bellingham Police Dept.*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992).

The failure to look at a specific conversation to determine whether or not it was a private conversation based upon the subjective intent of the parties as manifested by the surrounding circumstances was an error in the application of law.

2. The Commissioner's Review Judge failed to follow RCW 34.05.464(4)

The commission, when reviewing an initial order by a presiding officer "shall give due regard to the presiding officer's opportunity to observe the witnesses." RCW 34.05.464(4). The reason for the statutory requirement is obvious, only the presiding officer is in a position to observe and hear the witnesses for both sides.

In this case, the commission heard tapes and/or viewed transcripts. It could not evaluate credibility to any degree, any more than any court reviewing the record. Yet, it claimed an additional finding that Mr. Smith's fear of Ron Yingling was not credible. The county presented no evidence to refute the claim. And all the witness in attendance, all present or former employees of the county, supported the claim. Mr. Smith's claims were bolstered by Mr. Shank and all he had experienced. Several witness spoke of threats by high level county personnel, and of Mr. Smith's fears expressed to them contemporaneous to the event several years before. The commissioner's findings regarding Smith's credibility in that regard are not supported by any evidence, only by the legal argument of the County's attorney.

D. The lower court erred in Conclusion of Law IV wherein it stated the final order of the Commissioner correctly determined that the Petitioner was discharged from his employment with Kitsap County Due to disqualifying misconduct, consisting of recording private conversations in violation of RCW 9.73.030 and removing materials from

his assigned, county-operated laptop computer after being told not to do so.

1. **The lower court erred in Conclusion of Law IV wherein it stated the final order of the Commissioner correctly determined that the Petitioner was discharged from his employment with Kitsap County Due to disqualifying misconduct, consisting of recording private conversations in violation of RCW 9.73.030.**

The Commissioner's Additional Conclusion of Law stated as follows:

In his capacity as an official representative of Kitsap County, a governmental entity, the claimant intentionally, and without notice, recorded conversations with individuals seeking to deal with his employer. Such conduct, if known by the general public of Kitsap County, could certainly impact a citizen's willingness to discuss issues with a county employee, thereby adversely impacting the county's interest in serving its constituents, as well as exposing the county to litigation and liability.

Decision of Commissioner, dated Jan 5, 2007 at page 2 paragraph 4.

The Commissioner's Decision in finding of fact III was that these conversations were "work related" and were private conversations as contemplated by RCW 9.73.030 and interpreted by *State of Washington v. Clark*, 129 Wn.2d 211, 224-230, 916 P.2d 384 (1996).

However, there is no such case as *State of Washington v. Clark* with respect to the citation referenced by the Commissioner. The case referenced is *Washington v. Glass*, 129 Wn.2d 211, 916 P.2d 384 (1996).

Moreover, the *Glass* case cited by the Commissioner was completely off point. This case involved an undercover informant that, while posing as a drug dealer, was sent into a public area known to have large scale street trafficking of narcotics to covertly record conversations with other persons engaged in the curb side trafficking of drugs. This scenario in no way correlates to a situation where the Transportation Traffic Divisions Senior Program Manager meeting with a private citizen on his or her property or in their home is ludicrous to receive a complaint about a street sign or neighborhood traffic problems. The case is off point.

In the *Glass* case, the Court held that “The fact that a transaction is conducted with the public has been enough for us to find that such transaction is not private . . .” *Washington v. Glass*, 129 Wn.2d at 226. The Court focused on the fact that the transactions occurred in public places, where passerby could over hear conversations and the drug traffickers were openly soliciting the general public.

In addition to his apprehension that Yingling might appear at a meeting with a private citizen, Mr. Smith stated that he used the recordings to take accurate notes about the complaints or requests received by the resident’s he interviewed. Mr. Smith testified that:

. . . I did on occasion go back and listen to conversations with some of my employees because it helped me with my job. Typically I had a very busy office with two or three

people at any given point in my office talking to me about three or four different problems. And it would be difficult for me to try to make decisions like that. So I would often go back and listen to some of those things and say okay, well, what kind of signs did we decide to put out at this school, or, you know, what kind of striping did we decide to do out there at this location (unintelligible) access, and those kinds of things. So I did find it useful, quite useful, to help me with my job. But primarily it the reason I did it was to protect myself in case something happened to me.

CR at 163. Because he is the Senior Program Manager for the Transportation Traffic Division, Mr. Smith usually receives complaints about signs or road conditions and requests for signs to be posted, speed limits changed or improvements to intersections or highways. Consequently, Mr. Smith takes reports that are going to be seen by third parties and often has to discuss these situations with his superiors, supervisors in other departments and commissioners.

In *Kadoranian v. Bellingham Police Dept.*, 119 Wn.2d 178, 189, 829 P.2d 1061 (1992), a daughter answered a telephone call from a stranger, told the caller her father was not home and took a message. The conversation was not private because the information was conveyed to stranger without a reasonable expectation it would be kept secret since it was to be conveyed to the father. *Kadoranian*, 119 Wn.2d at 190-91. Accordingly, a person has no reasonable expectation of privacy in a conversation that takes place at a public meeting where persons in attendance

could reveal what transpired to others. *State v. Slemmer*, 48 Wn. App. 48, 53, 738 P.2d 281 (1987).

In the instant case with respect to private parties, David Smith was an employee of Kitsap County who recorded meetings and contacts on complaints. The David Smith could testify to what was said at these meetings demonstrates that these were not private conversations. Furthermore, the information was routinely placed in reports and in other instances the private parties requested action that required Mr. Smith to confer with his superiors and/or commissioners regarding how to handle a complaint or whether the relief requested can be approved.

Kitsap County residents that make complaints to the Transportation Traffic Division or requesting modifications to the roadways have no reasonable expectation of privacy because Mr. Smith will have to file a report and confer with other county employees regarding such complaints or requests. A person has no reasonable expectation of privacy in a conversation that takes place at a meeting where one who attended could reveal what transpired to others. *State v. Clark*, 129 Wash. 2d 211, 225-226 (1996); *State v. Slemmer*, 48 Wn. App. 48, 53 (1987). When any person may turn out to be the recipient of information resulting from a communication, that communication is not private. *State v. Wojtyna*, 70 Wash. App. 689, 695-696 (1993).

Citizens making complaints to Public Works Transportation Traffic Division should expect to be talking to a stranger, a county employee, and they can not reasonably expect such conversations to be private or that the information they provide will not be passed on. In fact, such communications will routinely by necessity be disclosed to others in order take action on the complaints.

The analysis on this issue was legally incorrect because the Washington courts have addressed the term "private conversation" by analyzing the circumstances of each particular case to determine whether a specific conversation or communication was private. The "intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case" controls whether a conversation is private. (emphasis added) *Kadoranian*, 119 Wn.2d at 190 (quoting *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978), *review denied*, 92 Wn. 2d 1006 (1979)).

In addition, it is very likely that a meeting with a local resident or business person will occur on a public roadway where the complaining party wants a change or improvements made. A conversation on or near a public street and within the sight and hearing of passersby is not private. *State v. Flora*, 68 Wn. App. 802, 806, 845 P.2d 1355 (1992). In *Flora*, a citizen recorded two police officers who allegedly were harassing him on a public street within sight or hearing of passersby. The officers in *Flora*

had no privacy interest in statements made as public officers effectuating an arrest in public. *Id.* at 807. Generally, speaking any conversation that occurs in a public place where there are people nearby or passersby that could hear the conversation is not a private conversation.

The County failed to present any witnesses before the ALJ judge to testify regarding any specific instances where Mr. Smith had recorded a private citizen in the field. Mr. Smith gave no such testimony and the County's only witness was Randy Casteel who did not address the subject regarding any allegations of any specific misconduct. Absent specific details, there is insufficient information to make a legal determination as to whether a conversation is private because such a determination has to be made specifically on a case by case basis. Thus, the Commissioner's additional conclusion of law regarding the issue of "private communications" was false and erroneous because his analysis was not determined based upon any specific facts or circumstances.

The Commissioner's Findings of Fact and Conclusion of law were also erroneous because he completely failed to address Mr. Smith's claim that the discharge was pretextual and that he was terminated in retaliation for engaging in protected activities.

The timing in this case is clearly suspect. The County was given notice about the recordings in February of 2004 and never advised Mr.

Smith that his recordings were improper or unlawful. He stopped recording in November of 2004, and pre-termination notice was not issued until April 14, 2006, twenty-seven (27) months after the County became aware of the recordings and about one (1) month after Smith filed an EEOC complaint against the County. It should also be noted that Mr. Shanks also recorded conversations without consent and he was never charged with misconduct regarding such.

Mr. Smith presented numerous witnesses in support of his retaliation claim and that the discharge was pretextual. Whereas, this testimony, by and large, was unrefuted by the County which only presented one witness at hearing. The authorities regarding a pretextual retaliation claim are set forth below.

- 2. The lower court erred in Conclusion of Law IV wherein it stated the final order of the Commissioner correctly determined that the Petitioner was discharged from his employment with Kitsap County Due to disqualifying misconduct, consisting of consisting of removing materials from his assigned, county-operated laptop computer after being told not to do so.**

The Commissioner clearly erred because the claim of misconduct was clearly pretextual and in retaliation for the following reasons: (1) Mr. Smith's refusal to comply with Mr. Brand and Mr. Casteel's demands that he prepare a false employee evaluation for Supervisor Cioc; (2) Because

he refuse to commit perjury when deposed in a law suit against the County; and (3) Because he filed a whistle blower and an EEOC complaint against the Kitsap County Public Works Department.

RCW 49.60 provides as follows: "It is an unfair practice for any employer . . . to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter{.}" RCW 49.60.210(1). Retaliatory motivation need not be the principal reason for terminating an employee; an employer motivated in part by retaliatory influences who discharges an employee engaged in protected activity is in violation of the statute. *Selberg v. United Pac. Ins. Co.*, 45 Wn. App. 469, 471-72, 726 P.2d 468 (1986). In order to establish a prima facie case of retaliatory discharge, the employee must show that he or she was engaged in a statutorily protected activity, that the employer discharged or took some other adverse employment action against the employee, and that retaliation was a substantial factor behind the adverse action. *Delahunty v. Cahoon*, 66 Wn. App. 829, 840-41, 832 P.2d 1378 (1992) (citing *Allison v. Housing Auth.*, 118 Wn.2d 79, 95, 821 P.2d 34 (1991)).

The claim regarding the removal of a file is clearly pretextual. Mr. Smith removed a program that was his private property and he only had a license to use it on one computer. He knew he would never see the laptop

again so he removed the program. The program could be easily replaced and there was only one audio recording on the lap top which was a recording of the conversation where assistant director Brand admitted he was giving Smith a bad evaluation because he filed a whistle blower's complaint. Moreover, Smith had previously offered the recording to Civil Deputy Prosecutor Aufderheide and the County already received it through civil discovery in another case.

Mr. Smith testified that he was ordered not to remove files and he did not. He removed a software program. This is uncontested because Casteel testified that he is not sure whether he told Mr. Smith not to delete "any files" or "anything". CR at 34.

Proximity in time between the adverse action and the protected activity, coupled with evidence of satisfactory work performance and supervisory evaluations suggests an improper motive. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991) If an employee establishes that he or she participated in an opposition activity, the employer knew of the opposition activity, and he or she was discharged, then a rebuttable presumption is created in favor of the employee. *Id.* at 69; *Graves v. Department of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994).

The timing of the termination is suspect. The misconduct was stale

because it occurred over a year prior on March 10, 2005, and because it occurred five weeks after Mr. Smith filed an EEOC complaint. It was also known that Mr. Smith was a friendly witness in Shank's and Sutherland's lawsuits against the County. Evidence was also presented that Smith was asked to perjure himself at his deposition, to file false evaluations for Supervisor Cioc and that he was retaliated against because "his memory was too long" to suit the Public Works director and assistant directors. Mr. Smith's testimony was corroborated by Mr. Wiley, Shanks and Sutherland. Whereas, the allegations were unrefuted by the County which only presented one witness Mr. Casteel.

E. The lower court erred in Conclusions of Law V wherein it stated the decision of the Commissioner of the Employment Security Department of the State of Washington entered in this matter on February 2, 2007, is proper and should be upheld.

The lower court erred because the Commissioner's Review Judge's decision was not supported by substantial evidence, because the Review Judge's findings were based upon errors of law and errors in the application of law. The arguments made above in sections B, C and D are hereby incorporated by reference.

F. The lower court erred in ordering, decreeing, and adjudging the decision of the Commissioner of the Em-

ployment Security Department of the State of Washington in the matter affirmed.

The lower court erred in ordering, decreeing and adjudging the decision of the Commissioner of the Employment Security Department of the State of Washington in the matter affirmed because the Review Judge's Findings of Fact and Conclusions of law were not supported by substantial evidence and were based upon erroneous applications of law and error as argued above. Said arguments raised above in sections B, C and D are hereby incorporated by reference.

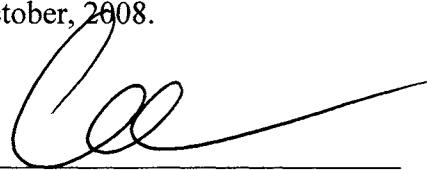
V. CONCLUSION

The Commissioner's Review Judge should have deferred to the discretion of the ALJ trial judge regarding the credibility of the witnesses. Even so, the Commissioner's Review Judge's Findings of Fact and Conclusions of law were not supported by evidence that is substantial when viewed in light of the whole record before the court. The claimant presented numerous witnesses and sufficient evidence to establish that he did not engage in misconduct and that the claims were pretextual. The claimant's actions was not in the best interests of upper level management at public works, but his conduct was in the best interests of Kitsap County. How can the exposure of unfair labor practices not be in the best interests of the county? The upper management of the Public Works department is

controlled by a family clique that practices nepotism instead of equal opportunity, that lacks veracity and that has no respect for the law or the judicial system. They believe they are above the law. We respectfully request that the Appellate Court prove that they are wrong and reverse the Findings of Facts and Conclusions of Law and the Memorandum Opinion and affirm the original decision of the ALJ.

DATED this 10th day of October, 2008.

1



Clayton E. Longacre, WSBA #
Attorney for Claimant/Appellant

 ORIGINAL

No. 37492-7--II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DAVID N. SMITH,
Petitioner-Appellant

Vs.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,
Respondents-Appellees

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PROOF OF SERVICE

I Nori Dumbaugh, the undersigned, hereby certify and declare under penalty of perjury under the state of Washington that the following statements are true and correct.

1. I am over the age of 18 years old and not a party to the above referenced action.

2. I hereby certify that I caused to be served a copy of

A. BRIEF OF APPELLANT;

Court of Appeals Number 37492-7-II,

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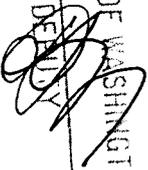
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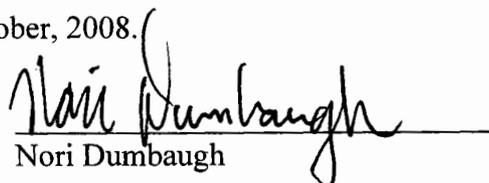
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of October, 2008.


Nori Dumbaugh