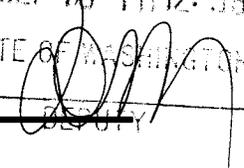


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DIVISION II

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NO. 39229-1

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

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.

RESPONDENT'S BRIEF

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I. NATURE OF THE CASE

This appeal arises from a whistleblower retaliation lawsuit brought by two Department of Social and Health Services employees, one of whom never filed a whistleblower complaint, and another who filed a complaint only after the alleged retaliation ended.

Appellants Teresa Bienick and Katherine Shipman-Thompson tried to evade summary judgment by belatedly asserting that their informal contacts with a Department administrator and two employees of the State Auditor's Office constituted whistleblower complaints. The trial court rejected their argument because Bienick and Shipman-Thompson did not expect those contacts to start a State Auditor's Office investigation, none of them did, and only complaints that start State Auditor's Office investigations are protected under the whistleblower statute.

The trial court dismissed Bienick's and Shipman-Thompson's whistleblower retaliation claims because they failed to establish a prima facie case and failed to rebut the Department's legitimate, non-retaliatory reasons for its actions – business needs and performance problems. Because ample evidence supported dismissal, the Department asks this Court to affirm.

II. RESTATEMENT OF THE ISSUES

A. Did the trial court properly dismiss Bienick's and Shipman-Thompson's whistleblower retaliation claims because they could not establish protected activity or causation where Shipman-Thompson never engaged in protected activity and Bienick did so only after the alleged retaliation ended?

B. Did the trial court correctly dismiss Bienick's and Shipman-Thompson's whistleblower retaliation claims where they failed to rebut the Department's legitimate non-retaliatory reasons for its decisions?

C. Did the trial court abuse its discretion by denying Bienick's and Shipman-Thompson's hearsay-based motion to strike, where the evidence was considered for relevant purposes other than the truth of the matter asserted, such as to show the information the Department considered in deciding whether to take corrective action against their supervisor?

III. RESTATEMENT OF THE CASE

A. **Pelkey Became Aware Of Bienick's Performance Problems Soon After He Became Finance Chief**

On August 1, 2004, John Pelkey began to serve as the Department of Social and Health Services' Chief of Finance in the Mental Health

Division. CP at 37. As Finance Chief, Pelkey supervised the Mental Health Division's Fiscal Office. Two of his subordinates within the Fiscal Office were Teresa Bienick and Katherine Shipman-Thompson, long-time friends and former roommates who worked as the Contracts Administrator and Chief Financial Officer, respectively. CP at 206.

Shortly after management informed the Fiscal Office staff of Pelkey's appointment, Bienick asked to meet with him before his start date to discuss her subordinates. CP at 37 ¶ 2. Pelkey agreed. During the meeting, Bienick discussed her management style and her concern that Pelkey would interfere with it. CP at 37 ¶ 3. She also warned Pelkey that her staff might complain about her supervision. *Id.* Bienick's concerns set off immediate red flags for Pelkey. CP at 37 ¶ 4.

During his first week as Finance Chief, Pelkey met with all of the Fiscal Office staff. CP at 37 ¶ 5. As Bienick predicted, her staff complained about her supervision to Pelkey. CP at 37 ¶¶ 5, 7. Pelkey also spent his first two weeks working with outgoing Finance Chief Linda Tullis, who discussed the job and staff with him. CP at 631-32. Tullis informed Pelkey that Bienick was a dictatorial micromanager who needed management training, while her staff needed stress-management training and difficult-supervisor training. CP at 37 ¶¶ 9-10; 38 ¶ 1; 632 ¶¶ 3-4.

During August 2004, Bienick had several arguments with a subordinate, Lois Thadei, that including shouting matches, harsh words, and derogatory e-mails, which raised further concerns for Pelkey. CP at 39 ¶ 3. Between August and September of 2004, Bienick and Thadei had about six such clashes, one of which Pelkey was called out of a management meeting to break up. CP at 39 ¶ 3.

Chief Pelkey held his first all-staff meeting in late August 2004. CP at 39 ¶ 4. The meeting turned into a complaint session in which several employees seemed to contend with each other, while the non-contentious staff stated that meeting with the disruptive staff – specifically Bienick, Shipman-Thompson, and Thadei – was a waste of time. *Id.* Thereafter, Chief Pelkey met with staff individually or in small groups. *Id.*

Pelkey noticed early on that Bienick often arrived late, left early, or missed the entire day, then called her staff incessantly to check up on them while she was out. CP at 38 ¶ 4. He also received complaints from the Department's Contract Support Services Manager about the Central Contract Services unit staff's difficulty dealing with Bienick, who called them to complain or make demands, then called other staff members if she did not get the response she wanted from her initial contact. CP at 38 ¶ 7. In fall 2005, Division Director Brimner suspended Bienick's contract

signing authority in fall 2004 due to the Central Contract Services unit complaints. CP at 264 ¶ 4; 272 ¶ 3; 274-75.

In early September 2004, Brimner asked Pelkey to consider removing Bienick from her supervisory position, but Bienick asked Pelkey not to, explaining that she had not received sufficient supervisor training to understand her supervisory role. CP at 39 ¶ 5. Pelkey therefore agreed to let Bienick continue in her position and asked Brimner for six months to work with her on improving her supervisory skills, which Brimner approved. *Id.* Pelkey followed through by sending Bienick to a week-long supervisory training class in October 2004 and meeting with her to counsel her on her interactions with other staff. CP at 39 ¶ 6; 142 ll. 13-18. In their meeting, Pelkey discussed Bienick's tendency to intimidate staff by invading their space and cornering them in their cubicles. CP at 40 ¶ 1.

B. Pelkey And Others Were Concerned About The Fairfax Contract

In early 2003, at the behest of Division Director Brimner, former Finance Chief Tullis, Bienick, and others in the Fiscal office began working on a contract to provide Fairfax Hospital, a private mental health hospital in Seattle, with funds to keep its doors open. CP at 681 ll. 4-5. The Fairfax contract was a priority because the hospital provided mental

health care to children who might otherwise be sent to juvenile detention or emergency rooms due to the lack of another place to receive care. CP at 98, 686.

Pelkey and Bienick shared similar concerns about the propriety of the Fairfax contract. CP at 681. In fact, Pelkey, Contracts Specialist Ramona Bushnell (who drafted the contract), Bienick, and others expressed concerns that the contract might constitute an improper loan of State funds because it authorized a one-time advance payment of \$310,000 for vaguely specified services,¹ with no provisions for reviewing performance, monitoring progress, or evaluating the services provided. CP at 492-99, 691. Pelkey shared his concerns with Division Director Brimmer, but Brimmer directed Pelkey to execute the contract. CP at 448, 454, 690-92.

Pelkey went out of his way to shield Mental Health Division staff from any fallout from the Fairfax contract, such as by directing Program Administrator David Weston to bring a payment document to Pelkey to sign so Weston would not have to sign it. CP at 457, 694.² In September 2004, Pelkey sent Bienick and Bushnell an email stating that they would be protected if they signed the Fairfax contract. CP at 97, 681-82.

¹ The contract was apparently vaguely worded to avoid violating Medicaid regulations and impacting Medicaid reimbursements. CP at 492-93.

² Pelkey could not sign the actual contract, however, because he did not have contract signing authority. CP at 683 (Pelkey Dep. at 47 ll. 23-25).

Bushnell later asked not to sign the contract because she could not do so in good faith, and Pelkey agreed. CP at 682, 701. When Pelkey asked Bienick to sign it, but gave her the option not to, Bienick said she was a team player and signed the contract. CP at 682.

C. Bienick And Shipman-Thompson Discussed The Fairfax Contract With A Colleague Over A Smoke Break

Bienick and Shipman-Thompson state that in September or October 2004, after the Fairfax contract was done, they spoke with a Department administrator, Kathleen Brockman, while they were all outside smoking cigarettes. CP at 559 (Bienick Dep. at 47), 627 (Shipman-Thompson Dep. at 181). Bienick expressed concern about the State being able to recover the money. Brockman doubted that the State would go after that money. CP at 559. Shipman-Thompson asked Brockman if there was some way to resolve the issue internally, because she preferred to resolve issues internally rather than externally. CP at 627-28 (Shipman-Thompson Dep. at 181-82).

D. Bienick And Shipman-Thompson Learned How To File A Whistleblower Investigation

Bienick and Shipman-Thompson say they spoke with Marie Steffan of the State Auditor's office in October 2004. CP at 336 ¶ 7. Bienick states that they met with Steffan while she was auditing another Mental Health Division matter, and told her about the Fairfax contract. *Id.*

Bienick specifically told Steffan that she would not take any action at that time and would not do so as long as she reported to John Pelkey. CP at 480, 559 (Bienick Dep. at 48 ll. 7-13).

Steffan explained that State Auditor's Office employee Sandra Miller was the person to call if they wished to file a whistleblower complaint, and she told them how to contact Miller. *Id.*; CP at 550 (Bienick Dep. at 10 ll. 6-10), 559 (Bienick Dep. at 46 ll. 10-11). Bienick contacted Miller and told her, as she told Steffan, that she would not file a whistleblower complaint while she was under Pelkey's supervision. CP at 336 ¶ 7, 559 (Bienick Dep. at 48 ll. 10-13). Miller explained that Bienick could file a whistleblower complaint at any time within a year of the allegedly improper activity. *Id.*

Bienick states that she did not follow Miller's complaint filing instructions until she was removed from Pelkey's supervision almost a year later and that the first time she filed a whistleblower complaint was when she filed with the State Auditor's Office on August 1, 2005. CP at 559 (Bienick Dep. at 48 ll. 15-17), 571 (Bienick Dep. at 95).

E. Human Resources Directed Pelkey To Suspend His Staff's Supervision Of Other Staff

One of the conflicts between Bienick and Thadei concerned Thadei's first name. Thadei used two first names at work, her given

Native American name of “Louie” and the more common English name of “Lois.” CP at 102-03, 42 ¶ 8. A vendor became confused by the two names and asked Bienick about it. CP at 42 ¶ 9. In response, Bienick changed Thadei’s name on her e-mail account, without Thadei’s agreement. CP at 42 ¶ 9, 43 ¶ 1. Pelkey resolved the issue by having Thadei use an e-mail signature block that included both names. CP at 43 ¶ 2.

The Department’s Division of Access and Equal Opportunity investigated the name conflict from October to December 2004. CP at 43 ¶ 5. The Human Resources Division informed Pelkey during the investigation that to avoid any perception of retaliation, none of his Fiscal Office staff should supervise other Fiscal Office staff, meaning that Bienick should not supervise her subordinates during that time. CP at 43 ¶ 6; 135 ll. 4-13; 145 ll. 1-10; 285 ¶¶ 4-5; 286 ¶ 4. Pelkey informed Bienick of this direction on October 15, 2004, before she left the office for supervisor training the following week. CP at 43 ¶ 6.

The week after Bienick returned from her supervisor training, she confronted Pelkey about her belief that he was only going to suspend her supervision of Thadei, not her supervision of her entire staff. CP at 44 ¶¶ 3-4. While confronting Pelkey, Bienick spoke disrespectfully, telling him that even without supervisory authority, no contract would leave the unit

without her approval, and if any contract failed to meet her expectations, she would go to the State Office of Financial Management. CP at 45 ¶¶ 2-3. Because of the inappropriate way Bienick was speaking to him, Pelkey stopped the conversation, directed Bienick to leave his cubicle, and later sent her home. CP at 45 ¶¶ 4-5.

To deal with his staff's inability to supervise coworkers, Pelkey hired Sheila Anderson as the Acting Contracts Manager, starting December 6, 2004. CP at 46 ¶ 6. Soon after Anderson began, Bienick began to constantly question Anderson's directions, including her directions to other staff. In response, Anderson asked Pelkey to reassign Bienick because she was not completing her work assignments and was causing constant difficulties through her interactions with Anderson and other contracts staff. CP at 47 ¶ 3. Per Anderson's request, Pelkey moved Bienick and Thadei, as Thadei was also resisting Anderson's directions. CP at 47 ¶¶ 4-5.

F. Human Resources Reviewed Fiscal Office Staff Concerns In Early 2005.

In April 2005, Human Resources Division Investigator Barbara Bowdish completed a Management Review of the Fiscal Office. CP at 242 ¶ 1, 267 ¶5. The issues she reviewed included staff attendance problems and some staff having to work harder because other staff were

often unavailable because they regularly arrived late, left early, and took excessive smoke breaks. CP at 246 §§ V-VI. Fiscal office staff felt that management had never adequately addressed these old, unresolved issues. CP at 246 § VI.

To resolve these concerns, Bowdish recommended that management develop core working hours for all Fiscal Office staff. CP at 247 § VI (2). Brimner and Pelkey adopted Bowdish's recommendation, and on April 19, 2005, Pelkey notified all Division staff working less than five days a week that five-day workweeks were now expected of all staff. CP at 169; 263 ¶ 2; 268 ¶¶ 1-2; 287 ¶ 3. When Shipman-Thomson asked Pelkey to reconsider due to family needs, Pelkey declined to make a wholesale exception for her, but allowed her to vary her work schedule so that she could assist her family and work 40 hours a week without having to use sick leave. CP at 169 ll. 9-23, 288 ¶ 4.³

Pursuant to the new policy, at least one other employee's schedule changed from four days a week to five. Shipman-Thompson noted that that employee, who was one of her subordinates, had attendance issues

³ Back in May 2004, Division Director Brimner asked all division employees to work five-day work weeks, meaning that Shipman-Thompson would have had to discontinue her four-day workweek schedule (CP at 172 ll. 2-6; 173 ll. 23-25; 174-75; 256 ¶¶ 1-2; 268 ¶¶ 1-2), but his request was not implemented at that time because Shipman-Thompson wrote letters asking Brimner and Pelkey's predecessor, Finance Chief Linda Tullis, to allow Shipman-Thompson and her staff to continue to work four-day workweeks, which Tullis allowed. CP at 256 ¶ 2.

and was not in the office very often, consistent with Investigator Bowdish's findings. CP at 183 ll. 1-7; 210 ll. 12-13. Shipman-Thompson testified that Pelkey expected the entire unit to be in the office five days a week and that she is not aware of any fiscal office employee who was allowed to work only four days a week during that time. CP at 183 ll. 14-16; 187 ll. 13-25; 188 ll. 1-2.

In June 2005, the management team considered reassigning contracting authority back to Bienick due to needs created by staff changes. CP at 54 ¶ 7. After again receiving strong opposition from Contract Support Services and its manager, Sue Bush, they chose not to do so. CP at 54 ¶ 8; 272 ¶ 3; 274-75.

G. Interim Division Director Lindeblad Made Changes And Addressed Bienick's and Shipman-Thompson's Concerns

MaryAnne Lindeblad succeeded Karl Brimner and became the Interim Director of the Mental Health Division in June 2005. During the last week of July 2005, Bienick complained about Pelkey's supervision to his supervisors, who asked him to work from home for a couple of days. CP at 55 ¶ 6. When Pelkey returned to the office, he was notified by Lindeblad that he would no longer supervise Bienick, as Bienick had filed allegations against him that would require an investigation. CP at 55 ¶ 9;

403 (Pelkey Dep. at 18 ll. 5-6). Pelkey had no further contact with Bienick after receiving Lindeblad's notification. CP at 55 ¶ 9.

Interim Assistant Division Director Norm Webster also responded to Bienick's concerns about Pelkey by transferring her to a position with another supervisor, doing similar work, with no loss of pay or benefits. CP at 251 ¶ 2. In her July 28, 2005, e-mail, Bienick acknowledged that Webster and Lindeblad tried to relieve her distress by moving her and thanked them. CP at 249 ¶¶ 1-6; 250 ¶ 5. Lindeblad confirmed the immediate reassignment of Bienick's supervision from Pelkey to Webster on July 29, 2005. CP at 254.

Webster also agreed that Lindeblad would look into Bienick's and Shipman-Thompson's claims that Pelkey promised them raises and Shipman-Thompson's request to return to a four-day-a-week schedule. CP at 251. Lindeblad later approved retroactive 2.5 percent raises for both. CP at 130 ll. 2-9; 263 ¶ 5; 282. (Due to a June 2005 reorganization that placed MHD into a new Department administration, 2.5 percent was the maximum raise available to any MHD employee.) CP at 219 ll. 19-25; 220 ll. 1-4. None of Bienick's and Shipman-Thompson's coworkers received higher raises. CP at 133 ll. 1-6; 263 ¶ 5; 268 ¶ 5.

Bienick filed a whistleblower complaint with the State Auditor's Office on August 1, 2005. CP at 260, 479. Shipman-Thompson did not.

CP at 293 ¶ 1. State Auditor Brian Sonntag acknowledged Bienick's complaint and confirmed that it warranted a preliminary investigation by his office, pursuant to the Whistleblower Act. CP at 260. Lindeblad reassigned Pelkey to a non-supervisory position on August 22, 2005, due to issues surrounding the Finance Office. CP at 268 ¶ 3.

H. Procedural History

Bienick and Shipman-Thompson filed this lawsuit asserting whistleblower retaliation and negligent infliction of emotional distress claims on July 24, 2007. CP at 5-10. The Department moved for summary judgment, which the trial court granted on March 31, 2009. CP at 750-51. Bienick and Shipman-Thompson timely appealed the dismissal of their Whistleblower retaliation claims.

IV. SCOPE AND STANDARDS OF REVIEW

This Court's review of an order granting summary judgment is *de novo*, and the Court engages in the same inquiry as the trial court. *Tyrrell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 132-33, 994 P.2d 833 (2000). This Court reviews evidentiary decisions, such as motions to strike related to summary judgment, for an abuse of discretion. *Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418 (2002). This Court may affirm the trial court on any ground supported by the record, even if not considered or applied by the trial court. *E.g., LaMon v. Butler*, 112

Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814, 110 S. Ct. 61, 107 L. Ed. 2d 29 (1989); *see also Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004).

V. LAW AND ARGUMENT

A. Summary Judgment

Ample grounds exist to affirm the summary judgment dismissal of this case. First, Bienick and Shipman-Thompson are unable to establish a *prima facie* case of whistleblower retaliation because Shipman-Thompson never filed a whistleblower complaint, and Bienick filed her whistleblower complaint only after the alleged retaliation ended. Their casual conversations with a Department administrator (who was not authorized at the time to receive whistleblower complaints) and with two State Auditor's Office employees did not initiate a State Auditor's Office investigation, nor did Bienick or Shipman-Thompson believe that they would.

Second, Bienick and Shipman-Thompson are unable to establish pretext, as they cannot rebut the Department's need to address performance issues and improve the Fiscal Office staff's performance and attendance by implementing recommendations made by its Human Resources Division.

Third, the trial court properly denied their motion to strike Pelkey's statement as it was not hearsay when it was offered and considered for reasons other than the truth of the matter asserted.

B. The *McDonnell Douglas/Hill v. BCTI* Burden-shifting Analysis For Summary Judgment In Employment Cases

1. The *McDonnell Douglas* Burden-shifting Analysis

The burden shifting analytical framework first articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to state retaliation claims. *Hill v. BCTI Income Fund-I*, 144 Wash.2d 172, 180-81, 23 P.3d 440 (2001). Where there is no direct evidence of retaliation, the employee must satisfy her first intermediate burden by producing the facts necessary to support a prima facie case. *Id.*; *Milligan*, 110 Wn. App. at 638.⁴

To establish a prima facie case of whistleblower retaliation, an employee must present evidence demonstrating that:

- She engaged in a statutorily protected activity;
- Her employer took an adverse employment action against her; and

⁴ Appellants claim, without legal or factual support, to have direct evidence of retaliation. Appellant's Opening Brief at 24. Direct evidence is evidence that proves the fact of an unlawful motive without inference or presumption if the evidence is believed. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003), which typically takes the form of an employer's statement that an unlawful motive was the basis for their adverse action. Respondent is unaware of any such evidence in this case.

- A causal connection exists between the protected activity and adverse action.

See Milligan, 110 Wn. App. at 638; *Manatt v. Bank of America, NA*, 339 F.3d 792, 800 (9th Cir. 2003). Unless the employee can establish a prima facie case, the employer is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 181. Opinions or conclusory facts are not enough. *Chen v. State*, 86 Wn. App. 183, 191, 937 P.2d 612, *review denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997). To survive summary judgment, the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having [her] affidavits considered at face value." *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wn. App. 542, 549, 85 P.3d 959 (2004) (citations omitted).

Only if the employee can establish a prima facie case does the burden of production shift to the employer to articulate a legitimate, non-retaliatory reason for the adverse employment decision. *Hill*, 144 Wn.2d at 181-82. Once such a reason is identified, the presumption of retaliation is rebutted. *Id.* The burden of production then shifts back to the employee to show that the proffered reason "was in fact pretext." *Id.* "If the plaintiff proves incapable of doing so, the defendant is entitled to judgment as a matter of law." *Hill*, 144 Wn.2d at 182.

2. The Court Can Weigh Evidence On A Motion For Summary Judgment In A Retaliation Case

In *Hill*, the Washington Supreme Court followed the U.S. Supreme Court's guidance in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), and held that even where an employee produces some evidence of pretext, other factors may still warrant judgment as a matter of law. *Hill*, 144 Wn.2d at 182-87. The court of appeals applied this standard in *Milligan*:

A court may grant summary judgment even though the plaintiff establishes a prima facie case and presents some evidence to challenge the defendant's reason for its action.

...

[W]hen the 'record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,' summary judgment is proper.

Milligan, 110 Wn. App. at 637, quoting *Reeves*, 530 U.S. at 148 (internal quotations omitted); *Hill*, 144 Wn.2d at 184-85.

Consequently, mere competing inferences are not enough to defeat summary judgment. Only when the record contains a reasonable but competing inference of retaliation will the employee be entitled to a jury decision. *Id.* Applying these standards, the trial court's summary

judgment dismissal should be affirmed because the record does not contain a reasonable inference of retaliation.

C. Summary Judgment Was Properly Granted Because Bienick And Shipman-Thompson Failed To Establish A Prima Facie Case Of Whistleblower Retaliation

1. Neither Bienick Nor Shipman-Thompson Engaged In Timely, Statutorily-Protected Whistleblower Activity

Bienick and Shipman-Thompson focus their protected-activity argument on the difference between oral and written whistleblower complaints. Appellant Br. at 17-19. But the Department's argument was not and is not based on the difference between oral and written complaints, but on the difference between complaints that initiate a State Auditor's Office Investigation and complaints that do not. Bienick's and Shipman-Thompson's claims initially fail because they did not make a complaint that initiated a State Auditor's Office investigation until August 2005.

a. Shipman-Thompson Was Not A Whistleblower

Shipman Thompson cannot establish her whistleblower retaliation claim because she is not a statutory whistleblower. Former RCW 42.40.020 (8) defines a whistleblower, relevant to this case, as:

(1) "an employee who in good faith reports alleged improper governmental action to the auditor, initiating an investigation under RCW 42.40.040;"

(2) “an employee who in good faith provides information to the auditor in connection with an investigation under RCW 42.40.040;” and

(3) “an employee who is believed to have reported asserted improper governmental action to the auditor or to have provided information to the auditor in connection with an investigation under RCW 42.40.040, but who, in fact, has not reported such action or provided such information.”

RCW 42.40.020(8).

Shipman-Thompson initially conceded that she did not file a complaint with the State Auditor (CP at 293 ¶ 1) and based her claim solely on her assertion that supervisor Pelkey silently perceived her to have supported Bienick after she was sent home by Pelkey. But even if her allegation were true, Shipman-Thompson’s alleged support for Bienick was not protected activity, as it did not initiate any whistleblower investigation and had no supporting connection to any active whistleblower investigation. Thus, Shipman-Thompson does not qualify as a whistleblower under the Whistleblower Statute. *See* RCW 42.40.020(10)(b)(i).

The Whistleblower Statute also directs the State Auditor to mail a written acknowledgment to the whistleblower stating whether a preliminary investigation will be conducted within days of “receiving specific information that an employee has engaged in improper governmental action.” RCW 42.40.040(3).

In this case, the only such written acknowledgment was the State Auditor's letter dated August 5, 2005, notifying Bienick that her complaint filed on August 1, 2005, warranted a preliminary investigation under the Whistleblower Statute. CP at 116 ll. 13-19; 260. Neither Bienick nor Shipman-Thompson have provided any evidence that any other contact they made initiated a State Auditor's investigation. Consequently, they were not statutory whistleblowers under RCW 42.40.020(10)(a), and they did not receive protection under RCW 42.40.050(1)(a), until August 2005.

b. Bienick And Shipman-Thompson Neither Intended Or Expected That Their Casual Contacts Would Initiate A State Auditor's Office Investigation

Bienick and Shipman-Thompson attempted to escape dismissal by belatedly alleging that their exploratory conversations with a Department administrator and an investigator investigating another claim constituted protected whistleblower activity. Their attempt failed because their testimony showed that they never intended to initiate a whistleblower investigation before August 2005 and did not consider their conversations to be "whistleblower complaints" until well after this case was filed.

**(1) Bienick And Shipman-Thompson
Learned How And When To File A
Complaint, But Did Not File Until Almost
A Year Later**

According to Bienick's and Shipman-Thompson's testimony, when they spoke with Marie Steffan of the State Auditor's office in October 2004, Stefan informed them that State Auditor's Office employee Sandra Miller was the whistleblower contact person and that they should contact Miller if they wanted to file a whistleblower complaint. CP at 336 at ¶ 7; 480; 550 (Bienick Dep. at 10 ll. 6-10); 559 (Bienick Dep. at 48 ll. 7-13). But Bienick specifically told Steffan that she would not take any action at that time and would not do so as long as she reported to John Pelkey. CP at. 480.

Although Shipman-Thompson did not contact Miller, Bienick called Miller and explained, as she did to Steffan, that she would not file a whistleblower complaint while she was under Pelkey's supervision, which she was at that time. CP at 336 ¶ 7; 559 (Bienick Dep. at 48 ll. 10-13). Miller essentially explained to Bienick that if she changed her mind, she could attempt to initiate an investigation by filing a whistleblower complaint any time within a year after the alleged illegal activity. *Id.*

Bienick admitted that she did not follow Miller's instructions until almost a year later, when she filed a whistleblower complaint with the

State Auditor's Office for the first time on August 1, 2005. CP at 559 (Bienick Dep. at 48 ll. 15-17); 571 (Bienick Dep. at 95). Because neither Bienick nor Shipman-Thompson became whistleblowers as defined by the current or prior whistleblower statutes, their claims were properly dismissed to avoid a futile trial.⁵

(2) Brockman Was Not A Whistleblower Designee In 2004

Bienick and Shipman-Thompson lean on Department administrator Kathleen Brockman's current status as the Department's designee for receiving whistleblower complaints pursuant to the State Auditor's Office whistleblower program. But they fail to acknowledge that Brockman was not the Department's whistleblower designee at the time of her conversations with Bienick and Shipman-Thompson in October 2004. The Whistleblower Act was first amended effective June 12, 2008, to

⁵ In their Response below, Bienick and Shipman-Thompson asserted in a footnote, without meaningful analysis, that the June 2008 amendments to the Whistleblower Statute applied retroactively in this case. On appeal, they have correctly noted that this argument is essentially irrelevant to this appeal, as nearly every relevant section of the statute remained unchanged. If they had raised the retroactivity argument, however, it would have been appropriate for this court to reject that argument because retroactivity is disfavored and statutory amendments are presumed to apply prospectively only. *Densley v. Department of Retirement Systems*, 162 Wn.2d 210, 223, 173 P.3d 885 (2007); *Olesen v. State*, 78 Wn. App. 910, 913, 899 P.2d, 837 (1995). Additionally, the changes Bienick and Shipman-Thompson relied upon below affected substantive rights by providing State employees with a right to whistleblower protection under circumstances where they would not have received it in the past, through the submission of a complaint to a designated public official. Therefore, retroactive application is also inappropriate because the amendments affected a vested right and/or created a cause of action. *See Olesen*, 78 Wn. App. at 914-15; *Dep't of Retirement Systems, v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994).

require State agencies to designate a specific agency official to receive whistleblower complaints other than the State Auditor. CP at 351. Accordingly, Brockman could not accept whistleblower complaints prior to June 2008, 3-1/2 years after Bienick and Shipman-Thompson claim to have complained to Brockman about the Fairfax contract. Thus, their discussions with Brockman in 2004 did not make them whistleblowers.

Moreover, Bienick and Shipman-Thompson did not intend or expect that their informal conversations with Brockman – while smoking cigarettes in the rain – would result in an external whistleblower complaint of any kind. CP at 559, 560, 627. This fact is apparent from their informal conversation, during which Shipman-Thompson asked Brockman if there was some way to resolve the issue internally, because she preferred to resolve issues internally rather than externally. CP at 627-28. This testimony negates any reasonable inference that Bienick or Shipman-Thompson intended or expected their chat with Brockman to initiate a State Auditor’s Office whistleblower investigation.

c. Bienick and Shipman-Thompson Could Not Create An Issue of Fact By Belatedly Claiming That Their Contact With Brockman, Steffan, Or Miller Were Whistleblower Complaints

In their depositions, Bienick and Shipman-Thompson asserted for the first time that they discussed their contract concerns with a Department

administrator and State Auditor's Office employees. These deposition (and later declaration) assertions impermissibly contradict their prior discovery responses. In the Department's interrogatories and requests for production, Bienick and Shipman-Thompson were asked to identify any complaints or reports related to their claims in this case. The only whistleblower-related complaint they identified in response was the complaint Bienick made on August 1, 2005. CP at 707-16.

In Washington, such contradictory statements cannot create issues of fact on summary judgment and must be disregarded. *Ramos v. Arnold*, 141 Wn. App. 11, 19, 169 P.3d 482, 486 (2007). "When answers to unambiguous interrogatories clearly eliminate any genuine issue of material fact, a party cannot thereafter create such an issue merely by contradicting, without explanation, previous admissions." *Dep't of Labor & Indus. v. Kaiser Aluminum & Chemical Corp.*, 111 Wn. App. 771, 778, 48 P.3d 324, 329 (2002)(also citing *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989); *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 430-431, 983 P.2d 1155 (1999).

Because Bienick and Shipman-Thompson can not create a material issue of fact by contradicting, without explanation, their prior discovery responses, their assertion of earlier complaints properly failed to forestall dismissal. The same conclusion is appropriate on appeal.

2. Bienick And Shipman-Thompson Failed To Establish Causation Because The Evidence Reflected No Temporal Proximity Or Decision Maker Awareness

a. Bienick Filed Her Only Whistleblower Complaint After The Alleged Adverse Actions Ended

An employee bears the burden of proving that retaliation was both a substantial factor in the adverse actions and the proximate cause of her damages.⁶ *Delahunty v. Cahoon*, 66 Wn. App. 829, 841, 832 P.2d 1378 (1992). Factors suggesting retaliation include temporal proximity between the adverse action and protected activity, along with satisfactory work performance and evaluations. *Vasquez v. Dep't of Soc. & Health Servs.*, 94 Wn. App. 976, 985, 974 P.2d 348 (1999). 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 or disciplined, then a rebuttable presumption of retaliation is created in favor of the employee that precludes the dismissal of the employee's case. *Id.*

Initially, Bienick has not established a reasonable inference of causation because it is undisputed that her work performance was not satisfactory at the time that the alleged adverse actions occurred. It is undisputed that Bienick's supervisors, both Linda Tullis and John Pelkey,

⁶ The Department does not concede that Bienick and Shipman-Thompson have alleged actionable adverse actions herein.

had serious concerns about her attendance and her performance as a supervisor. CP at 37-39, 631-33. This fact alone prevents Bienick from establishing a reasonable inference of causation.

Another prominent flaw in Bienick's whistleblower retaliation claim is that her evidence established effect and cause, not cause and effect. Obviously, if the alleged adverse action occurred before the claimant engaged in protected activity, then the protected activity could not have caused the adverse action; nor can causation depend solely on timing when the same adverse action occurred or was initially considered before the protected activity took place. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509 (2001); *see also Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1126 (W.D. Wn. 2004); *Manatt v. Bank of America*, 339 F.3d at 803.

The only whistleblower complaint filed by Bienick or Shipman-Thompson that initiated a State Auditor's Office investigation was the complaint she filed on August 1, 2005. It is undisputed that the adverse actions they allege, including the suspension of Bienick's supervisory responsibilities and contracting authority in October 2004, the elimination of 4/10 schedules in April 2005, and supervisor Pelkey's non-recommendation or provision of raises to Bienick and Shipman-Thompson

before Bienick's supervision was reassigned in July 2005, all occurred before August 1, 2005. CP at 43, 169, 251.

Of course, the evidence shows that some of Bienick's and Shipman-Thompson's concerns even predated Pelkey's appointment as Finance Chief. For instance, it is undisputed that the Department initially notified her of its intent to eliminate 4/10 schedules in May 2004, while Linda Tullis was still the Finance Chief. CP at 172-75, 256, 268. Likewise, Bienick cannot dispute Pelkey's statement that his concerns about Bienick arose soon after he accepted the Finance Chief position, due in part to his conversations with Tullis and his meeting with Bienick herself, before Bienick expressed concerns to him about any contract. CP at 37; 631-33 ¶¶ 1-6; 679-80; 687 ll. 17-23. Notably, Bienick believed that Pelkey did not like her right from the start of his term as Finance Chief in August 2004. CP at 284 ¶ 5. Consequently, Bienick cannot attribute these events and issues on her August 1, 2005, whistleblower complaint, which she filed months after her these events occurred.

Since Bienick's whistleblower complaint filing followed the actions at issue and could not possibly have motivated the Department's decisions and actions, ample grounds exist to affirm the trial court's dismissal of Bienick's and Shipman-Thompson's claims.

b. Bienick and Shipman-Thompson Failed To Show That Any Decision Maker Knew That She Filed A Whistleblower Complaint At The Time Any Adverse Action Occurred

Bienick and Shipman-Thompson must also present evidence from which a reasonable fact finder could conclude that the superior who took the alleged adverse action was aware that the employee engaged in purportedly protected activity. *Breedon*, 532 U.S. at 273-74; *Raad v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185 (9th Cir. 2003). They have not.

Bienick's and Shipman-Thompson's supervisors were not aware of Bienick's whistleblower complaint until after the allegedly retaliatory decisions were made, and the Department is not aware of any evidence indicating otherwise. Although Bienick claims that she told Pelkey that she would inform the Auditor's Office about any contract that did not meet her specifications,⁷ her assertion does not create a reasonable inference that Pelkey believed her to actually be a whistleblower, especially at any point prior to August 2005.

⁷ Pelkey states that Bienick referenced OFM, the State Office of Financial Management, not the State Auditor's Office. CP at 45 ¶¶ 2-3.

Because Bienick and Shipman-Thompson cannot establish supervisor awareness of their opposition activity or supportive timing, their claims should be dismissed.⁸

D. Neither Bienick Nor Shipman-Thompson Rebutted The Department's Non-Retaliatory Reasons For Its Actions

Bienick and Shipman-Thompson also failed to refute the Department's legitimate reasons for its decisions and actions and establish that they were a pretext for retaliation.

A “pretext is ‘a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs.’” *Johnson v. Express Rent & Own, Inc.*, 113 Wn. App. 858, 862, 56 P.3d 567 (2002) (quoting Webster’s Third New International Dictionary 1797 (1969)). To show pretext, the plaintiff must present evidence that the articulated reason for the action is unworthy of belief and was not believed in good faith by the decision maker. *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 90, 98 P.3d 1222 (2004); *Kuyper v. State*, 79 Wn. App. 732, 738-39, 904 P.2d 793, 795, *review denied*, 129 Wash.2d 1011, 917 P.2d 130 (1995). It is not enough that the employer’s reason

⁸ Appellants have not raised an issue or claim of retaliation based on their Human Rights Commission discrimination complaints, but if they had, the same justification for dismissal would apply, as their only opposition to discrimination occurred when they filed complaints with the Human Rights Commission near the end of September 2005, nearly two months after Bienick filed her whistleblower complaint. CP at 673, 676.

was incorrect or foolish. Employees must show that their employers did not, in good faith, believe their articulated justifications for their actions. *Domingo*, 124 Wn. App. at 88-89.

As discussed above, Bienick's and Shipman-Thompson's supervisors' decisions were based on their perceptions of their attendance and performance issues, and the needs of the Department. CP at 242-47, 267-69. Bienick and Shipman-Thompson have submitted no meaningful evidence showing that their supervisors' perceptions of them, their unit, and the Department's business needs were not honestly held.

For example, the Department explained that its reasons for removing Bienick's contracting authority was to meet the needs of the Department and due to concerns raised by the Department's Central Contract Services unit about Bienick's negative interactions with its staff. In fact, when the Central Contract Services manager learned that management was considering returning contracting authority to Bienick, she expressed strong objections to such a decision in a June 20, 2005, e-mail. CP at 274 (Bush e-mail to Pelkey).

Because Bienick and Shipman-Thompson cannot rebut the Department's reasons for the alleged adverse actions, ample grounds exist to affirm the trial court's dismissal order.

E. The Trial Court Correctly Denied Bienick's And Shipman-Thompson's Motion To Strike

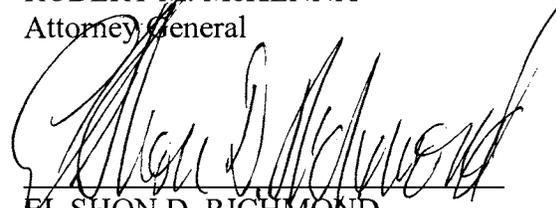
Appellants have renewed their Motion to Strike Pelkey's statement, which the trial court denied because the statement did not constitute inadmissible hearsay. CP at 33-55. Pelkey's statement is not inadmissible hearsay because, pursuant to ER 801(c), it is offered for purposes other than the truth of the matter asserted. Those purposes include showing the information the Department considered in deciding whether to take disciplinary action against Pelkey; establishing that improper contracts were not issues of dispute between Pelkey, Bienick, and Shipman-Thompson; establishing the Department's legitimate reasons for its actions; and showing Pelkey's lack of awareness or perception of Bienick or Shipman-Thompson as whistleblowers. For these reasons, Appellants' motion was denied below and that denial should be affirmed.

VI. CONCLUSION

For the above-stated reasons, the Department asks the Court to affirm the trial court's order granting summary judgment and denying the motion to strike.

RESPECTFULLY SUBMITTED this 17th day of September, 2009.

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I certify that I served a copy of this document on all parties or
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E-mail

United State Postal Service mailed on September 17, 2009.

Hand delivered by _____

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

DATED this 17th day of September, 2009, at Tacoma, WA.


Breanne Higginbotham, Legal Assistant