

No. 39229-1

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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TERESA E.L. BIENICK, a single individual, and KATHERINE  
SHIPMAN-THOMPSON, a single individual,

Appellants,

v.

STATE OF WASHINGTON, and DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES

Respondents.

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APPELLANTS' REPLY BRIEF

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## I. SUMMARY OF ARGUMENT

The State's response brief is factually supported almost exclusively by the hearsay statement, created after his removal from supervisory position, of John Pelkey. Contrary to how the statement is actually used, the State unpersuasively asserts that the statement is used for matters other than the truth. Its brief, however, belies this contention as the statement is the only source for much of the State's factual description of the case and its assertion that there is a legitimate reason for the adverse employment actions at issue in this case.

Aside from relying almost exclusively on the inadmissible unsworn statement of John Pelkey, the State also frames issues in its brief through a standard other than that used during summary judgment proceedings. Instead of articulating the facts viewed in the light most favorable to Teresa Bienick and Katherine Shipman-Thompson, the State simply asserts that its evidence is all that is credible. When the facts are reviewed in the correct procedural posture, in the light most favorable to the nonmoving party, the evidence in this case shows that there were verbal complaints made to the Auditor's Office prior to the incidents in this matter, that Ms. Bienick told John Pelkey that she was going to the Auditor's Office,

and immediately upon making this statement, Mr. Pelkey ran her out of the office and placed her on administrative leave, an action that resolved in Ms. Bienick's favor. CP 335-337. While the State claims surprise about learning of Ms. Bienick's verbal complaints to the Auditor's Office, these arguments are difficult to understand considering the written complaint to the Auditor's Office, in fact, references the prior verbal contacts. CP 480.

In short, Appellants contacted the Auditor's Office at the time Mr. Pelkey was directing the misappropriation of State funds. Ms. Bienick also personally confronted John Pelkey, saying that she was going to go to the Auditor's Office to make these actions known. CP 335-337. In a direct response to these statements, Mr. Pelkey retaliated against Ms. Bienick by removing her from the office. Ms. Shipman-Thompson was a supporter of Ms. Bienick and suffered a number of adverse employment actions within days of Ms. Bienick's administrative leave. CP 356-358. The Washington State Legislature has directed the Courts to construe the whistleblower statute broadly in favor of employees. RCW 42.40.010. Under these facts, there was no basis to grant summary judgment. The decision below should be reversed and this matter should be remanded for trial.

## II. ARGUMENT

### A. The Trial Court Erred In Denying Appellants' Motion To Strike.

Appellants argued to both the trial court and this Court that the unsworn statement of John Pelkey was inadmissible hearsay. In the State's response brief, there is no assertion that any hearsay exemption applies to the statement. Instead, the State's argument is that the John Pelkey statement is used for matters other than the truth.

While the State makes this argument, the manner in which it actually uses the John Pelkey statement is in complete contradiction to this claim. First, throughout the fact section of its brief, the State relies almost exclusively on the John Pelkey statement to establish its claimed background facts. Second, the State concedes that it uses the John Pelkey statement to establish "that improper contracts were not issues of dispute between Pelkey, Bienick, and Shipman-Thompson[.]" Respondent's Brief at 32. Third, the State admits that it is using the Pelkey statement to establish "the Department's legitimate reasons for its actions[.]" *Id.* Fourth, the State asserts that it is using the Pelkey statement to establish a "lack of awareness or perception of Bienick or Shipman-Thompson as whistleblowers." *Id.* Contrary to its claim, the State is using the Pelkey statement to

establish its version of the truth. The document is hearsay and the trial court erred for considering it over Appellants' objection.

**B. Appellants' Verbal Complaints To The Auditor's Office Are Sufficient.**

The State concedes, for the first time, that verbal complaints to the State Auditor are sufficient to establish an employee as a whistleblower. In its response, the State instead argues that there must be a causal connection between the verbal complaints and the institution of the Auditor's subsequent investigation. In this case, the State's argument fails for several reasons.

Initially, the verbal complaints to the Auditor's Office were part and parcel of continued communication that did, in fact, ultimately lead to an investigation and conclusion that State funds were inappropriately spent. CP 497. Indeed, Ms. Bienick's verbal complaints with the Auditor's Office are set forth and listed in the subsequent written complaint. When Ms. Bienick initially contacted the Auditor's Office, she was advised that there could be an additional time that went by before an investigation was necessary, which could include as much as a year, during which time she could work toward no longer being under the supervision of Mr. Pelkey. CP 336. Ms. Bienick followed the suggestion, and Mr. Pelkey's supervisory authority over her was removed and an investigation by the Auditor's

Office ensued thereafter. Again, considering the Legislature's command that this statute be broadly construed in favor of employees, the State's narrow and restrictive construction is unpersuasive. The verbal complaints made to the Auditor's Office were sufficient and this Court should reverse the decision below.

**C. There Is Sufficient Evidence To Allow A Fact Finder To Conclude That John Pelkey Believed That Ms. Bienick Had Or Would Go To The State Auditor.**

Assuming, *arguendo*, that this Court should conclude that verbal complaints to the State Auditor are insufficient, there is still evidence to support a conclusion that Mr. Pelkey was under the subjective belief that Ms. Bienick had or shortly thereafter would go to the Auditor's Office about these illegal contracts. Specifically, Ms. Bienick told John Pelkey that she would do this and he responded in an irate fashion. CP 337. Irrespective of whether an employee actually complains to the Auditor's Office, if there is a subjective belief on behalf of the supervisor that the employee is a whistleblower, then this is sufficient to trigger the protections of the act. RCW 42.40.020. For this additional reason, the decision below should be reversed and this matter should be remanded for trial.

**D. Direct Evidence Is Sufficient To Show Retaliation.**

The State argues that even if this Court should find a prima facie case established, there is still insufficient evidence of retaliation or pretext. These arguments are unpersuasive because there is direct evidence of retaliation in this case. CP 336-338; 356-358. When there is direct evidence of discrimination, the courts do not utilize the *McDonnell-Douglas* burden shifting type analysis. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 359, 172 P.3d 688 (2007) (“Hegwine’s claim that Fibre violated RCW 49.60.180(4) is supported by direct, as opposed to circumstantial, evidence. Hence, her second claim is not to be analyzed under the three-step protocol from *McDonnell Douglas*, 411 U.S. 792, 93 S. Ct. 1817.”); *Subia v. Riveland*, 104 Wn. App. 105, 112, 15 P.3d 658 (2001) (“In addition to the *McDonnell Douglas* test, the federal courts have recognized that a prima facie case of discrimination can be established by showing direct evidence of discriminatory intent.”) (quoting *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 491, 859 P.2d 26 (1993), *amended by*, 122 Wn.2d 483, 865 P.2d 507 (1994)).

Here, the statements made by Mr. Pelkey and the temporal connection between Ms. Bienick’s confronting Mr. Pelkey about the contracts and his immediate response by removing her from the office

is more than sufficient evidence to create a question of fact as to both retaliation and pretext. Beyond this direct evidence, the fact that the investigation regarding her administrative suspension concluded in Ms. Bienick's favor is also more than sufficient to establish that Mr. Pelkey's actions were retaliatory and any claimed legitimate reason for placing her on administrative leave was simply pretextual. CP 337.

### III. CONCLUSION

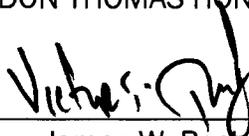
For the reasons stated above, and those outlined in Appellants' opening brief, this Court should reverse the decision below and remand this matter for trial.

Dated this 10<sup>TH</sup> day of November, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

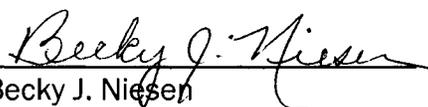
I, Becky J. Niesen, certify that I served a copy of this document by U.S. Mail on all parties or their counsel of record on the date below as follows:

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

SIGNED this 18th day of November, 2009 at Tacoma.

  
Becky J. Niesen