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No. 50570-3-II

COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

In the Matter of

BRETT HAMILTON

BRETT HAMILTON

Plaintiff - Appellant,

v.

KITSAP COUNTY,

Defendant - Respondent.

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The Trial Court failed to recognize the proper standard on summary judgment and errored finding that no material issue of fact existed relating to the negligent supervision claim.

2. The Trial Court improperly dismissed the negligent infliction of emotional distress claim failing to recognize emotional impact from factors outside of the work environment.

3. The Trial Court failed to recognize the proper standard on summary judgment and failed to recognize material issues of fact which remained in dispute when granting summary judgment on the Retaliation claim.

II. ISSUES

1. Did the Trial Court fail to properly exercise the standard on summary judgment in finding that no material issue of fact existed relating to the negligent supervision claim.

2. Did the Trial Court wrongfully fail as a matter of law to recognize emotional impact which occurred from outside work influences.

3. Did the Trial Court error by applying the wrong standard on summary judgment and failing to recognize a material issue of fact in dispute when dismissing the retaliation claim.

III. STATEMENT OF THE CASE

In 2012 the Plaintiff, Brett Hamilton, had been employed by the Kitsap County Sheriff's Department in the Corrections Division for over 10 years. CP 349. In 2011 Officer Hamilton was selected as Officer of the Year. CP 349. All of his performance reviews were fully successful. In 2008 and 2009 Officer Hamilton was specifically complemented on his investigative skills in his performance reviews. CP 271.

As an officer with the Kitsap County Sheriff's Department Officer Hamilton was a member of the Kitsap County Corrections Officers Guild. A Collective Bargaining Agreement (CBA) was in effect between January 1, 2010 and December 31, 2012. Attached to the CBA as "Appendix D" was the Corrections Officer Bill of Rights. CP 328-332.

Appendix D, paragraph 2 after stating it is essential that public confidence be maintained in the ability of the employer to investigate and properly adjudicate complaints against the employees that the rights of the employee, the employer, as well as those of the public must be protected. This paragraph states that in criminal matters an employee shall be afforded those constitutional rights available to any citizen. It further states in administrative matters in which an employee will be interviewed concerning an act, which, if proven, could reasonably result in disciplinary action involving a loss of pay against him or her, she/he will be afforded the safeguards set forth in this Appendix.

There is nothing in Appendix D, paragraph 2, or the CBA as a whole, which in any way suspends the employees administrative rights outlined in Appendix D if a simultaneous criminal investigation is taking place. The rights of an employee in administrative matter coexist with an employee's rights under a potential criminal matter.

Appendix D, paragraph 3, states whenever the employer decides to initiate an investigation that may lead to disciplinary action involving the loss of pay, the employer shall promptly provide the employee notice of the investigation. No notice was provided to Hamilton of the decision to initiate an investigation into his actions. Paragraph 3 further requires such notice to include a description of the general nature of the

complaint unless such notice would endanger the investigation. No notice describing the general nature of a complaint against him was provided to Hamilton.

Appendix D, paragraph 4 requires the employee to be informed in writing not less than forty-eight (48) hours prior to conducting an investigatory interview that the employee is a subject of an inquiry that may lead to disciplinary action that involves a potential loss of pay. Paragraph 4 requires the employee to be informed of the nature of the investigation and provided a summary of the factual allegation(s) sufficient to reasonably apprise the employee the nature of the charge. Paragraph 4 also requires that upon request the employee shall be afforded the opportunity to consult with a Guild representative.

Appendix D, paragraph 5 requires the employee under investigation to be informed of the name of the person in charge of the investigation and the name of the questioners, and all other persons to be present during the questioning. No such information was provided to Hamilton.

Appendix D, paragraph 6 requires that when possible the questioning shall be conducted at a reasonable hour, preferably at time when the employee is on duty or during the normal waking hours

for the employee, unless the seriousness of the investigation requires otherwise.

In 2012 the administration and officers of the Corrections Department became aware of potential abuse of the Telmate communication system by inmates. On April 6, 2012, a Jail Incident Report was prepared by Officer Hamilton regarding the abuse of the Telmate system and approved by his supervisor, Sgt. Dick. CP 257. Within this report Hamilton discussed looking at the account for an inmate, Aaron Caseria, and noted that he had 37 free visits in the past few weeks with a value of $740 that should have been paid for those visits. Hamilton contacted Mr. Caseria directly within the jail and discussed the discrepancy. Mr. Caseria's response was that it was not his problem that the system can be manipulated and "that's just the way it is." CP 257.

Other supervisors and officers also conducted investigations into the same issue. On April 12, 2012, a Jail Incident Report was prepared by Officer Sapp regarding her monitoring of the video visitation system because "there have been several prisoners who had been defrauding the institution and Telmate by not paying for visits." CP 259. On April 26, 2012, a Jail Incident Report was prepared by Sgt. Dick regarding his reporting of the potential abuse of the Telmate

system and manipulation to obtain free visits. CP 262. On March 13, 2012, Sgt. Hall sent an email to the representative of Telmate, Kelly O'Neil, which included an attached handwritten note from an inmate describing how the manipulation was taking place. CP 264. On April 27, 2012, Sgt. Hall sent an email to Chief Newlin in which he informed him regarding Telmate issues and described how inmates had been manipulating the remote visit scheduling system and obtaining free remote visits. CP 267. These problems continued and on July 11, 2012, Sgt. Hall prepared a Jail Incident Report which was reviewed by Lt. Elton. CP 269. This report detailed how after the implementation of the video visiting system in early May 2012, several inmates had been manipulating the scheduling system in order to receive free remote visits. Inmate Aaron Casaria was specifically mentioned in this report.

Sgt. Glover and Sgt. Dick were asked during their depositions if the officers possessed the discretionary authority to conduct investigations into rule violations independently. Sgt. Glover was asked, "Do corrections officers have the authority to investigate potential criminal activity?" Sgt. Glover's answer was, "Yes." CP 236. Sgt. Glover was asked, "Do correctional officers have the authority to investigate rule violations within the general environment?" He

testified, "Yes." CP 237. Sgt. Glover was asked, "Are officers authorized to proactively look into activities of inmates to look for rule violations?" He testified "Yes." CP 237.

Sgt. Dick was similarly questioned regarding an officer's authority to investigate matters within the corrections system. He was asked, "As the supervisor, would you deem it to be inappropriate for an officer under your supervision to be proactively looking for rule violations, as opposed to reacting to what they see in front of you?" Sgt. Dick testified, "No, I would not be adverse to proactivity." CP 231. The follow-up question was, "Do the officers have the individual discretion to engage in proactive efforts to search out rule violations within the jail?" Sgt. Dick testified, "They have discretion, yes." CP 231. Later within this deposition Sgt. Dick was asked, "Do the individual officers have the discretionary authority within their job to proactively look for rule violations?" He testified, "Yes, as long as it does not interfere with their job." CP 232. The follow-up question was, "Have you ever heard the term "investigation" associated with proactive activities by officers looking for rule violations?" Sgt. Dick testified, "It is not a term commonly used in the jail."

In early 2002 Hamilton began an investigation into the Telmate system and the abuse that was taking place. As a reserve officer on the Bremerton Police Department Hamilton had learned an investigative technique from one of the department's detectives regarding sending text messages to the known phone number of a suspect pretending to be someone else hoping to solicit a response. CP 240-41. He chose to use this technique with the wife of the inmate that was suspected of abusing the Telmate system, Ashley Caseria.

Hamilton sent several text messages to Ms. Caseria without identifying himself seeking to elicit a response demonstrating the abuse of Telmate. The corrections staff had received information that Ms. Caseria's mother had passed away. CP 241. They were also aware that her husband, Aaron, was seeking permission to leave the jail to attend funeral services. CP 241. Hamilton took it upon himself to review all local public information as well as newspapers and was unable to find any information that Ms. Caseria's mother had in fact passed away. He then sent a text message to her stating, "Never forget how much I love u Ash everything will be okay I will keep u safe im here for u even in death see u soon." CP 163. There was a response to this email demanding to know who sent this text message.

CP 242. Hamilton responded simply indicating that he would send no more messages and wished "all good for you always." CP 242.

Hamilton made no effort to hide his investigative activities from his fellow corrections officers. After openly discussing his attempts to solicit information from Ms. Caseria this information was brought to the attention of Sgt. Dick on June 12, 2012. He brought this to the attention of his supervisor, Lt. Genie Elton, that same day. CP 283.

Lt. Elton drafted a memorandum on June 14, 2013, to Chief Newlin describing her actions. CP 283-91. She met with Chief Newlin on June 12, 2012 at approximately 8:40 AM. They discussed the "potential criminal nature of this allegation and concerns of the potential for various policy violations having taken place by Hamilton". CP 288. Lt. Elton made contact with Sgt. McDonough who was in charge of the Office of Professional Services later that same day regarding this matter. CP 289. On June 12th Lt. Elton also had telephone contact with Detective Martin of the Port Orchard Police Department. They met later that morning and she briefed Detective Martin in full. CP 290.

Lt. Elton spoke with Detective Martin on June 13, 2012 regarding emails that he sent to her on the case. CP 290. One of those emails was sent to Lt. Elton by Detective Martin on June 13, 2012 at

8:23 AM. CP 279. In this email Detective Martin described staffing this matter with his Chief and Commander and stated, "The Chief and Commander met with me yesterday afternoon and asked if I thought there was any criminal act involved." "I told them it might be telephone harassment, but that was pretty slim." "They said before I go any further, to get the Prosecutors take on this and see if they would pursue charging before I went any further, that this looked like a violation of your department policy, not criminal." "So–I will wait to see if the Prosecutors Office will charge." CP 279.

Lt. Elton called Detective Martin at approximately 14:15 on June 13, 2012, "and told him that I had reviewed the report and that regarding contacting Hamilton, if necessary, that it not be done while he is at work." "Martin agreed." CP 290. This conversation occurred after she had received the email from Det. Martin stating this looked like a policy violation, not a criminal matter. Chief Newlin during his deposition acknowledged that he probably did direct Lt. Elton to inform Detective Martin that they were not to contact Officer Hamilton at his place of employment. CP 208.

Hamilton was interviewed at his personal residence on Saturday, June 16, 2012, by Detective Martin. CP 303. Prior to the June 16, 2012 interview no notification was made either to the Guild

or Officer Hamilton individually of any potential investigation or interview. CP 342. No communication was given to Hamilton that he was the subject of any criminal or administrative investigation prior to Detective Martin appearing unannounced at his place of residence. CP 342-43. Hamilton's personal residence is not his customary work location, and Hamilton was not afforded the opportunity prior to or during Detective Martin's unannounced appearance at his personal residence to have the opportunity to consult with a Guild representative. CP 343.

The Office of Professional Services during 2012 was a position held by Sgt. James McDonough of the Kitsap County Sheriff's Department. Sgt. McDonough acknowledged being aware of the CBA between the Corrections Officers Guild and Kitsap County. CP 242. Sgt. McDonough was asked specifically what information had been provided to him by Chief Newlin when he first became involved in this matter. Sgt. McDonough testified, "Well, as I remember it, it was basically that Officer Hamilton was conducting some sort of investigation or doing something involving a possible misuse of the telephone system and that several other people within the Corrections Division had heard about this." CP 241. Sgt.

McDonough acknowledged that he was involved with this issue prior to June 16, 2012. CP 243.

Referring back to Appendix D, paragraph 3 Sgt. McDonough was asked to provide his understanding of what was meant by the term "notice will include a general description of the nature unless such notice would endanger the investigation?" He testified, "my understanding is that it would be that normally you would provide a general notice that you're under investigation, unless notifying you would cause you – – well, say you were under criminal investigation at the same time." "If I notified you that you were under an internal investigation, then you most likely would alter your behavior and it would probably – – well, it might mess up the criminal investigation." CP 244-45.

During his deposition Sgt. McDonough was specifically asked if there was anything in Appendix D, or the CBA as a whole, that stated that the requirements of Paragraph 3 to provide written notification of a potential investigation was waived if a matter was considered to be a criminal investigation. Sgt. McDonough testified, "No, because we're talking about two separate investigations." "This contract, the way I understand it, only has to do with employee

conduct." "Criminal matters are completely separate and are not addressed by the contract, the way I understand it." CP 247.

Sgt. McDonough was asked if at any time he had suggested to Chief Newlin, Lt. Elton, or the Undersheriff that Officer Hamilton should be afforded the opportunity to have a Guild representative present before he was interviewed by Detective Martin. His reply was "No." CP 248. He was asked if there was anything so significant or serious about the allegations as he understood them that would justify questioning Officer Hamilton outside of a reasonable hour or at his place of duty during normal waking hours for the employee. Sgt. McDonough testified, "For the administrative investigation, no." He was then asked about the criminal matter and his testimony was, "Not my decision." CP 249.

Officer Hamilton was involved in bringing awareness to safety-related issues within the jail. In 2011, a concern arose regarding the safety of officers in the Central Pod. Officer Hamilton prepared an Emergency Injunction which was signed by 60 individual officers. CP 274-78. Chief Newlin, Sgt. Glover, and Sgt. Dick all denied having seen this Emergency Injunction during their depositions. CP 214, 239, 233. Chief Newlin acknowledged that he was aware that safety-related issues were being raised by the Guild. CP 214. Terry Cousins, a former

twenty-year employee of Kitsap County Jail and President of the Guild in 2012-13 stated in her Declaration she has personal knowledge that Chief Newlin was made aware of this Emergency Injunction, contrary to his sworn testimony during his deposition. CP 344. She personally gave a copy of the Emergency Injunction to Administration and discussed this with him. CP 344.

Chief Newlin was asked during his deposition if he recognized that there were possible administrative policy implications to the alleged actions of Officer Hamilton. Chief Newlin testified, "There were policy implications, yes." "If there's a criminal investigation, there's potential policy violations by the fact of it being a criminal investigation, but I didn't know which policies or those kinds of things." CP 215. Chief Newlin testified that he considered all the information presented to him in making the decision to engage in the criminal investigation process. CP 220. He further testified, "the totality of the information led me to believe that this could possibly be a criminal violation." CP 220-21. He also admitted to making the decision not to engage in the administrative process when he testified, "once I make a determination that it is potentially criminal, then, no, we don't go down the administrative route prior to that." CP 221. Chief Newlin also testified that it was not

material to him whether a person is a good employee when making the decision to engage in a criminal investigation. CP 220.

On June 13, 2012, three days prior to Detective Martin's contact with Officer Hamilton at his personal residence at the specific direction of Lt. Elton, who herself was specifically directed to convey this direction by Chief Newlin, Chief Newlin knew the following:

1. Hamilton at the time was an officer with 10 years' experience; CP 349.
2. Hamilton was selected as Corrections Officer of the year in 2011; CP 349.
3. Hamilton according to his performance reviews had excellent investigative skills as well as being considered an "outstanding" employee by Sgt. Glover; CP 238. a "good employee" by Sgt. Dick; CP 234. and a "hard-working" employee by Lt. Elton. CP 226.
4. Hamilton during his 10 years of employment had no prior disciplinary actions; CP 349.
5. During 2012 the Corrections Division was dealing with multiple Telmate inmate abuse related issues;

6. Both Sergeants Hall and Dick had individually written reports regarding the Telmate inmate abuse issue as well as Officer Sapp; CP 258, 269.
7. Hamilton himself had authored a Telmate inmate abuse report dated April 6, 2012; CP 257.
8. Inmate Aaron Caseria had been reported during 2012 for abusing the Telmate system by multiple individuals in addition to Hamilton;
9. Hamilton openly discussed his texting actions with his fellow officers and made no apparent attempt to hide his activities; CP 284.
10. No authority existed in the CBA authorizing the Kitsap County Sheriff's Department or the administration of the Corrections Division to suspend a Guild members rights under the CBA Appendix D simply because a potential criminal investigation existed; CP 247.
11. Hamilton had engaged in Guild and safety related issues in 2011 by preparing the Emergency Injunction which was signed by 60 corrections officers and submitted to the corrections Division administration by then president of the Guild, Terry Cousins; CP 348.

12. Detective Martin after consultation with his Chief and Commander made the determination that this appeared to be a violation of department policy, not a criminal matter. This determination was communicated to Lt. Elton via email on June 13, 2012, at 10:31am. CP 279.

On June 16, 2012, Detective Martin came to the residence of Hamilton unannounced for the purpose of interviewing him regarding this alleged criminal activity. No prior notification to either the Guild or Hamilton himself had been provided. Hamilton the previous evening had worked until early in the morning and was still asleep when Detective Martin arrived at his residence. Detective Martin was asked how Hamilton appeared when he answered the door and Detective Martin testified, "Like he just woke up." CP 252.

Detective Martin did not clearly identify himself as a law enforcement officer or even what department he represented, he did not inform Hamilton that he was a subject of a criminal investigation and no Miranda warnings were provided. CP 298-309. Detective Martin on Page 7 of his report states: "Paid a visit to Hamilton at his residence and asked that he come to my "office" [vehicle] so we could talk." "Before we started Hamilton asked why I was there." "Once in the vehicle, I announced that everything we talked about was being recorded, that I

was there to ask questions and find out what was going on." "I looked at Hamilton and asked "okay" and Hamilton said "okay" and offered no objections or concerns." CP 303.

Hamilton was not sure of this individual's identification. He testified both in his declaration and during his deposition that he was not provided a business card by Detective Martin until the conclusion of the interview. CP 359. This fact is supported by Detective Martin's report in which he also clearly states: "our conversation ended with my explanation of why I asked these questions and offered my card, telling him to call me if he had any other questions." "We talked about police work and such, nothing relative to the case." CP 307. This ended the initial interview.

After this interview with Detective Martin, Hamilton contacted his Guild president and fellow officer, Terry Cousins. CP 344. Hamilton told her what had just occurred and he discussed his responses to the questions asked by Detective Martin. He acknowledged to Officer Cousins that he had not answered each question fully truthfully. CP 344. Officer Cousins advised him to prepare a written statement describing truthfully what had occurred and to make this available to Detective Martin. CP 344.

Hamilton did this by immediately preparing a written statement regarding his texting Ashley Caseria and his reasons for doing so. On June 19, 2012, Hamilton went to the Port Orchard Police Department and asked to speak with Detective Martin. CP 307-08. The two of them met and Hamilton provided his written statement to Detective Martin. This document was stamped with a certification under penalty of perjury which Detective Martin asked Officer Hamilton to sign. Officer Hamilton did sign and acknowledge the written statement in a certified fashion. CP 308.

IV. ARGUMENT

Summary Judgment Standard

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Westberry v. Interstate Distributor Co.,* 164 Wn.App 196, 204, 263 P.3d 1251 (2011). A trial is not useless, but absolutely necessary, where there is a genuine issue as to any material fact. *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P/2d 605 (1960). A material fact is one upon which all or part of the outcome of litigation depends. *Hill v. Cox,* 110 Wn.App. 394, 402-403 41 P.3d 495 (2002)

The principles regarding a motion for summary judgment have been long established. While often noting the beneficial use to which

summary judgments may be put in dismissing unfounded claims, courts have at the same time recognized they must be employed with caution lest worthwhile causes be dismissed short of a determination of their true merit. *Smith v. Acme Paving Co.,* 16 Wn.App. 389, 392, 558 P.2d 811 (1976). In *Meissner v. Simpson Timber Co.,* 69 Wn.2d 949, 951, 421 P.2d 674 (1966)the Court noted:

> The object and function of summary judgment procedure is the avoidance of a useless trial. *Blaise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). A summary judgment is properly granted if the pleadings, affidavits, depositions or admissions on file show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Blaise v. Underwood, supra;*; . . . In ruling upon such motion, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom most favorable to the nonmoving party. *Reed v. Streib,* 65 Wn.2d 700, 399 P.2d 338 (1965); *Blaise v. Underwood,* supra. If, from this evidence, reasonable men could reach only one conclusion, the motion should be granted. *Blaise v. Underwood*, supra; *Wood v. City of Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960).
> *Meissner,* Supra at 951.

Stated another way it is not the function of the trial court to weigh the evidence thus to be considered and so construed, and summary judgment of dismissal must be denied if a right of recovery is indicated under any provable set of facts. *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964); *Smith,* Supra at 392-393

While stated nearly 40 years ago all of these principles remain as applicable today as they did when these decisions were initially issued. To overcome summary judgment a plaintiff has only a burden of production, not persuasion, and this may be proved to direct or circumstantial evidence. *Scrivener v. Clark College,* 181 Wn.2d 439, 447, 334 P.3d 541 (2014).

Once the employer meets its burden on a motion for summary judgment, the presumption of discrimination raised by the establishment of a prima facie case is rebutted. *Rice v. Offshore Sys., Inc.,* 167 Wn.App. 77, 89, 272 P.3d 865, review denied 174 Wn.2d 1016 (2012). The employee resisting summary judgment must then produce evidence that raises a genuine issue of material fact on whether the reasons given by the employer for discharging the employee are unworthy of belief or are mere pretext for what is in fact a discriminatory purpose. Id. The employee is not required to produce evidence beyond that offered to establish the prima facie case, nor introduce direct or "smoking gun" evidence. Id. Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's burden. Id.

Negligent Supervision

For Hamilton to establish a negligent supervision claim against Kitsap County based upon a supervisor's harmful actions he must

establish: (1) the relevant supervisor's acted outside the scope of their employment; (2) they presented a risk of harm to him; (3) the County knew, or in the exercise of reasonable care should have known, that the supervisors posed a risk of harm to Hamilton; and (4) the County's failure to supervise its supervisor adequately was the proximate cause of Hamilton's injury. *Niece v. Bellevue Group Home*, 131 Wn.2d 39, 48-51, 929 P.2d 420 (1997).

When an employee causes injury by acts beyond the scope of employment an employer may be liable for negligently supervising the employee. *Gilliam v. Department of Social and Health Services*, 89 Wn.App. 569, 584-85, 950 P.2d 20 (1998). The limited duty required of an employer to control the actions of its employee to protect other persons can extend to a circumstance where one employee harms another employee. *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 865-66, 991 P.2d 1182 (2000).

Hamilton's initial negligent supervision claim was pled based on the allegation that Lt. Elton falsely and deliberately told Detective Martin that she was not aware of any investigation being completed by Hamilton and that he was not authorized to engage in any such investigation. In March 2016 when this Complaint was filed this was Hamilton's limited knowledge.

Within discovery obtained during this lawsuit the actions of Lt. Elton and Chief Newlin outside of the scope of their employment was first discovered. Documents were obtained not otherwise available to Hamilton which demonstrates the extent to which both Lt. Elton and Chief Newlin purposely violated Hamilton's rights under Appendix D of the Collective Bargaining Agreement.

Detective Martin sent Lt. Elton an email dated June 13, 2013 in which he stated:

> The Chief and Commander met with me yesterday afternoon and asked if I thought there was any criminal act involved. I told him it might be telephone harassment, but that was pretty slim. They said before I go any further, to get the Prosecutor's take on this and see if they would pursue charging before I went any further, and this look like a violation of your Department policy, not criminal. So - I will wait to see if the Prosecutors Office will charge.

Whether Detective Martin was directed by Lt. Elton as to how to conduct this investigation is a material issue of fact to this cause of action. Lt. Elton in her Declaration states:

> I communicated with Detective E.J. Martin and cooperated with his investigation. During one of our conversations, I expressed my desire that the interview of Mr. Hamilton occur outside of the workplace to avoid disruption of the workplace and to ensure that Mr. Hamilton did not feel that he was being pressured by KCSO to incriminate himself. I did not in any way direct or control Detective Martin's investigation. In fact, I had no authority or power to do so.

In his declaration Detective E.J. Martin stated:

> I interviewed Mr. Hamilton on June 16, 2012 as part of my own criminal investigation. I did not conduct this interview on behalf of, at the direction of, or for Kitsap County.

In the Memorandum prepared by Lt. Elton to Chief Newlin dated June 14, 2012, Lt. Elton wrote:

> Further follow up (06/13/12)
>
> I spoke with Detective MARTIN this date regarding emails he had sent me on the case. One email being a copy of his police report, and another being him asking what I thought of him meeting with HAMILTON. I spoke with the Chief of Corrections and he gave me permission to read the police report as the acting liaison to this investigation. Additionally we spoke of the fact that HAMILTON should not be contacted at work while on the clock.
>
> I called Detective MARTIN at approximately 1415 this date (06/13/12) and told him that I had reviewed the report and that regarding contacting HAMILTON, *if necessary, that it not be done while he is at work. MARTIN agreed.* He informed me that he will attempt to meet with RITHALLER tomorrow (06/14/12.) (Emphasis added)

A material issue of fact exists regarding whether Lt. Elton and Chief Newlin directed Detective Martin in the conduct of his investigation contrary to the requirements of Appendix D. Whether or not Detective Martin was directed by Lt. Elton, after her consultation with Chief Newlin, directing him to conduct his investigation in a

manner contrary to Appendix D is a factual question, not a legal question. It is also without questions a factual question in dispute.

This evidence shows that prior to directing Detective Martin to conduct the investigation in the manner Lt. Elton and Chief Newlin desired; Lt. Elton and Chief Newlin knew based on the email of June 13th from Detective Martin following his discussion with his supervisors that this was not likely a criminal matter. With this knowledge Lt. Elton and Chief Newlin then discussed the desirability that Hamilton be contacted outside of the work environment even though they knew this violated Appendix D, paragraph 6. This would also ensure as they well knew that Hamilton would not have access to a Guild representative. With this knowledge Chief Newlin directed Lt. Elton to direct Detective Martin to contact Hamilton outside the work environment. She directed him to do this as described in her June 14th Memorandum outlined above.

When all reasonable inferences are extended to Hamilton as they are required for a motion for summary judgment a reasonable jury could conclude that the conflicting language between the Memorandum prepared by Lt. Elton and her testimony in her Declaration, in conjunction with the testimony of both Detective Martin and Chief Newlin that Lt. Elton did in fact direct Detective Martin to engage in an

investigation that they knew violated Hamilton's rights under the Appendix D.

The first element that a supervisor acted outside the scope of his or her employment is clearly established because no Kitsap County employee is authorized to deliberately act in a manner that violates an employees' rights under a negotiated CBA. Chief Newlin, Lt. Elton, and Sgt. McDonough all did this. The second element requires Hamilton to prove that they posed a risk of harm to him. Following their actions Chief Newlin made the decision to terminate Hamilton's employment. Clearly the second element is established. The County in exercising reasonable care should have been aware of the actions of its Chief of Corrections and his subordinates. Finally, the County failed to supervise adequately Chief Newlin, Lt. Elton and Sgt. McDonough. All three engaged in a deliberate and wrongful course of conduct that knowingly and with deliberate intention violated Hamilton's CBA, Appendix D rights.

Hamilton was denied prior notice of the investigation by Sgt. McDonough, Lt. Elton and Chief Newlin. He was denied the opportunity to know the substance of the investigation prior to any interview, denied the opportunity to discuss this with a Guild representative prior to being interviewed, and even denied the

opportunity to have any such interview occur at his work location during reasonable work hours. All of these rights were denied to him knowingly and intentionally by Sgt. McDonough, Lt. Elton, and Chief Newlin. All of which were contractual rights to which he was entitled by Appendix D.

To grant summary judgment under these circumstances was legal error and should be reversed by this Court.

Statute of Limitations

The County argues that the statute of limitations has expired and justifies the dismissal of this cause of action. The rule that a cause of action accrues when a tortious injury occurs does not always apply. *E.R.B. v. Church of God*, 89 Wn.App. 670, 681-82, 950 P.2d 29 (1998). A cause of action may accrue when a plaintiff is afforded a remedy. *Green v. A.P.C.* 136 Wn.2d 87, 96, 960 P.2d 29 (1998). A plaintiff is afforded a remedy when he knows all the essential elements of his cause of action or when each element of the action is "susceptible of proof." *Haslund v. Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976).

In this case as outlined above Hamilton is required to prove that the County had knowledge Lt. Elton's and Chief Newlin's actions violated their scope of employment. He also has to prove that the County had knowledge that Lt. Elton and Chief Newlin presented a risk

of harm to Hamilton. *Niece*, supra at 48-51. Hamilton of course did not have knowledge of the actions of his supervisors until after this litigation was filed. He was terminated on March 26, 2013 and this cause of action was filed on March 24, 2016. This is clearly within the three-year statute of limitations which does not apply.

Even if this Court disagrees with this analysis the issue of the statute of limitations in the analogous cause of action for a hostile work environment claim was addressed in *Antonius v. King County*, 153 Wn.2d 256, 103 P/3d 72 (2004). In *Antonius* the Court addressed the United States Supreme Court's decision of *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). In *Morgan* the Court concluded that hostile work environment claims "are different in kind from discrete acts" and "their very nature involves repeated conduct." Id. at 536 U.S. at 115. A hostile work environment claim was determined to be a claim comprised of a series of separate acts that collectively constitute "one unlawful employment practice." Id at 117.

The Court in *Antonius* recognized that RCW 4.16.005 addressed the statute of limitations but RCW 49.60 did not contain a discovery rule. *Antonius*, supra at 269. The Court recognized that hostile work environment claim occurs over a period of days or perhaps even years

and as such the Court declined to adopt a discovery rule for this type of cause of action. Id. at 270.

Similarly, this cause of action for negligent supervision is not comprised of one discreet act but is based on a combination of acts by supervision ultimately culminating in Hamilton's termination on March 26, 2013. As outlined above, Hamilton would have had no reasonable opportunity to even know of the actions of his supervisors until after discovery was received filing the cause of this action on March 24, 2016. The statue limitations had not expired when this cause of action Complaint was filed and does not serve as a bar to this litigation.

All four elements of the cause of action for negligent supervision are established and the granting of summary judgment was legal error.

Negligent Infliction of Emotional Distress

A plaintiff may recover for negligent infliction of emotional distress if he proves negligence—that is, duty, breach of the standard of care, proximate cause, and damage—and proves the additional requirement of objective symptomatology. *Kloepfel v. Bokor*, 149 Wn.2d 192, 198, 66 P.3d 630 (2003); *Snyder v. Med. Serv. Corp. of E. Wash.,* 145 Wn.2d 233, 243-45, 35 P.3d 1158 (2001). Negligent infliction of emotional distress may be a cognizable claim in the workplace when it does not result from an employer's disciplinary acts

or its response to a workplace "personality dispute." *Chea v. Men's Wearhouse, Inc.,* 85 Wn.App. 405, 410, 932 P.2d 1261 (1997), *review denied*, 134 Wn.2d 1002 (1998). Further, "[a]n employee may recover damages for emotional distress in an employment context but only if the factual basis for the claim is distinct from the factual basis for the discrimination claim." *Haubry v. Snow,* 106 Wn.App. 666, 678, 31 P.3d 1186 (2001).

Under Washington law an employee can establish a claim of negligent infliction of emotional distress by showing: (1) that the employer's negligent acts injured him/her; (2) the acts were not a workplace dispute or employee discipline; (3) the injury is not covered by the Industrial Insurance Act, and (4) the dominant feature of the negligence claim was the emotional injury. *Chea* Supra at 412-13. The Court in *Snyder* stated:

> Like all negligence claims, a negligent infliction of emotional distress claim requires duty, breach, proximate cause, and injury. *Hunsley v. Giard,* 87 Wn.2d 424, 434-35, 553 P.2d 1096 (1976). Emotional distress is "a fact of life" and so the elements of duty, breach, causation, and injury place limits on an employer's liability for emotional distress. Id. at 435; *Bishop v. State,* 77 Wn. App. 228, 233, 889 P.2d 959 (1995). In other words, a defendant's liability is measured "by the strictures imposed by negligence theory, i.e., foreseeable risk, threatened danger, and unreasonable conduct measured in light of the danger." *Corrigal v. Ball & Dodd Funeral Home, Inc.,*_89

> Wn.2d 959, 962, 577 P.2d 580 (1978). (Plaintiff) must also show objective symptoms of emotional distress. Id.; *Whaley v. State,* 90 Wn.App. 658, 673, 956 P.2d 1100 (1998). *Snyder* Id. at 323

The County cites to *Chea v. Men's Warehouse* and *Haubry v. Snow* for the proposition that the factual basis for a negligent infliction of emotional distress claim cannot be the same factual basis supporting employment-based discrimination claim. Such is not disputed. The basis for this negligent infliction of emotional distress claim however extends beyond Hamilton's employment.

This cause of action involves in part Hamilton's dismissal from the Bremerton Police Department Reserve. It was Hamilton's desire to have a career in law enforcement which has now been denied to him because of the actions of the County through their agents. This emotional impact is outside of his employment situation. The fact that Hamilton was terminated from the Bremerton Police Department Reserve was specifically noted by the Trial Court when denying the CR 12(b)(6) motion.

This cause of action is also based on the impact to his marital relationship with his wife who came to the United States from the Philippines in expectation that her husband would be employed in the law enforcement community, as well as the financial stress created by

his inability to meet obligations which she had made, and the reliance upon funds from his mother to meet his living expenses. All of these issues are outside the facts surrounding the wrongful termination of his employment and serve as a basis for denial of the motion for summary judgment on this cause of action.

No argument is made by the Defendant as to the objective evidence required for this cause of action. Mr. Hamilton has met multiple times with a counselor and this evidence exits, but is not being presented with this response as no argument is made on this point and this highly personal information should not therefore be placed in this public file.

Dismissal of this cause of action on this motion is inappropriate.

Retaliation

To establish the prima facie elements of a retaliatory discharge a plaintiff must demonstrate (1) that he engaged in a statutorily protected activity, (2) the employer took adverse employment action against him, and (3) demonstrate a causal link between the activity and the adverse action. *Short v. Battle Ground*, 169 Wn.App. 188, 205, 279 P.3d 902 (2012); RCW 49.17.160 A retaliatory motive need not be the employer's soul or principal reason for discharge so long as the employee establishes that retaliation was a substantial factor. *Wilmot v.*

Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991); *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 621, 60 P.3d 106 (2002); WAC 296-360-09(2). A factor supporting the decision is "substantial if it so much as "tips the scales one way or the other.'" *Wilmot,* supra at 72, *Renz*, supra at 621.

In *Renz* the Court stated:

> Employers, of course, rarely openly reveal that retaliation was a motive for adverse employment actions. Employees must then necessarily resort to circumstantial evidence to demonstrate the retaliatory purpose. *Kahn,* 90 Wn.App. at 130 (citing *Wilmot*, 118 Wn.2d at 69). An employee can meet this prong by establishing that he or she participated in an opposition activity, the employer knew of the opposition activity, and the employer discharged him or her. *Id.* at 131 (citing *Wilmot*, 118 Wn.2d at 69.

Renz, supra at 621-22.

The actions engaged in by Mr. Hamilton when creating the Emergency Injunction in November 2011 are statutorily protected by WAC 296-360-100 and RCW 49.17.060. His actions are protected activities under WAC 296-360-100 and RCW 49.17.160.

Mr. Hamilton did not file a complaint with the Washington State Department of Labor & Industries regarding the safety conditions within the Kitsap County corrections facility. He does not have to in order to sustain this cause of action. This question and RCW 49.17.160 were

squarely addressed in *Wilson v. City of Monroe*, 88 Wn.App. 113, 943 P.2d 1134 (1997). As noted by this Court, the inclusion of the term "may" in the same statute as the term "shall" has been considered strong evidence that the Legislature did not intend the statute to provide exclusive procedures and remedies to address retaliatory discharge. *Id.* at 125. The Court noted that RCW 49.17.160 utilized the term "shall" regarding what must be done in response to an employee's complaint, but uses the term "may" in reference to the employees initiation of the process of obtaining relief. *Id.* at 125. Therefore the Court squarely ruled that RCW 49.17.160 did not create an exclusive remedy. Despite being now nearly 20 years old this decision has not been overruled and remains the standing law in the State of Washington. Mr. Hamilton does not need to file a complaint with L&I to make this claim of retaliation under WISHA.

For reasons known only to the County, no challenge was made by the County that Hamilton had not engaged in a statutorily protected activity. The only mention of this by the County was in footnote 16 of their Memorandum in support of Summary Judgment.

The first element of a retaliatory cause of action is established. By drafting what he termed an Emergency Injunction which he had

signed by 60 peer level corrections officers he engaged in statutorily protected activity under the WISHA.

The second element requires demonstration that the employee suffered an adverse employment action. Hamilton was terminated from employment on March 26, 2013. The second element is therefore also established.

The third element requires a demonstration by Hamilton that there is a connection between his drafting the Emergency Injunction and his ultimate termination from employment. To prove a causal link between his drafting of the Emergency Injunction and his termination from employment, Hamilton must provide evidence that his actions were a "substantial factor" motivating the County's decision to terminate his employment. *Currier v. Northland Servs., Inc.*, 182 Wn.App. 733, 747, 332 P.3d 1006 (2014). Again, retaliation need not be the main reason behind the discharge decision but instead need only be the reason that "tips the scales" towards termination. *Wilmot,* supra at 72; *Renz*, supra at 621-22. Therefore, if an employee establishes that he participated in statutorily protected activity, the employer knew about the opposition activity, and the employee was then discharged, a rebuttable presumption of retaliation arises that precludes summary dismissal of the case. *Currier*, supra at 747; *Estavez v. Faculty Club of Univ. of Wash.*,

129 Wn.App. 774, 799, 120 P.3d 579 (2005); *Vasquez v. State*, 94 Wn.App. 976, 985, 974 P.2d 348 (1999); *Kahn v. Salerno*, 90 Wn.App. 110, 131, 951 P.2d 321 (1998); and *Graves v. Dep't of Game*, 76 Wn.App. 705, 712, 887 P.2d 424 (1994).

In the present case whether Chief Newlin had knowledge of Hamilton's safety related activities by drafting the Emergency Injunction is a material issue of fact.

During his deposition Chief Newlin was asked if he had knowledge of the safety related activities engaged in by Officer Hamilton. He testified: "Not being raised by Officer Hamilton, but I knew that the Guild, from time to time, would meet with me, both in labor-management meetings, and they would bring that topic up almost every year in negotiations with the County, in Collective Bargaining Agreement negotiations, their perception of the fact that conditions may not have been safe for their officers." In her Declaration dated December 1, 2016, the former President of the Guild, Officer Terry Cousins stated:

> On November 28, 2012 a meeting occurred between the Guild and Chief Newlin. Chief Newlin was proposing closing down the central control due to staffing issues. The Emergency Injunction prepared by Officer Hamilton was discussed during this meeting. I did not hand a copy of this emergency injunction to Chief Newlin directly, but I did

> provide a copy of it to the Administration and have personal knowledge that he was aware of it.
> CP 344.

In her May 15, 2017 Declaration Ms. Cousins reaffirmed this testimony. She further expanded upon the conversations which she had engaged in with Chief Newlin as well as Lt. Elton regarding not only staffing issues, but Officer Hamilton specifically and this Emergency Injunction.

Whether Chief Newlin possessed knowledge of Officer Hamilton's safety related activities is a material issue of fact in this cause of action. He testified that he did not have knowledge of Officer Hamilton's activities. The President of the Guild, Officer Terry Cousins, testified she had personally discussed Hamilton's safety activities with him, provided a copy of the Emergency Injunction to the Administration and had personal knowledge that he was aware of Officer Hamilton's actions.

This is a material issue of fact that is in dispute. These facts were pointed out to the Trial Court both at the time of arguing the motion for summary judgment as well as in the Motion for Reconsideration. In fact, in the relief requested in the Motion for Reconsideration the Court was specifically asked: "If this Court declines to reconsider its ruling on summary judgment it is respectfully requested

that this Court for the benefit of not only the Plaintiff, but for the benefit of the Court of Appeals as well further explain its reasoning that despite all of the evidence presented in response to this Motion for Summary Judgment that "there is no material issue of fact presented by the responsive pleadings.'" No further explanation was provided by the Trial Court in denying the Motion for Reconsideration.

Summary judgment is properly granted only if the pleadings, affidavits, depositions or admissions on file show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Capitol Hill,* supra at 364. A material issue of fact regarding whether Chief Newlin had knowledge of Hamilton's safety related activities remains in dispute. The granting of summary judgment while stating in its Order "there is no material issue of fact presented by the responsive pleadings" is clear legal error.

The main argument submitted by the Defendant seeking to demonstrate Mr. Hamilton's inability to establish the third element is that the timing factor is too attenuated to support a causal connection. In support of this argument the County cites to *Francom v. Costco Wholesale Corp.,* 98 Wn.App. 845, 991 P.2d 1182 (2000). *Francom* is cited for the proposition that a 15 month period of time between when an individual engages in some protected activity and then subsequently

suffers an adverse employment action is too long of a period of time to establish a causal connection. *Id.* at 863.

This argument ignores substantial facts that are present and refute this argument. There is no dispute that Officer Hamilton drafted the Emergency Injunction in November 2011 or that he was terminated in March 2013. The County simply chooses to ignore everything which occurred in between and disregards the clearly and consistently stated principle that on a motion for summary judgment the court is to consider all facts presented, not just those selectively cited to by the moving party.

The evidence relied upon by Hamilton to support his contention that there is a causal connection in addition to the timing connection consists of all the evidence presented including the testimony from Ms. Cousins that at the meeting held between Chief Newlin and Ms. Cousins as the Guild president cited above.

It must also be recalled that all of Mr. Hamilton's supervisors, Sgt. Dick, Sgt. Glover, as well as Lt. Elton all testified that prior to the June 2012 text messages Officer Hamilton performed his duties in a very satisfactory manner. Indeed in January 2011 he was recognized as Officer of the Year for 2010.

The discriminatory acts to which Mr. Hamilton was arguably subjected occurred not in March 2013, but as early as June 2012, and continued throughout the balance of the year. As the Supreme Court noted in *United States Dist. Court for the E. Dist. of Wash. V. Kaiser Aluminum & Chem Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991):

> Discharge some length of time after the employees filing of a claim will be less likely to reflect an improper motive connected with that claim. Thus, as Larson suggests, in establishing the prima facie case, "[p]roximity in time between the claim and the firing is a typical beginning point, coupled with evidence of satisfactory work performance and supervisory evaluations. *Evidence of an actual pattern of retaliatory conduct is, of course, very persuasive.* (Emphasis added)
>
> *Id.* at 69.

A reasonable jury could determine that Chief Newlin seized upon this opportunity presented by Hamilton when he sent the text messages to use this excuse to justify Hamilton's termination. He chose to disregard every contractually bargained for guarantee Hamilton was entitled to under Appendix D. He deliberately placed Mr. Hamilton in a situation where with virtually no prior notice he had a plainclothes police officer come to his residence, invite him into an unmarked police car, and without even properly identifying himself began asking questions which could potentially have a serious impact upon Mr. Hamilton's

career as well as possible criminal implications, all of course without even the benefit of being advised of his Miranda warnings. All of this was arguably designed to place Mr. Hamilton at a significant disadvantage, which is of course exactly why the guarantees of Appendix D were bargained for in the first place. The County's reliance upon *Francom* is clearly factually distinguishable from the present facts.

V. CONCLUSION

Clear material issues of fact which remain in dispute exist for both the negligent supervision and retaliation claims. As it relates to negligent supervision, several issues exist factually whether Sgt. McDonough, Lt. Elton, and Chief Newlin acted outside the scope of their employment.

Lt. Elton testified that she did not have the authority to direct Detective Martin in the conduct of his investigation, but her own Memorandum dated June 14, 2013, states that she did exactly that. Further, this direction to Detective Martin occurred after she had a conversation with Chief Newlin following receipt of an email from Detective Martin in which he clearly outlined that it was not likely criminal charges existed. Even with this knowledge the administration continues to insist that the requirements of Appendix D did not apply to Hamilton because this was a criminal investigation, not an

administrative matter. Throughout all these proceedings, however, the County has yet to provide any authority in support of this position.

Similarly, as it relates to the retaliation claim clear material issues of fact exist whether Chief Newlin had knowledge of Hamilton's safety related actions. Chief Newlin testified that he did have not knowledge of Hamilton's safety actions. The Guild President, Terry Cousins, stated under penalty of perjury in her declaration that she provided a copy of the Emergency Injunction to the Administration and discussed Hamilton's safety related activities with Chief Newlin directly. This is not only a material fact; it is clearly one that is in dispute. The granting of summary judgment is legal error.

Hamilton desired to have a career in law enforcement. Because of the wrongful termination by the County the Bremerton Police Department removed him from his reserve position. He has not been able to find subsequent work in a law enforcement capacity. This is outside of his work environment and not precluded by authority.

The Trial Court refused to apply the correct standard on summary judgment and dismissed all causes of action even though all three are legally sustainable. This decision should be reversed.

RESPECTFULLY SUBMITTED this 21st day of November 2017.

s/ Rodney R. Moody
Rodney R. Moody, WSBA #17416
Attorney for Appellant

CERTIFICATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on November 21, 2017, I caused to be delivered via US Mail and Email Service the foregoing to:

Counsel for Defendant

Christine Palmer
Kitsap County Civil Division
614 Division St., Stop 35A
Port Orchard, WA 98366

DATED this 21st day of November, 2017.

s/ Rodney R. Moody
Rodney R. Moody, WSBA #17416
Attorney for Appellant

LAW OFFICE OF RODNEY R. MOODY

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