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Thurston County Superior Court Case No. 14-2-01089-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RUSSELL BURKE and JULIE BURKE, and their marital community,

Plaintiffs/Appellants,

v.

CITY OF MONTESANO; KEN ESTES and "JANE DOE" ESTES;
KRISTY POWELL and "JOHN DOE" POWELL; and
ROCKY HOWARD and "JANE DOE" HOWARD,

Defendants/Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

To survive summary judgment, appellants Russell and Julie Burke must establish wrongful intent to discharge in contravention of public policy. This requires sufficient evidence of a nexus between Russell Burke's termination and the alleged policy. As the Superior Court correctly recognized, the Burkes cannot meet this burden. This Court should affirm summary dismissal of the sole claim at issue on appeal, which fails as a matter of law.

Mr. Burke's fundamental contention to this Court is that he was discharged on June 17, 2013, based upon political animus allegedly expressed in a single conversation with then-Mayor Elect Kenneth Estes more than 18 months earlier. Contrary to numerous arguments submitted to this Court, neither the record nor the law supports that assertion.

Burke acknowledged at his deposition that no allegedly retaliatory act by either respondent Kristy Powell or Rocky Howard was due to Burke's political views. Burke omits that respondent Kristy Powell actually supported the same mayoral candidate, and even planned and attended the rally held at his house in 2011. Numerous additional City of Montesano employees were also present at that event without alleged retaliatory treatment.

Russell Burke's termination was the straightforward result of his

repeated refusals to appear at ordered interviews conducted as part of the City of Montesano's lawful investigation into the misappropriation of its property in 2013. There are no intervening events from which retaliatory animus may be inferred. There is no causal nexus between politics and his termination.

Burke's decision to spurn numerous compelled appearances, despite repeated warnings and attempted accommodations, is undisputed. This transpired well over a year after the sole expression of alleged animus by a person who, at the time, was another private citizen. The Superior Court thoroughly and fairly ruled against the Burkes by analyzing the gap in time, legal significance of interceding events, and inferences that may be permissibly drawn from the record. Their claim should not survive summary judgment. This Court should affirm.

II. COUNTER STATEMENT OF THE ISSUE

Did the Superior Court err as a matter of law by dismissing appellants Russell and Julie Burke's claim of termination in violation of public policy, when more than 18 months passed between an isolated conversation involving then mayor-elect Kenneth Estes and Burke, and given Kristy Powell's role in events and support of the same mayoral candidate as Burke, an absence of any intermediate evidence of politics or retaliatory events, and Burke's repeated refusals to appear at compelled

interviews held as part of the City's lawful investigation into the misappropriation of its property?

III. STATEMENT OF THE CASE

A. The City's Legitimate Concern About Missing Paint.

In early February 2013, the City of Montesano received notice of \$4,199.74 owed to a paint supplier for the Public Works Department. (CP 174 ¶ 7 & 215-16.) Burke was the only person who ordered paint for the Public Works Department during this time period. (CP 318-19.)

Upon reviewing the outstanding balance, then-City Administrator Kristy Powell and Public Works Director Rocky Howard identified statistical increases in the quantities of paint purchased by the Public Works Department beginning in 2010. (CP 174 ¶ 9 & 221.) For example, in 2009, the City purchased 145 gallons of paint thinner, yellow paint, and white paint. (CP 389.) In 2011, the City purchased 215 total gallons. (CP 389.) Once Burke started buying paint on behalf of the City, it was never inventoried or separately secured. (CP 322-23.) Burke had also requested that paint invoices be sent to him. (CP 174 ¶ 8 & 219.)

Burke does not dispute the statistical increase in paint purchased by the City after 2010. (CP 350-60 & 389.) Similarly, the increases corresponded with the official start to Burke's own paint striping business, RC Striping LLC. (CP 321.) Indeed, Burke testified that it was his

practice when buying paint for the City to rely on the previous year and attempt to stay consistent. (CP 317.) Burke's primary defense is that the City did not properly quantify the amount of paint the City ordered or used each year; however, he undisputedly refused to participate in an interview about this missing paint, as explained in detail below.

Contemporaneously, in 2013, the City received an inquiry from the Washington State Auditor's Office regarding the paint investigation. (CP 482.) Respondents contacted City of Montesano Police Chief Brett Vance to discuss their options. (CP 482-83.) The information available at the time indicated that the City purchased more paint than was used in years past, but could not locate it. (CP 770.) Based upon Chief Vance's referral, the City contacted the City of Hoquiam Police Department to conduct an investigation. (CP 483, CP 222-256 & CP 174-75 ¶ 10.)

B. Burke Repeatedly Failed to Appear for Ordered Interviews During the Course of the Paint Investigation.

On February 7, 2013, the City met with Detective Shane Krohn of the Hoquiam Police Department. (CP 222-226.) On February 8, 2013, the City of Montesano attorney on labor-related issues advised the City to bifurcate the personnel and criminal investigations to avert possible conflicts, and to hold off on advising Burke of the investigations to avoid the potential destruction of evidence. (CP 27 ¶ 3.)

Pending the criminal inquiry, the City initially suspended its personnel investigation and placed Burke on paid administrative leave. (CP 27 at ¶ 4 & CP 40.) The City also required Burke to remain available and provide information relating to his employment. (*Id.*)

As part of the criminal investigation, on February 12, 2013, Detective Krohn interviewed Mr. Burke. (CP 226-229.) On February 13, 2013, he interviewed seven additional City of Montesano employees. (CP 230-31.) As summarized in Detective Krohn's subsequent affidavit for a search warrant, which the Grays Harbor County District Court granted on April 15, 2013, paint purchases increased substantially at about the time Burke started his own striping business. (CP 251.)

"Summer help," who worked for both the City and Burke's private business, also told Detective Krohn that Burke had used a City paint sprayer for his personal company jobs in 2010. (CP 252.) As the City came to learn, while working as Public Works Supervisor Burke recommended that the City declare a paint sprayer originally valued at approximately \$6,000 to be sold as surplus in 2011. (CP 252 & CP 382-83.) Burke then purchased that same sprayer for \$25.00 through a friend, who was the only bidder. (CP 252 & 382-83.) Burke began using it for his personal business after spending about \$300 to repair it. (CP 252 & 382-83.) By comparison, he separately paid \$3,259 for another sprayer in

2011. (CP 325.)

On March 22, 2013, believing the criminal investigation had concluded, the City provided Burke with notice of its intent to move forward with its internal personnel investigation. (CP 27 ¶ 5 & CP 43-44.) The City notified Burke of several areas of inquiry, including: (1) use and/or diversion of City property, personnel, and equipment for personal gain; (2) misuse of his position with the City for personal gain; and (3) carelessness or negligence in the use of City property, among others. (CP 27 ¶ 5 & CP 43-44.)

As part of its notice, the City specifically advised Burke of his rights under *Garrity*: “you retain your Fifth Amendment right against self incrimination and nothing you say in the course of the investigation interview may be used against you in a criminal proceeding.” (CP 43-45.)¹ Burke was further advised that his “[f]ailure to comply with this direction to appear for the designated interview . . . may result in separate

¹ A *Garrity* warning derives its name from the seminal United States Supreme Court decision, *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967), and its progeny. *Garrity* and other subsequent opinions provide “a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices.” *Seattle Police Officers’ Guild v. City of Seattle*, 80 Wn.2d 307, 316, 494 P.2d 485 (1972) (affirmatively quoting *Uniform Sanit Men. Assoc. Inc. v. Comm’n of Sanit of City of N.Y.*, 392 U.S. 280, 285, 88 S. Ct. 1920 (1968) (Harlan J., concurring)). “Thus an employee knows that if he fails to divulge information pertinent to the issue of his use or abuse of the public trust he may lose his job” *Id.* at 314 (quoting *Silverio v. Muni. Ct. of City of Boston*, 247 N.E.2d 379, 384 (Mass. 1972)).

disciplinary action against you.” (*Id.* at 45.) The City retained an external investigator, William Curtright, to conduct the inquiry. (*Id.* at 44; CP 28 ¶¶ 8-9.)

1. Burke Refused to Appear On April 11, 2013.

After coordinating with Burke’s union representative Mike Werner, the City agreed to schedule an interview with Burke on April 11, 2013. (CP 28 ¶¶ 8-9 & CP 50-52.) On April 4th, however, Burke’s counsel of record, Trevor Osborne, requested to reschedule the interview. (CP 28 ¶ 10.) In response, the City clarified the scope of its anticipated questions, but highlighted the importance of a timely interview based upon the availability of Mr. Curtright and Burke’s union representative, Mr. Werner. (*Id.* at ¶¶ 11-13.) After additional correspondence, Mr. Osborne advised that Burke would not attend the interview. (*Id.* at ¶¶ 13-16.)

2. Burke Refused to Appear on April 19, 2013.

On April 15, 2013, the City inquired as to Mr. Osborne’s availability for an interview beginning on April 19, 2013, to which Mr. Osborne did not respond. (CP 30-31 ¶¶ 17, 19-24.) After more follow-up, the City sent Burke notice (with copies to Mr. Werner and Mr. Osborne) setting an interview for April 19, 2013 at 10:00 a.m. (CP 31 ¶ 21.) Again, Burke was ordered to participate in this interview. (CP 92-93.)

On April 18, 2013, the City provided Burke a written warning for

his failure to appear on April 11, 2013: “You have disobeyed a direct order. This is a written warning. If you fail to attend the interview rescheduled for tomorrow, Friday, April 19, 2013, the City will pursue progressive discipline up to and including discharge.” (CP 258.) That same day, Mr. Osborne again advised that Burke would not participate in this second ordered interview. (CP 31 ¶ 22 & 96-97.)

Following Burke’s second refusal to appear, the City again requested Mr. Osborne’s availability. (CP 31 ¶ 23.) As of April 23, 2013, Mr. Osborne had not responded. (CP 31-32 ¶ 24.) The City notified both Mr. Osborne and Mr. Werner of its intent to reschedule the interview between April 29 and May 10, 2013. (*Id.*) The City also advised of its intent to schedule a pre-disciplinary hearing for Burke’s failure to appear on April 19, 2013. (CP 31-32 ¶ 24.)

The City eventually scheduled the pre-disciplinary hearing on May 1, 2013, in response to which Burke submitted written materials. (CP 32 ¶¶ 25 & 27.) On May 2, 2013, Burke was suspended for 21 days (or 15 working days) for failing to appear on April 19th. (*Id.* at ¶ 28.) Burke grieved this discipline under his Collective Bargaining Agreement, but later abandoned any challenge to the propriety of his 21-day suspension: “Please be advised that pursuant to Mr. Burk’s [sic] letter of September 18, 2013 stating that he no longer wishes to pursue the scheduled

arbitration with the City of Montesano Teamsters Union Local 252 will be withdrawing the grievance(s) related to Mr. Burk's [sic] discipline. (Suspension and termination)[.]" (CP 34-35 ¶¶ 41-43; CP 149.)

3. *Burke Refused to Appear on June 4, 2013.*

On April 30, 2013, the City temporarily suspended its personnel investigation pending execution of the aforementioned search warrant and resulting additional inquiry in the criminal investigation: "[t]he material gathered may be either essential to the investigation or exculpatory and the city needs to have . . . all available information to conduct a full and fair investigation." (CP 105; CP 175 ¶ 11; CP 222-256; CP 32 ¶ 26.)

Based upon probable cause of Theft in the Second Degree approximately two weeks earlier, the Grays Harbor County District Court issued a search warrant for Burke's property. (CP 175 ¶ 11; CP 222-256; CP 32 ¶ 26.) As is well settled, "[p]robable cause is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." *State v. Maddox*, 152 Wn.2d 499, 509 P.3d 1199, 1204 (2004) (internal citations omitted). In its correspondence, the City advised Burke and Mr. Osborne that another interview would be scheduled in late May or early June. (CP 105.)

On May 16, 2013, respondent then-Mayor Estes *declined* to discipline Burke for failing to be available to receive correspondence from the City, instead clarifying his prior order regarding his availability. (CP 260.) On approximately May 21st, the City again sought availability from Mr. Osborne to conduct another interview. (CP 32 ¶ 29; CP 112.) Mr. Osborne responded in no uncertain terms that Burke “*will not participate in the interview, regardless of when it may be scheduled.*” (CP 112) (emphasis added).

On May 29, 2013, the City clarified the scope of its investigation to include whether Burke violated RCW 42.23.070(1). (CP 114-117.) That provision provides: “No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others.” RCW 42.23.070(1). For the third time, the City ordered Burke to appear for an interview on June 4, 2013. (CP 116-17.) It again advised that, if he failed to appear, he would be disobeying a direct order and subject to discipline. (CP 114.) Burke did not appear for this interview. (CP 33 ¶ 31.)

On June 6, 2013, the City sought Mr. Osborne’s and Mr. Werner’s availability to conduct a pre-disciplinary hearing regarding Burke’s failure to appear on June 4, 2013. (CP 33 ¶ 33.) The City specifically advised that, given the range of potential punishments, written comments would

not be accepted—Burke later responded through Mr. Osborne that “a hearing is not likely to be good use of anyone’s time.” (CP 122; CP 127.) Burke confirmed he would not attend a pre-disciplinary proceeding and would rely only on prior communications. (CP 34 ¶ 37.) On June 17, 2013, the City terminated Burke for insubordinately and repeatedly refusing to appear for ordered interviews. (CP 34 ¶ 40 & CP 392:3-398:25.)

4. Burke Abandoned His Union Grievance and Conceded He Had No Evidence the Paint Investigation Was Retaliatory.

In addition to abandoning his challenge to the 21-day suspension, Burke also forfeited his Union grievance challenging the propriety of his termination. (CP 34-35 ¶¶ 41-43.) Burke conceded he has no evidence that then-Mayor Estes, Kristy Powell, or Rocky Howard intended to retaliate against him through the paint investigation. (CP 387:13-17.) Rather, the gravamen of his complaint is that the City: (1) did not talk to him first (CP 384:2-385:7); (2) gave inconsistent figures and/or relied on Rocky Howard’s paint estimates (CP 385:10-386:10); and (3) alleged that he directed receipt of the invoices to cover up his alleged misconduct (CP 386:11-387:2). There is simply no connection between these allegations and alleged political retaliation.

Furthermore, Detective Krohn acquired information based upon

independent evidence and interviews that would cause any reasonable employer to be concerned. For example, although *Burke* originally told Detective Krohn that the new City paint sprayer used more paint than its predecessor, other witnesses indicated no accountable difference in paint consumption. (CP 251.) *Burke* also claimed City paint may have been disposed of, but there was no direct witness account of paint disposal and no correlating surplus resolution or inventory control records. (*Id.*)

During his deposition in 2014, *Burke* was asked about how one would determine different or additional painting done in any given year. (CP 362:3-23.) He testified that he was the most qualified person to make that determination, but could not do so. (*Id.*) Despite attributing additional paint purchases to more paint being used, *Burke* could not identify *any* specific location or instance of additional painting occurred between 2010 and 2012. (*Id.*)

Burke cannot dispute that the allegations raised in the criminal investigation, which resulted in an unchallenged finding of probable cause, are serious. Though the Grays Harbor County Prosecuting Attorney's Office declined to file criminal charges, it notes in its denial letter that, although one witness did not see *Burke* take or possess any City paint, she "heard him make a statement to her to that effect" (CP 120-21.) There is no fundamental dispute that a city may and should

investigate the potential misappropriation of its property, and Burke does not challenge that he refused to obey orders to participate in an interview. Burke's refusal to do so impeded the inquiry, caused disruption and significant expense, and made it impossible for the City to fully investigate the allegations. (CP 124; CP 130; CP 140-41.) There is no evidence that the City used this investigation as pretext for Burke's termination.

C. The Burkes Rely on Events from 2011 to Claim Retaliatory Discharge in 2013.

The foundation of appellants' claim of political retaliation rests on two events in 2011: (1) the Doug Streeter campaign party, which Burke hosted; and (2) a conversation with then-Mayor Elect Kenneth Estes in approximately December 2011. (Appellants' Br. at 4.) Burke concedes that, after their single alleged political conversation in December 2011, Ken Estes never made any other comments to him regarding political parties or politics in general. (CP 363:25-364:11 & CP 335-339.) Similarly, Burke acknowledges that neither Kristy Powell nor Rocky Howard have made any comments to him about political activities. (CP 363:25-364:11.)

Burke also omits critical facts about the 2011 summer party. First, Burke planned the campaign party with respondent Kristy Powell, whom

he now contradictorily argues intended to retaliate against him on that basis. (CP 329:6-330:22.) Second, multiple other City of Montesano employees also attended, including then-City Councilmember respondent John Doe Powell (Ms. Powell's husband) and Community and Development Director and former Public Works Director Mike Wincewicz. (CP 327:21-328:16.) There is no evidence that any other employee suffered alleged political retaliation for doing so. (CP 367:14-16.)

The Burkes' description of his discussion with then Mayor-Elect Estes is also misleading. They imply an intent to target Burke that the record does not support: Mayor-Elect Estes "came down to talk to the crew who was there and brought donuts as a peace offering" (CP 333:20-334:11.) General conversation involved union issues. (*Id.*)

During the visit, which lasted approximately 15 to 25 minutes, Burke claims Mayor-Elect Estes "questioned why I would have the party because, . . . of my position at the City of Montesano." (CP 331:13-332:17.) Burke responded by saying: "what is my position at the City of Montesano that would—that I wouldn't be allowed to have a campaign party?" (CP 331:13-332:17.) Estes responded: "Well, you just shouldn't, you know, represent somebody because of your position . . . I just think it was wrong; you shouldn't have had that party." (*Id.*) Though elected in

2011. Kenneth Estes did not take office until January 1, 2012. (Appellants' Br. at 6; CP 436 (35:21-24).)

During the conversation, then-Mayor-elect Estes offered Burke a pin, which they were passing out to people around town, and said, "Well, I know you didn't vote for me, but here's a pin, and he handed it to me in my office, and he walked out." (CP 332:10-17.) Since that conversation, Burke has not been more reluctant to participate in any local, state, or national elections. (CP 330:9-17.) Nor is he aware of anyone else from the City of Montesano who has been deterred from political participation because of his or her beliefs. (CP 330:18-22.)

D. Burke Does Not Believe the Actions of Kristy Powell Were Politically Motivated.

Burke testified that he did not have reason to believe any allegedly retaliatory actions by Ms. Powell were politically motivated:

Q. Would it be fair to say that you don't have reason to believe that Kristy's adverse actions toward you are politically motivated?

...

A. *I would say they're not politically motivated, no.*

...

Q. . . . All of the things that she has done that you think are in retaliation for

some reason. I am calling those adverse employment actions. In other words, taking away your supervisory powers, I would categorize that as an adverse employment action. Do you understand what I mean?

A. Yeah. Yes. *I'm just waiting for you to stop. It's not politically driven, no. I don't – her actions are not based on political views.*

(CP 365:6-10 & 365:20-366:23) (emphasis added).

E. Burke Does Not Believe the Actions of Rocky Howard Were Politically Motivated.

Burke complains that Mr. Howard (1) removed Burke from his office space; (2) denied him access to email; and (3) reprimanded him for authorizing overtime of other employees in October 2012 without prior approval. (Appellants' Br. at 9-10.) Just as with Kristy Powell, however, Burke does not believe any of these actions were in retaliation for Burke's political beliefs:

Q. Do you believe that Rocky Howard's adverse employment actions against you are in retaliation for your political beliefs?

...

A. *No.*

(CP 366:21-25) (emphasis added). Burke also agreed that Howard's acceptance of the Public Works Director position in May 2012 was not retaliatory. (CP 378:20-379:7.) In short, Burke asks this Court to ascribe

political animus to actions that he does not actually believe were politically motivated.

F. Burke's Arguments Regarding "Repeated Acts of Retaliation" Are Unsupported.

The temporal gap between the December 2011 meeting and the June 2013 termination is too lengthy to support an inference of retaliatory termination. Burke attempts to bridge the distance with allegations of other employment issues, despite his inability to show that political animus caused any of them.

1. The Alleged Demotion.

Burke claims that, after January 1, 2012, he was "effectively demoted." (Appellants' Br. at 6.) Although Burke self-servingly disputes that he was offered the position of Public Works Director in January 2012, he concedes the following: (1) the City explored the possibility of making Burke a non-union Public Works Director (CP 370:16-21); (2) that included discussion of pay, time off, and personal days (CP 368:9-13); (3) a non-Union director is paid approximately \$5,000-\$10,000 more per year (CP 302:19-304:9; CP 371:17-372:1); (4) he discussed transitioning with his union representative, Mike Werner, (CP 372:12-21) and shop steward Ken Frajford (CP 373:11-374:4); and (5) the consensus was to make sure Burke stayed in the Union (CP 373:11-374:4). Burke testified that Kristy

Powell repeatedly told him to “*just take the position . . .*,” and that “the crew would crawl through a minefield for you, which I assumed meant that I was going to have the backing of the crew if I took the position.” (CP 374:16-24) (emphasis added). This evidence does not support a conclusion that the City “effectively demoted” Burke: to the contrary, it wanted to promote him.

Burke then construes Mayor Estes’ testimony about Ms. Powell’s appointment as Interim Public Works Director as evidence of a demotion. (Appellants’ Br. at 6-7.) He argues that Mayor Estes’ “justification for the change was Burke’s lack of leadership.” (*Id.* at 7.) But Mayor Estes testified that he wanted a Public Works Director because a person in that position would have authority to discipline Public Works employees, and that Burke would not accept that position so he had to find someone else who would. (CP 437 (41:5-42:4); 433-436 (22:9-36:25).) He subsequently clarified:

Q. Why did you once again offer Mr. Burke the public works director position after you determined since your meeting in January 2012 that he lacked leadership?

A. I may have misspoken the term of leadership. He did not have authority to discipline as supervisory.

(CP 97:9-14.) In short, Burke attempts to construe the phrase “lack of

leadership” as a personal observation, which is an inference unsupported by the evidence. (*Id.*; CP 437 (41:5-42:4); 433-436 (22:9-36:25).)

It is undisputed that Burke lacked authority to discipline fellow union members by operation of the Collective Bargaining Agreement. (303:19-305:9; CP 148-171 §§ 9.1.1.) A contemporaneous performance review by Powell encouraged Burke to get involved in leadership training classes. (CP 802.) At bottom, Burke was not effectively demoted—the City repeatedly encouraged him to take a position that expanded his authority. Moreover, the appointment of Ms. Powell, who also supported Doug Streeter, as Interim Public Works Director contradicts any assertion of retribution against Doug Streeter supporters.

2. Hiring Process for Public Works Director.

After Burke turned down the director position, the City posted an in-house notice for the position during the spring of 2012. (CP 375:13; 376:17-377:3; CP 402:10-416:25.) The City maintains that, after the interview process, it offered Burke the job a second time, but he again turned it down. (CP 420:4-421:22.) Burke focuses his attention on a May 2012 letter in which Mayor Estes described perceived negativity with Burke because he would not leave the union. (CP 446 (104:6-105:1); *see also* CP 152 §§ 2.1.) “We wanted him—both of us wanted him to be the candidate. We wanted him to be the public works director, and it just

implied to us he didn't want it because he didn't want to leave the union" (CP 446 (104:6-105:1).)

Burke does not allege that Rocky Howard's eventual acceptance of the Public Works Director position in May 2012 was retaliatory. (CP 379:4-7.) Further, after Howard accepted the Public Works Director position in May 2012, the City negotiated Burke's transition to Public Works Lead with his union representation. (CP 174 ¶ 5; CP 380:3-381:1.) Burke originally contended the transition to Public Works Lead constituted a separate breach of contract, but he has since abandoned those claims. (CP 13 ¶¶ 6.2 & 7.2; CP 864-866; CP 346:23-347:1; CP 380:3-381:1; CP 167-169 §§ 13.1-13.3.6.) Again, there is no link between the City's decision to hire Mr. Howard as the Public Works Director and any alleged political animus.

G. Burke's Remaining Arguments Also Lack Any Link to Politics.

Burke also assigns meaning to numerous additional scenarios that he also did not challenge via the grievance process in 2012, but which neither independently nor taken as a whole offer any connection to mayoral politics. (Appellants' Br. at 9-10.)

For example, Burke alleges he was subject to an investigation in the fall of 2012 based upon the allegation that members of the Public Works Department were "unfriendly" to a coworker. (Appellants' Br. at

10.) This is already more than a year after the campaign party and approximately 10 months after the single conversation cited by Burke as evidence of political animus. Even so, Burke does not argue that he was disciplined as a result of the hostile work environment investigation, because he was not. The record makes clear that the complaint at the heart of that inquiry included ongoing overtime disputes amongst Public Works Department employees and possible physical injury and fear created by one employee allegedly slamming a backhoe bucket down next to another employee in retaliation for complaining. (CP 890:9-894:16.) There is no nexus to politics here.

Burke separately argues that Norm Case (the complaining employee in the Hostile Work Environment complaint) told Burke that he would regret hosting the campaign party and that it would come back to haunt him. (Appellants' Br. at 5.) Burke cites his own declaration for that proposition, which is inadmissible hearsay, and which cannot be imputed to any named defendant. (*Id.* (citing CP 783 ¶ 8).) *See also* (CP 885:10-887:14 & 888:7-889:5).

Burke also argues that sometime before March 14, 2013, Mayor Estes decided to terminate Burke without legitimate explanation. (Appellants' Br. at 14.) To support this assertion, he cites a single email drafted by Ms. Powell, who planned and attended the same rally as him in

2011 and supported the same mayoral candidate. (*Id.* (citing CP 489).)

It is undisputed that Mayor Estes did not write the email and that it did not arise until after the criminal investigation had already commenced—more than 15 months after the single alleged conversation. (*Id.*) Furthermore, in addition to conceding that no action by Kristy Powell was motivated by political animus, her testimony on this issue is that (1) she could not recall why the email was sent (CP 926:25-92:2); or (2) the relevant “goal” or “objective” at the time, other than it pertained to moving the then-suspended internal investigation forward (CP 924:14-926:2); and (3) at that time and in this context, Mayor Estes did not want to terminate Burke (CP 922:24-923:5). Indeed, Mayor Estes testified that, on June 16, 2013, he had not made a decision about whether or not to terminate Burke. (CP 397:1-3.)

Burke finally asserts that the City terminated him for failing to appear at a pre-disciplinary *Loudermill* hearing. (Appellants’ Br. at 16.) He cites testimony from the unemployment benefits hearing. (*Id.* (citing CP 397:12-15 & 564:21-23).) But as the hearing examiner noted, Powell was not qualified to give expert testimony regarding the legal significance of correspondence sent by Mr. Snyder (CP 913:11-914:4), the email speaks for itself, and that the underlying supporting documentation rather than her truncated summary statement in a form provided a better

explanation of Burke's termination. (CP 915:10-917:18.) As noted above, Burke had indicated separately he would not attend and would instead rely on prior correspondence.

Burke also cites Mayor Estes' testimony regarding the pre-disciplinary hearing (Appellants' Br. at 16 (citing CP 397:12-15)), but overlooks Mayor Estes' elaboration based upon review of the June 17, 2013 letter: "He had—had ordered to come in and see me or come in and see the investigator many times, as noted in this letter, and he was terminated for insubordination for not appearing." (CP 397:12-398:25.) In short, the Burkes have no evidence of any retaliatory animus related to the City's termination of Burke.

H. Procedural Background.

Burke asserted five causes of action, only one of which is before this Court. He alleged violations of the Fair Campaign Practice Act, breach of contract, promissory estoppel, and violation of the Washington State Constitution. However, Burke voluntarily abandoned his breach of contract, Fair Campaign Practices Act, and promissory estoppel claims during the pendency of summary judgment. (CP 864-866.) He has not appealed the Superior Court's dismissal of his claim for the alleged violation of the Washington State Constitution. (Appellants' Br. at 2.) This Court should now affirm dismissal of Burke's final cause of action.

IV. ARGUMENT

A. Standard of Review and Summary Judgment.

An appellate court reviews de novo a trial court's decision to grant summary judgment. *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 311, 358 P.3d 1153 (2015) (internal citations omitted). Summary judgment dismissal should be affirmed where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

This Court views the evidence in the light most favorable to the nonmoving party, and draws reasonable inferences in that party's favor. *Rickman*, 184 Wn.2d at 311. A party may not, however, ask a court to draw unreasonable inferences. *Landstar Inway Inc. v. Samrow*, 181 Wn. App. 109, 132, 325 P.3d 327 (2014) (citing *Lynn v. Ready, Inc.*, 136 Wn. App. 295, 310-11, 151 P.3d 201 (2006) (factual causation required inferences that were remote and unreasonable)).

A party may also not defeat summary judgment by reciting ultimate facts, conclusions of fact, or conclusory statements of fact. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988); CR 56(c) (opposing affidavits must be made on personal knowledge). As *Grimwood* demonstrates, an affidavit with statements that something was "petty," "pretext," an "exaggeration," or "much ado about

nothing” contains conclusions, rather than “facts,” for purposes of summary judgment. *Id.* at 360. It is not the employee’s perception of himself that is relevant, but rather the perception of the decision maker. *Id.* (citing *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980)).

Remarkably analogous to Burke’s testimony, Grimwood testified in his deposition: “Well, because I don’t feel I was given sufficiently good reason for my termination so I feel it has to be fundamentally another reason that’s all I can come up with.” *Id.* at 361 (emphasis removed). Burke testified as follows regarding the paint investigation: “I think it was an opportunity they took. They went down the list of things to try, and they got to that one, and they tried to make it stick.” (CP 385:2-7.) But Burke conceded that he did not really know how the paint investigation arose (CP 384:10-13), which happened well over a year after the political conversation of December 2011. He also concedes that no act by respondent Kristy Powell or Rocky Howard was in retaliation for politics. (CP 365:6-10 & 365:20-366:25.)

Further, on summary judgment, a party may not rely on inadmissible evidence such as hearsay. *Lynn v. Ready Labor, Inc.*, 136 Wn. App. 295, 306, (citing *Dunlap v. Wayne*, 105 Wn.2d 529, 535-36, 716 P.2d 842 (1986)). Exemplar hearsay in this matter includes alleged statements by Norm Case submitted via the declaration of Russell Burke,

which stand in direct contradiction to sworn testimony by Mr. Case. (Compare CP 783 ¶ 8 with CP 885:10-887:14 & CP 888:7-889:5.)

When a party has previously given clear answers to deposition questions that negate the absence of any dispute of material fact, a party may not create an issue of fact via affidavit that merely contradicts prior testimony. *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999) (internal citations omitted). Ultimately, Burke cannot circumvent his own testimony or that of other witness with whom he does not agree by submitting self-serving, inadmissible, and conclusory assertions to avoid summary judgment dismissal of his claim.

B. Summary of the Argument.

The Superior Court did not err in dismissing appellants Russell and Julie Burke's claim for wrongful termination in violation of public policy. They fail to make a prima facie showing of retaliatory discharge. There is no proximity of time between Burke's termination and alleged political speech, and the single instance of alleged political animus by Mr. Estes undisputedly occurred when Estes was a fellow private citizen and Mayor elect. Speech exchanged amongst private citizens does not implicate a clear public policy, and freedom of expression is not jeopardized by the undisputed facts of this case.

In addition, many of appellants' contentions are unsupported by

the record. Burke fails to distinguish the same actor inference, which involves his concession that he was encouraged to accept the Public Works Director position in early 2012 or again in May 2012, or that naming Kristy Powell as Interim Public Works Director stands in direct contradiction to his theory of political retribution against Doug Streeter supporters. The record lacks any evidence of alleged mistreatment of similarly situated employees. The law is well established that an employer may permissibly terminate an employee for insubordinately refusing to cooperate in an investigation. Burke fundamentally fails to present either direct or specific and substantial evidence to defeat summary judgment. This Court should affirm summary judgment dismissal of the single claim at issue on appeal.

C. Tort of Wrongful Discharge in Violation of Public Policy.

Wrongful discharge in violation of public policy is a narrow exception to the at-will employment doctrine, and courts must proceed cautiously. *Worley v. Providence Physicians Servs. Co.*, 175 Wn. App. 566, 573, 307 P.3d 759 (2013) (internal citations omitted). It is an intentional tort that fundamentally requires a plaintiff to produce evidence that his or her action, in furtherance of public policy, was a “substantial” factor motivating the employer to discharge the employee. *Rickman*, 184 Wn.2d at 314 (citing *Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wn.2d

46, 71, 821 P.2d 18 (1991)).

As the Washington State Supreme Court observed just last year, “[t]he wrongful discharge against public policy tort has undergone numerous permutations since its recognition over 30 years ago.” *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 275, 358 P.3d 1139 (2015). Because wrongful discharge jurisprudence was traveling along “two irreconcilable tracks,” however, our state supreme court has recently reaffirmed a return to the framework set forth in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), *Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991), and *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996). *Rose*, 184 Wn.2d at 274.

The *Rose* decision provides a helpful overview of this tort beginning with *Thompson*, including the burden-shifting framework:

The employee has the burden of proving his dismissal violates a clear mandate of public policy. Thus, to state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened . . . [O]nce the employee has demonstrated that his discharge may have been motivated by reasons that contravene a clear mandate of public policy, the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee.

Rose, 184 Wn.2d at 275 (quoting *Thompson*, 102 Wn.2d at 232–33) (modification by court). The strict pleading requirement articulated in *Thompson* ensures that only clear violations of important, recognized public policies may expose an employer to potential liability. *Id.* at 276.

As *Rose* further explains, following *Thompson*, the Washington State Supreme Court’s decision in *Wilmot* added an element: whether there was a separate, mandatory and exclusive remedy that precludes a plaintiff from recovering under the public policy tort. *Id.* at 276-77. After *Wilmot*, the Washington State Supreme Court in *Gardner* “refined the tort’s analytical framework somewhat but expressly refrained from substantively changing the underlying tort requirements.” *Rose*, 184 Wn.2d at 277.

Recognizing *Gardner*’s unique factual presentation, the Court applied a four-part framework. *Rose*, 184 Wn.2d at 277. This four-part test includes the following: (1) plaintiffs must prove the existence of a clear public policy (the clarity element); (2) plaintiffs must prove that discouraging the conduct in which the employee engaged would jeopardize the public policy (the jeopardy element); (3) plaintiffs must prove that the public-policy linked-conduct caused the dismissal (the causation element); and (4) defendants must not be able to offer an

overriding justification for the dismissal (the absence of justification element). *Worley*, 175 Wn. App. at 573 (citing *Gardner*, 128 Wn.2d at 941).

As *Rose* candidly acknowledges, particularly regarding jeopardy analysis, “cases since *Gardner* have reflected a significant departure from our initial explanation of the wrongful discharge tort. This departure has generated considerable confusion” *Rose*, 184 Wn.2d at 281. But as *Rose* now reaffirms, the Washington State Supreme Court’s decisions prior to *Gardner* remain good law and are merely supplemented by the additional guidance provided by the four-factor analysis. *Id.* at 278. Because the cases that follow *Thompson*, *Gardner*, and *Wilmot* have “embraced the same core principles, and in large part remain good law,” *Rose* abrogates them only to the extent they require analysis of the adequacy of alternative available remedies for an employee under the jeopardy prong. *Id.* at 286.

1. The Burkes Cannot Make a Prima Facie Showing of Wrongful Discharge in Violation of Public Policy.

This case requires a return to first principles articulated in *Wilmot*. Relying directly on *Thompson*, the Court began with the premise that an employee alleging a claim of wrongful discharge in violation of public policy had the burden of proving his dismissal violates the clear mandate

of public policy. *Wilmot*, 118 Wn.2d at 67-68 (citing *Thompson, supra*). To meet the prima facie burden, a plaintiff must show that (1) he or she exercised a (statutory) right or communicated intent to do so; (2) he or she was discharged; and (3) there is a causal connection between the exercise of the legal right and discharge, *i.e.*, “that the employer’s motivation for the discharge was the employee’s exercise or intent to exercise the statutory rights.” *Id.* at 68-69 (internal citations omitted); *cf. Rickman*, 184 Wn.2d at 315 (discussing *Wilmot* in context of causation, but remanding for further consideration of causation/absence of justification of whistleblowing claim in which approximately one to two months passed between termination and speech).

Regarding the third component of a plaintiff’s prima facie burden, *Wilmot* adopts a temporal proximity test, because a “[d]ischarge some length in time after the employee’s filing of a claim [for worker’s compensation] will be less likely to reflect an improper motive connected with that claim.” *Id.* at 69. In short, to make a prima facie showing, proximity in time between the claim and the firing is the typical starting point, coupled with satisfactory work performance and supervisory evaluations. *Id.* (internal quotations and citations omitted).

Though stated elsewhere in appellants’ brief regarding temporal proximity, Burke acknowledges that a substantial gap between the

exercise of a right and an adverse employment action can sink a retaliation claim. (Appellants' Br. at 30 & n.8.) *See also Bravo v. Dolsen*, 125 Wn.2d 745, 888 P.2d 145 (1995) (retaliation from complaints in early summer to termination in July of same year); *Blinka v. Wash State Bar Ass'n*, 109 Wn. App. 575, 580 & n.1, 36 P.3d 1094 (2001) (speech in October 1996, but termination in September 1997 plus acknowledgment that speech was factor in discharge); *Hayes v Trulock*, 51 Wn. App. 795, 755 P.2d 830 (1988) (retaliation approximately one to three months later); *cf White v. State*, 131 Wn.2d 1, 7 & 17-18, 929 P.2d 396 (1997) (insufficient evidence of prima facie First Amendment claim for report occurring between approximately three and six months prior to transfer).

Burke submits no Washington authority for the proposition that a termination occurring over a year after an alleged incident may satisfy his prima facie temporal proximity burden. Further, the Ninth Circuit case he relies upon to distinguish this issue, *Anthione v. N. Cent. Counties Consort.*, 605 F.3d 740, 751 (9th Cir. 2010), is inapposite because the plaintiff there provided a "very close temporal link" of four rather than eighteen months. Simply put, appellants Russell and Julie Burke cannot satisfy their prima facie burden under these undisputed facts, because there is no temporal relation between the December 2011 meeting and Burke's June 17, 2013 termination. The intervening events do not provide

any conceivable bridge for a jury. Indeed, the political party planned by and attended alongside respondent Kristy Powell in the summer of 2011, as many as 24 months prior to Burke's termination, highlights the inadequacy of a claim based upon a single conversation. This Court should affirm summary judgment dismissal.

2. *The Clarity Element in Context with Wilmot and Becker.*

Burke begins his analysis by advocating that he satisfies the clarity element articulated in *Gardner*, i.e., that there is a clear public policy in favor of free speech. (Appellants' Br. at 18.) However, he fails to account for the "first-step" prima facie analysis articulated in *Wilmot*, or its temporal proximity consideration. As the Washington State Supreme Court recently observed, the four-factor test of *Gardner* may provide guidance if a case does not "fit neatly" within the four traditional wrongful discharge scenarios. *Becker v. Comm. Health Sys.*, 184 Wn.2d 252, 259, 359 P.3d 746 (2015).

Those defined and narrow exceptions include: (1) where an employee is fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation; (3) where employees are fired for exercising a legal right or privilege, such as filing a worker's compensation claim; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., a whistleblower claim.

Becker, 184 Wn.2d at 258-59 (citing *Gardner*, 128 Wn.2d at 936). Burke's claim appears to fit within the ambit of the legal right prong, which limits the utility of the four-factor approach articulated in *Gardner*. *Rose*, 184 Wn.2d at 287.

Respondents' distinct starting point compared to the Burkes' likely stems from tension between *Gardner* and *Wilmot*. For example, *Gardner* favors separate analysis of the clarity and jeopardy elements in an effort to achieve a more consistent treatment of these types of claims. *Gardner*, 128 Wn.2d at 941-42 (construing *Wilmot* as relevant to causation). By contrast, *Becker* and *Rose* appear to question the efficacy of that approach in calling for a return to *Thompson*, or at least impliedly ask whether the clarity element applies to judgment on the pleadings (as opposed to summary judgment). *Becker*, 359 Wn.2d at 258-59; *Rose*, 184 Wn.2d at 287 (reliance on four-part test unnecessary because termination occurred for refusal to break drive-time hours law); *see also Wilmot*, 118 Wn.2d at 67-68 (distinguishing between stating a cause of action, and an employee satisfying his or her prima facie burden under *Thompson*).

Indeed, *Wilmot* address a certified question about whether a common law cause of action exists where the employee is discharged for filing for compensation when he or she has been injured on the job, answering as follows: "we hold that discharge of an employee for

absenteeism resulting from a workplace injury, under a neutral policy that employees will be discharged for excessive absenteeism, may be a legitimate reason for discharge which will satisfy an employer's burden of production in response to plaintiff's prima facie case." *Wilmot*, 118 Wn.2d at 67 & 75. Respectfully, this only indirectly answers the question.

The *Wilmot* Court critically recognized that analyzing the public policy as indicated via one statute at issue actually *permitted* an employer to lawfully discharge an employee despite filing a claim for injury compensation if the termination occurred for failing to observe health and safety standards. *Id.* at 75. In short, as part of summary judgment proceedings, it is not as straightforward as abstractly inquiring whether there is a clear public policy in favor of encouraging employees to file workers compensation claims, or in this instance, exercising "free speech" divorced from all context.

The mere fact that speech precedes an employment decision does not create an inference that the decision was motivated by the speech. *White v. State*, 929 P.2d 396, 17, 929 P.2d 396 (1997) (analyzing § 1983 claim) (summarizing *O'Connor v. Chicago Transit Auth.*, 985 F.3d 1362, 1368 (7th Cir. 1993)). Appellants' citation to numerous First Amendment cases and/or doctrines to abstractly satisfy the clarity aspect of the instant dispute therefore misses the mark.

a. *There is No Clear Public Policy Implicated by a Termination More Than 18 Months After the Last Alleged Speech.*

Even if this Court assumes *arguendo* that hosting a political party in 2011 or conversing regarding a mayoral election in December 2011 constitute acts of free expression (which may conceivably apply with equal force to Kenneth Estes as a private citizen), Burke's termination in June 2013 does not give rise to any inference of political motivation given the passage of time. For example, *Galli v. New Jersey Meadowland Comm'n*, 490 F.3d 265, 268-69 (3d Cir. 2007), as cited by the Burkes and which analyzes political patronage claims, involved a termination within four months of the new administration taking office (alongside ten other employees hired during a prior party's term). Galli offered specific evidence that the Commission was "letting Republicans go," based upon statements *after* the transition occurred, and that, despite claiming the terminations made commission more efficient—it hired 18 new employees the following year. *Galli*, 490 F.3d at 269. This is a far cry from the undisputed facts of this matter, which much more closely align with *Wrobel v. County of Erie*, 692 F.3d 22, 30 (3d Cir. 2012).

Wrobel involved an employee of the Erie County highway department who alleged he was harassed for being a member of the "old regime" and for complaints he raised involving matters of public concern.

Wrobel, 692 F.3d at 25-27. During Wrobel's deposition, he recounted a single instance in which political affiliation had been discussed on the first day of his new supervisor's tenure as Senior Highway Maintenance Engineer at the Aurora Barn. *Id.* at 28. The Third Circuit held that Wrobel failed to create a genuine issue of material fact: "there is good reason to hold the plaintiff to his burden of proof in a free association case . . . in a reform context, it is expected that employees will be fired, demoted, or transferred *soon after* the change in administration, with the result that there is temporal proximity between the change in 'regime' and the adverse employment action." *Id.* at 29.

Here, Burke concedes that after Mayor Estes actually took office, the City explored making him Public Works Director, a position with greater authority and pay, and that he was repeatedly encouraged by Kristy Powell "just to take the position." (CP 370:16-21; CP 374:19-24) (emphasis added). Furthermore, after the parties were unable to reach an agreement, Ms. Powell assumed the role of Interim Public Works Director, and she also supported Mr. Streeter and even helped plan the political party hosted by Burke in 2011. Burke has thus failed to offer prima facie evidence to support an allegation of violation of a clear public policy of free association/speech under threat. *See also Wrobel*, 692 F.3d at 30 (unless evidence is required, any mistreatment of an apolitical public

employee (or a political one for that matter) would go to the jury on a constitutional claim). The burden on summary judgment is not to abstractly distill First Amendment or penumbral rights, but to assess whether plaintiff has submitted prima facie evidence that Burke's termination violates a clear public policy. Here, it does not.

After Burke filed his appellate brief, the United States Supreme Court issued its opinion in *Heffernan v City of Paterson, N.J.*, No. 14-1280, 2016 WL 1627953, 136 S. Ct. 1412 (U.S. April 26, 2016). The decision involves the demotion and reassignment of a New Jersey detective, who was observed just one day earlier with campaign signs for an opposing mayoral candidate. *Heffernan*, 2016 WL 1627953, at *3. Heffernan did not actually support that candidate, but instead had picked up the campaign signs for his ill mother. *Id.* His supervisors thus made a factual mistake. *Id.* The Court assumed that the policies applied by the employer in demoting and disciplining the employee violated the Constitution, and held that, because the government intended to demote in violation of the Constitution, the employee is entitled to challenge that action under 42 U.S.C. § 1983 even though the employer was mistaken regarding the character of the actual activity. *Id.* at *5-6.

Heffernan highlights three critical aspects of this case: (1) the importance of proximity in time between alleged speech and an adverse

employment action, which is wholly absent: (2) extent to which “free speech” principles depend on numerous factors that cannot be distilled in a vacuum, and which the Court recognized as exceptions to the general patronage rule including governmental efficacy, *Waters v. Churchill*, 511 U.S. 661, 672 & 675, 114 S. Ct. 1878 (1994), a neutral and appropriately limited policy, *Civil Serv. Comm’n v. Letter Carriers*, 413 U.S. 548, 564, 93 S. Ct. 2880 (1973), and jobs in which political affiliation is required, *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980); and (3) the focus should be on whether Burke has made a prima facie showing under the undisputed facts. *Heffernan*, 2016 WL 1627953 at *6 (remanding for inquiry whether policy complied with constitutional standards).

Given the gap in time; a sole alleged instance of political animus assigned to another private citizen at the time it occurred; repeated encouragement to “just accept the position” after Mayor Estes took office; absence of similarly treated employees; appointment of another Doug Streeter supporter; and Burke’s repeated refusals to be interviewed about the missing paint, the undisputed facts of this case are inadequate to sustain a conclusion that there has been a clear violation of public policy for alleged speech activity more than a year earlier.

3. *Free Speech Is Not Jeopardized by the Undisputed Facts of This Case.*

Even if this Court applies the four-part *Gardner* test, which it does not need to do under recent case law, Burke fails to establish the jeopardy element. To establish jeopardy, a plaintiff must (1) show that he or she engaged in particular conduct; and (2) that the conduct relates directly to the public policy or was necessary for the enforcement of the public policy. *Piel v. City of Federal Way*, 177 Wn.2d 604, 611, 306 P.3d 879 (2013) (citing *Gardner, supra*). This considers whether available alternative remedies are exclusive, although an employee need not prove that bringing the tort claim is *strictly* necessary to vindicate public policy. *Rickman*, 184 Wn.2d at 310.

Burke states that respondents did not raise this element in their summary judgment motion. (Appellants' Br. at 23.) It is correct that respondents did not advocate to the Superior Court that there is a separate exclusive remedy that precludes the instant claim. (RP 10:5-18.) However, respondents expressly contended that "no reasonable jury could find [Burke's] termination *jeopardizes* public policy or was substantially motivated by political animus." (CP 280-81) (emphasis added). Respondents maintain that position here, because this dispute presents "no public policy that is under threat as a result of these events." (RP 37:20-

38:5). So while the issue could have perhaps been articulated more artfully, and the proceedings before the lower court primarily focused on the first, third, and fourth elements of the *Gardner* test, even the Washington State Supreme Court has conceded in an interim decision (which followed respondents' original summary judgment briefing) that cases on the jeopardy element have "generated considerable confusion ..." *Rose*, 184 Wn.2d at 280.

In returning to the fundamentals of *Gardner*, as *Rose* encourages, a plaintiff must show how "the threat of discharge will discourage others from engaging in the desirable conduct." *Rose*, 128 Wn.2d at 290. Burke cannot do this. He testified that, since the December 2011 conversation, he has not been more reluctant to participate in any local, state, or national elections. Nor is he aware of anyone else from the City of Montesano who has been deterred from political participation because of his or her beliefs.

Furthermore, regardless of whether the issue is analyzed under the jeopardy or justification prongs per se, Burke cannot dispute that (1) he refused to appear on April 11, 2013, after an order to so; (2) he refused to appear on April 19, 2013, after an additional warning to appear; (3) he received a 21-day suspension without pay, but abandoned his challenge to the propriety of that discipline in September 2013; and (4) he refused to

appear on June 4, 2013, despite warnings and additional attempts to accommodate, for which he was terminated. Burke later abandoned his challenge that he was terminated in violation of the terms of the Collective Bargaining Agreement, *i.e.*, without just cause.

Burke fails to articulate any reason why this scenario jeopardizes public policy, based upon a single conversation more than 15 months prior. As abundant case law makes clear, an employee may not simply refuse to appear for and answer questions during an employer investigation. For example, and as the City respondents advocated to the Superior Court, the Seventh Circuit in *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990-91 (7th Cir. 2002) (Posner, J.), analyzed an employee's refusal to participate in an interview into alleged financial improprieties: "The employee has no right to skip the interview merely because he has reason to think he'll be asked questions the answers to which might be incriminating." 286 F.3d at 991 (generally citing *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551 (1976)); *see also Crider v. Spectrulite Consort., Inc.*, 130 F.3d 1238, 1248 (7th Cir. 1997) (observing that insubordinately refusing orders will cause other employees to wonder why they should obey the rules).

Additional persuasive case law supports this conclusion: *Mass Parole Bd v. Civil Serv. Comm'n*, 716 N.E.2d 155, 159-61 (Mass. Ct.

App. 1999) (“failure to appear is tantamount to a refusal to answer” and reliance on an attorney’s advice for doing so provides no excuse). The Washington State Supreme Court in *Seattle Police Officers’ Guild v. City of Seattle*, 80 Wn.2d 307, 316, 494 P.2d 485 (1972), has specifically recognized that an employer may lawfully discharge an employee if they appear for an interview but refuse to answer questions under *Garrity*. It stands to reason that outright refusal to appear may also result in justifiable discipline up to and including termination. Unlike plaintiffs who refuse, for example, to commit an illegal act that an employer may not compel, Burke’s compelled attendance carries no such weight. To rule otherwise would turn employer-employee relations on its head.

Burke has also abandoned his breach of contract claim and previously forfeited his challenge under the Collective Bargaining Agreement. He does not contend that he received inadequate process. He was repeatedly warned that he could be terminated as a result of failing to appear, and chose to do so nevertheless. The foregoing all transpired more than 16 months after a single isolated conversation, one that took place before Mayor Estes even took office, which no reasonable jury could conclude jeopardizes the free speech principles.

4. *If Burke Satisfies the Prima Facie Burden, the City Has Articulated a Nonpretextual Nonretaliatory Reason for Discharging Burke (Causation/Absence of Justification Elements).*

Appellants cannot satisfy their prima facie burden because of the gap in time and encouragement to just take the Public Works Director position in January 2012. *See Wrobel*, 692 F.3d at 29 (invitation to “be on my team” incompatible with idea of rejecting employees on basis of partisan favoritism). Burke points to *no* political comments from Mayor Estes or anyone else from the City administration after December 2011. (CP 363:25-364:11.) There is also no evidence of retaliatory treatment of similarly situated employees.

If this Court concludes that Burke has nevertheless met his initial burden, the burden then shifts to the City to articulate a legitimate, nonpretextual, nonretaliatory reason for the discharge, which in this instance overlaps with the final element of the four-part test articulated in *Gardner. Wilmot*, 118 Wn.2d at 70. An employer must produce relevant admissible evidence of another motivation, “but need not do so by the preponderance of evidence necessary to sustain the burden of persuasion.” *Id.* (internal citations omitted).

The Burkes do not appear to challenge that the evidence presented by the City articulates its nonretaliatory motivation terminating Burke.

(Appellants' Br. at 25 & 27.) They instead advocate that the reason (insubordination) is pre-textual, which is a burden that they must only meet "if the employer produces evidence of a legitimate basis for the discharge." *Wilmot*, 118 Wn.2d at 70. This should be construed as a concession, which is overcome regardless. The abundant case law cited above, numerous pre-termination warnings, and Burke's unchallenged and repeated failures to appear satisfy the City respondents' burden that Burke was terminated for insubordination as a matter of law. *See also Grimwood*, 110 Wn.2d at 365 (plaintiff failed to overcome rationale for termination when employer warned six months prior that continued substandard performance would be cause for dismissal).

5. *There is No Evidence of Pretext, or a Causal Nexus Between the Termination in 2013 and the Pin Conversation or Rally in 2011.*

Once a defendant meets its intermediate burden of production, the "presumption" established by the prima facie evidence has been rebutted, and "simply drops out of the picture." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 182, 23 P.3d 440 (2001) *overruled on other grounds McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006) (internal citations and quotations omitted). To show pretext, a plaintiff must then submit sufficient evidence that the defendant's articulated reasons: (1) had no basis in fact; (2) were not really motivating factors for its decision; (3)

were not temporally connected to the adverse employment action; (4) or were not motivating factors in employment decisions for other similarly situated employees. *Scrivener v. Clark College*, 181 Wn.2d 439, 447, 334 P.3d 541 (2014).

A plaintiff may also show pretext by proving that retaliation was nevertheless a substantial motivating factor. *Id.* at 448. *See also Wilmot*, 118 Wn.2d at 72-73. Under the *McDonnell Douglas* framework, as the Superior Court discerned, a plaintiff attempting to show pretext may use either direct or circumstantial evidence. *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1096 (9th Cir. 2005). Burke primarily advocates that the termination had no basis in fact (Appellants' Br. at 28), and/or was not really a motivating factor. (*Id.* at 29.) Indeed, in stark contrast to his claims, there is temporal proximity between Burke's insubordination and termination. As appellants submit no direct evidence of a retaliatory nexus, however, they rely only on circumstantial assertions.

When a plaintiff relies on circumstantial evidence, it must be "specific and substantial" to defeat an employer's motion for summary judgment. *Coghlan*, 413 F.3d at 1095-96 (internal citations omitted). As this Court has recognized, even when a plaintiff establishes a prima facie case and presents some evidence to challenge the defendant's reasoning: "when 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 evidence that no discrimination had occurred, summary judgment is proper." *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418 (2002) (quoting *Reese v. Sanderson Plumb. Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097 (2000)).

A final but separately operative presumption in favor of City respondents is the same actor inference: "[w]hen someone is both hired and fired by the same decisionmakers within a relatively short period of time, there is a strong inference that he or she was *not* discharged because of any attribute the decisionmaker was aware of at the time." *Hill*, 144 Wn.2d at 189 (internal citation omitted). For a plaintiff to prevail, the evidence must answer an obvious question: "if the employer is opposed to hiring such a person with a certain attribute, why would the employer have hired them in the first place?" *Id.* Where the record fails to suggest an answer, the claim fails. *Id.* See also *Coghlan*, 413 F.3d at 1098 (the same actor inference is neither a mandatory presumption nor a mere possible conclusion for the jury, it is a "strong inference" that a court must take into account on summary judgment).

Here, Burke fails to present evidence adequate for his claim to survive. He ignores his own testimony that in January 2012 he was

repeatedly encouraged to take the Public Works Director position. (CP 374:19-24.) He unpersuasively argues this as an effective demotion. (Appellants' Br. at 31.) Burke overlooks the appointment of Kristy Powell as Interim Public Works Director, and the fact that she planned and attended the same political party as Burke (along with her husband). Burke concedes that no act by either Kristy Powell or Rocky Howard constituted retaliation based upon politics, and he cannot bridge the temporal gap between 2011 and 2013 by relying on inadmissible comments or a lawful investigation in which he was exonerated. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 467-68, 98 P.3d 827 (2004) (age discrimination) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989) (O'Connor J., concurring) (statements by non-decisionmakers insufficient to establish retaliatory intent); (CP 365:6-10 & 365:20-366:25).

Burke cannot refute that the Grays Harbor County District Court found probable cause of Theft in the Second Degree, or that Detective Krohn relied on Burke to build his case. Or that in the context of the internal investigation of that matter he repeatedly refused to appear despite warnings to appear or face termination. He cannot refute that he abandoned any challenge to whether the discipline he received or his termination occurred with just cause under the Collective Bargaining

Agreement, and did not, as he now advocates, implicate a pre-disciplinary opportunity to which Burke had also declined to attend. (CP 127 & 132-33.) The record does not contain any dispute of material fact—Burke has failed to submit evidence that in a single conversation in 2011 or earlier political party was a substantial factor in his termination in 2013. There is no causal nexus. This Court should affirm summary dismissal.

V. CONCLUSION

This Court should affirm the dismissal of appellant Russell and Julie Burke's sole remaining allegation of termination in violation of public policy for lack of temporal proximity and the complete absence of an evidentiary link between his release on June 17, 2013 and a conversation with a mayor elect regarding politics prior to taking office.

Respectfully submitted this 11th day of May, 2016.

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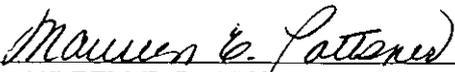
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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 11th day of May, 2016.



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