

FILED
Court of Appeals
Division II
State of Washington
12/21/2017 1:09 PM
NO. 50570-3-II

COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

BRETT HAMILTON,

Plaintiff/Appellant,

vs.

KITSAP COUNTY,

Defendant/Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

RESPONSE BRIEF OF RESPONDENT KITSAP COUNTY

TINA ROBINSON
Prosecuting Attorney

JACQUELYN M. AUFDERHEIDE,
WSBA NO. 17374
Chief Deputy Prosecuting Attorney
CHRISTINE M. PALMER,
WSBA NO. 42560
Deputy Prosecuting Attorney
614 Division Street, MS 35A
Port Orchard, WA 98366
(360) 337-4992

TABLE OF CONTENTS

I. INTRODUCTION1

II. SUMMARY OF THE CASE.....1

 A. Negligent Supervision Claim Properly Dismissed.....3

 B. Emotional Distress Claim Was Properly Dismissed.....5

 C. Retaliation Claim Was Properly Dismissed.....6

III. COUNTERSTATEMENT OF THE ISSUES.....7

IV. STATEMENT OF THE CASE.....8

 A. Procedural History.....8

 B. Statement of Facts.....9

 1. Hamilton’s Employment.....9

 2. Appendix D.....11

 3. Jail Investigations Regarding the Telmate System.12

 4. Hamilton’s Harassing Text Messages.....13

 5. POPD’s Criminal Investigation.....15

 6. KCSO’s Administrative Investigation.....16

 7. Hamilton’s Termination.....17

 8. Facts Regarding the 2011 “Emergency
 Injunction[s]”.....19

V. ARGUMENT22

 A. Standard of Review.....22

B.	Negligent Supervision Claim was Properly Dismissed.....	22
1.	Claim Barred Pursuant to Doctrine of Claim Preclusion	22
2.	Factual Assertions Are Unsupported And Incorrect.....	24
3.	No Evidence To Support Elements of Negligent Supervision Claim.....	26
a.	No Evidence of Action Beyond Scope of Employment.....	26
b.	No Evidence of Injury or Bodily Harm or Knowledge Thereof.....	27
c.	No Evidence Deficient Supervision Proximately Caused Injuries.....	29
4.	Negligent Supervision Claim Barred by Statute of Limitations.....	30
C.	Negligent Infliction of Emotional Distress Claim Properly Dismissed.....	30
1.	No Evidence of Negligent Conduct.....	31
2.	Washington Law Does Not Recognize a Cause of Action for Negligent Infliction of Emotional Distress Arising from Employee Discipline.....	32
3.	Negligent Infliction of Emotional Distress Claim Barred by the Statute of Limitations.....	34
D.	Claim for Retaliation was Properly Dismissed.....	34
1.	Elements of Employment Retaliation.....	35
2.	Burden Shifting Scheme.....	36

3.	No Evidence of a Causal Connection.....	37
4.	No Evidence of Pretext To Support Retaliation Claim.....	39
VI.	CONCLUSION.....	40

TABLE OF AUTHORITIES

Cases

<i>Afoa v. Port of Seattle</i> , 176 Wn.2d 460, 296 P.3d 800 (2013)	22
<i>Allison v. Housing Auth.</i> , 118 Wn.2d 79, 821 P.2d 34 (1991).....	35
<i>Armijo v. Yakima HMA, LLC</i> , 868 F. Supp. 2d 1129, 1137-38 (E.D. Wash. 2012)	32
<i>Barker v. Advanced Silicon Materials, LLC</i> , 131 Wn.App. 616, 128 P.3d 633, review denied, 158 Wn.2d 1015, 149 P.3d 377 (2006).....	37
<i>Betty Y. v. Al-Hellou</i> , 98 Wn.App. 146, 988 P.2d 1031 (1999).....	27
<i>Briggs v. Nova Servs.</i> , 135 Wn.App. 955, 147 P.3d 616 (2006)	27, 28
<i>Bunch v. Nationwide Mut. Ins. Co.</i> , 180 Wn.App. 37, 321 P.3d 266 (2014).....	23
<i>Chavez v. Dep't of Labor & Indus.</i> , 129 Wn.App. 236, 118 P.3d 392 (2005).....	23
<i>Chea v. Men's Warehouse, Inc.</i> , 85 Wn.App. 405, 932 P.2d 1261 (1997).....	33
<i>Colbert v. Moomba Sports, Inc.</i> , 132 Wn.App. 916, 135 P.3d 485, 490 (2006).....	31
<i>Delahunty v. Cahoon</i> , 66 Wn.App. 829, 832 P.2d 1378 (1992).....	35
<i>Eastwood v. Horse Harbor Found. Inc.</i> , 170 Wn.2d 380, 241 P.3d 1256 (2010).....	23
<i>Francom v. Costco Wholesale Corp.</i> , 98 Wn.App. 845, 991 P.2d 1182 (2000).....	32, 35, 36
<i>Haubry v. Snow</i> , 106 Wn.App. 666, 31 P.3d 1186 (2001)	33
<i>Hunsley v. Giard</i> , 87 Wn.2d 424, 553 P.2d 1096 (1976)	31

<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 887 P.2d 898 (1995).....	23
<i>Lynn v. Labor Ready, Inc.</i> , 136 Wn.App. 295, 151 P.3d 201 (2006)	27
<i>Milligan v. Thompson</i> , 110 Wn.App. 628, 42 P.3d 418 (2002).....	37
<i>Niece v. Bellevue Group Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997)26, 28	
<i>Renz v. Spokane Eye Clinic, P.S.</i> , 114 Wn.App. 611, 60 P.3d 106, 111 (2002).....	35, 36
<i>Rowe v. Vaagen Bros. Lumber, Inc.</i> , 100 Wn.App. 268, 996 P.2d 1103 (2000).....	35
<i>Smith v. Sacred Heart Med. Ctr.</i> , 144 Wn.App. 537, 184 P.3d 646 (2008).....	27
<i>Snyder v. Medical Services Corp. of Eastern Washington</i> , 145 Wn.2d 233, 35 P.3d 1158 (2001).....	32
<i>Wilmot v. Kaiser Aluminum & Chem. Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	36

Statutes

42 U.S.C. §1983.....	8
Revised Code of Washington 4.16.080(2).....	30, 34

Rules

Rules of Appellate Procedure 14.2	40
---	----

I. INTRODUCTION

Brett Hamilton was terminated from his position as a Corrections Officer with the Kitsap County Sheriff's Office because he sent harassing text messages to Ashley Caseria, the wife of an inmate at the Kitsap County jail, impersonating Ms. Caseria's mother who had died the previous day, and then lied about his actions to the Port Orchard Police Detective conducting a criminal investigation into the matter. Hamilton concedes he sent the text messages and was untruthful to the police detective. These facts are undisputed. Yet, despite his own misconduct, Hamilton now seeks to hold Kitsap County liable in tort for the consequences of his actions—his termination. Because Hamilton's claims are both unfounded and misplaced, the trial court properly dismissed them.

II. SUMMARY OF THE CASE

Between May 28, 2012 and June 7, 2012, the following text messages were exchanged between Hamilton, who was on duty working as a Corrections Officer at the time, and Ms. Caseria, the wife of an inmate at the Kitsap County jail:

Hamilton:	I love you hon.
Hamilton:	I love u so much ash plss call me babe.
Caseria:	This is Ashley. Who is this?

Then, on June 10, 2012, the day after Ms. Caseria's mother passed away, a fact Hamilton learned while he was working in the jail, Hamilton sent the following text messages pretending to be Ms. Caseria's deceased mother:

Hamilton: Never forget how much I love u
ash everything will be ok I will
keep u safe im here for u even
in death see u soon.

Caseria: Who is this?

Caseria's Father: Hey you have been texting my
daughter Ashley don't know
who you are but I will find out
come clean or stop calling.

Hamilton: I'm sorry Ash I leave you alone
now no worry I wish all good
for you always.

Hamilton claims he sent the text messages as part of an "investigation" he was conducting regarding the jail's inmate communication system, Telmate. Hamilton concedes he had not been assigned to do any such "investigation," did not inform any supervisors he was conducting such an "investigation," and did not prepare any reports to document his purported "investigation," as required by Sheriff policy.

Hamilton's conduct was the subject of a criminal investigation conducted by the City of Port Orchard's Police Department, a separate law enforcement agency. He was criminally charged with the crimes of

telephone harassment and giving a false statement to a public servant. Hamilton signed a pre-trial diversion agreement regarding these charges. Ms. Caseria successfully obtained an anti-harassment order against Hamilton on July 23, 2012.

After the criminal proceedings concluded, the Sheriff's Office initiated an administrative investigation. After two pre-termination hearings, Hamilton's employer determined he had engaged in misconduct, violated policy, and broke his oath of office. For these reasons, Hamilton was terminated on March 26, 2013.

A. Negligent Supervision Claim Properly Dismissed

Hamilton's claim for negligent supervision arises solely from his unsupported assertion his supervisors violated rights set forth in Appendix D of the collective bargaining agreement governing his employment. Hamilton claims his supervisors violated Appendix D when they "directed" a criminal investigation without giving Hamilton prior notice of the criminal investigation.

Hamilton's negligent supervision claim fails from the outset pursuant to the doctrine of claim preclusion, in that his negligent supervision claim is actually an attempt to re-litigate a previously-dismissed breach of contract claim. The breach of contract claim was adjudicated by the United States District Court of Western Washington and resolved

against Hamilton. Hamilton's present "negligent supervision" claim is the same breach of contract claim disguised as a negligence cause of action to avoid the prior unfavorable ruling.

Beyond the doctrine of claim preclusion, Hamilton's claim fails as a matter of law on multiple fronts. The entire premise of Hamilton's claim is that his supervisors, Lieutenant Elton and Chief Newlin, "directed" the criminal investigation carried out by Detective E.J. Martin with the Port Orchard Police Department. Hamilton claims Lieutenant Elton and Chief Newlin failed to give Hamilton advance notice of the criminal investigation and/or criminal interview which he asserts was required under Appendix D. Hamilton asserts that because Chief Newlin and Lieutenant Elton knew about Detective Martin's criminal investigation and requested he interview Hamilton outside of the workplace, they were thus "directing" the criminal investigation. This is an absurd inference that is not only unsupported, it is directly contradicted by all available evidence.

Furthermore, this issue of who was directing the criminal investigation is immaterial. Regardless of who was "directing" it, Hamilton was simply not entitled to advance notice of the criminal investigation. Appendix D expressly provides that the rights afforded thereunder apply only to "administrative investigations." Hamilton concedes this point in his brief. Accordingly, regardless of who directed the criminal investigation,

the nature of the investigation carried out by Detective E.J. Martin was, by all accounts, criminal and led to the filing of criminal charges against Hamilton. Hamilton was not entitled to advance notice of the criminal investigation. His rights under Appendix D were not violated, as already adjudicated in prior proceedings.

In addition, the alleged contract violation does not provide the basis for a tortious negligent supervision claim. Hamilton claims his employer intentionally violated his rights under a contractual agreement. Hamilton does not allege any negligent conduct, much less any conduct suggesting there was any failure to supervise which caused him harm.

B. Emotional Distress Claim Was Properly Dismissed

Hamilton's claim for negligent infliction of emotional distress has been stated by Hamilton as follows: "because of the actions of the County through their agents," he has suffered emotional distress (arising from his dismissal from the Bremerton Police Department Reserve program and a detrimental impact on his marital relationship). Appellant's Brief, page 34. Hamilton has failed to identify actionable negligent conduct by the County or its agents that was the proximate cause of his alleged damages.

To the extent his negligent infliction of emotional distress claim is intended to be based upon alleged violations of Appendix D, this claim fails as a matter of law for the same reason Hamilton's negligent supervision

claim fails—namely, as described above, there is no evidence of a violation of Appendix D and Hamilton’s breach of contract claim has already been adjudicated. To the extent this claim is intended to be factually based upon Hamilton’s termination from the Sheriff’s Office, it also fails as a matter of law. Under Washington law, employment-based decisions, such as disciplinary or termination decisions, cannot form the basis of a negligent infliction of emotional distress claim.

Furthermore, there is no evidence to suggest the termination of Hamilton’s employment was negligent in any way. Hamilton was terminated after he entered into a pre-trial diversion agreement for criminal charges arising from his conduct, after a thorough administrative investigation, and after two separate pre-termination hearings. Hamilton was terminated for sustained violations of Sheriff policies and civil service rules and for violating his oath of office by sending harassing text messages to the wife of an inmate and then lying to a police detective.

C. Retaliation Claim Was Properly Dismissed

Hamilton asserts his termination in 2013 was actually in retaliation for his act of preparing documents titled “Emergency Injunction[s]” in 2011. Hamilton’s claim for retaliation fails as a matter of law because he has no evidence to establish a causal connection between the “Emergency Injunction[s]” and his termination approximately fifteen months later.

Hamilton has the burden to show his preparation of the “Emergency Injunction[s]” (which he alleges was protected conduct) was a substantial motivating factor in his termination, but there is no evidence it was any factor at all. Chief Newlin was not even aware Hamilton had a role in the creation of the “Emergency Injunction[s].” The “Emergency Injunction[s]” were never directly provided to Chief Newlin but were merely a topic of discussion between himself and Guild President Terry Cousins.

Hamilton admits to his harassing and untruthful conduct which forms the basis of his termination. There is no evidence to support a claim of retaliation in light of the undisputed facts.

III. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly dismissed Hamilton’s claim for negligent supervision, a claim: previously adjudicated and rejected in prior proceedings, based entirely on an alleged breach of contract, lacks evidence Hamilton’s rights under Appendix D were violated, lacks evidence of misconduct constituting negligent supervision, and is barred by the statute of limitations.

2. Whether the trial court properly dismissed Hamilton’s negligent infliction of emotional distress claim where Hamilton presented no evidence of wrongful conduct which might constitute negligence, where Washington state law prohibits a claim for negligent infliction of emotional

distress arising from a disciplinary action, and where the claim is barred by the statute of limitations.

3. Whether the trial court properly dismissed Hamilton's claim for retaliation when Hamilton failed to provide any evidence of a causal connection between his preparation of "Emergency Injunction[s]" in 2011 and his termination in 2013.

IV. STATEMENT OF THE CASE

A. Procedural History

Hamilton filed his summons and complaint in Kitsap County Superior Court on March 24, 2016 ("present lawsuit"). CP 1-3. Hamilton's complaint alleges the following three causes of action based upon his termination and the criminal and administrative investigations: (1) negligent supervision, (2) negligent infliction of emotional distress, and (3) retaliation. CP 3-10.

At the time the present lawsuit was filed, Hamilton had another lawsuit ("prior lawsuit") pending against Kitsap County in the United States District Court of Western Washington (Cause No 3:15-cv-05587 BHS). CP 89 (¶7). The prior lawsuit alleged a 42 U.S.C. §1983 and breach of contract claim arising from the same factual basis as the present lawsuit. *Id.*; CP 131-145. The prior lawsuit (including the breach of contract claim) was dismissed on summary judgment on September 14, 2016. *Id.*

Hamilton filed an amended complaint for the present lawsuit on September 28, 2016. CP 553-566.

On November 18, 2016, Kitsap County filed a motion for summary judgment seeking to dismiss the negligent supervision and negligent infliction of emotional distress claims. CP 11, 33. The trial court dismissed these claims on December 22, 2016, and denied Hamilton's motion for reconsideration on January 4, 2017. CP 382-84, 402-03.

On April 24, 2017, Kitsap County moved for summary judgment on Hamilton's remaining retaliation claim. CP 405-419. The trial court dismissed this claim on June 9, 2017, and denied Hamilton's motion for reconsideration on June 21, 2017. CP 540-41, 547-48.

Hamilton now appeals the summary judgment dismissals.

B. Statement of Facts

1. Hamilton's Employment

Before his termination in March of 2013, Hamilton was a corrections officer in the Kitsap County jail. Declaration of Ned Newlin. CP 39 (¶4). The Corrections Division is part of the Kitsap County Sheriff's Office ("KCSO"). CP 38 (¶2).

Corrections officers carry out the day to day operations of the Kitsap County jail. CP 39 (¶4). They receive inmates into custody, enforce rules and regulations according to the jail's Standard Operating Procedures,

restrain inmates when necessary, oversee food services and the disbursement of medication, escort and transport inmates, testify in court proceedings, and prepare written incident reports regarding problems or situations that occur within the jail, among other things. CP 39 (§4). When something unusual or eventful occurs, corrections officers are instructed to prepare incident reports describing their observations and/or interactions with inmates. CP 39 (§5). These incident reports are reviewed by the supervising sergeant and then forwarded to a lieutenant for further review. Id. Chief Newlin issued a directive regarding the protocol for writing incident reports on November 22, 2006. Id.; CP 51-52. The directive requires reports to be submitted at the end of an officer's shift. Id.

The skills and abilities of a corrections officer include demonstrating honest and ethical behavior, making effective decisions and exercising good judgment under stressful situations, and positively representing the County and maintaining the trust of the community. CP 39 (§4); CP 46-49. All corrections officers take an "Oath of Office." CP 40 (§6). On January 28, 2003, Hamilton took the following "Oath of Office:"

I hereby swear and affirm to honestly, faithfully, and impartially perform my duties as a Kitsap County Corrections Officer. [...] On my honor, I will never betray my badge, my integrity, my character, or the public trust.

CP 54.

2. Appendix D

During the time of his employment, Hamilton was a member of the Kitsap County Corrections Guild (“Guild”), which represented him in his termination proceedings. CP 40 (§7). The terms of Hamilton’s employment were governed by a collective bargaining agreement (“CBA”). Id. The CBA contains an Appendix D which outlines the rights afforded to an employee with regard to administrative investigations that may lead to disciplinary action. Id.; CP 519-523.

The relevant portions of Appendix D state as follows:

It is essential that public confidence be maintained in the ability of the employer to investigate and properly adjudicate complaints against its employees. Additionally, the employer has the right and the responsibility to seek out and discipline those whose inappropriate conduct impairs the effective operation of the employer. The rights of the employee, the employer, as well as those of the public, must be protected. In **criminal matters, an employee shall be afforded those constitutional rights available to any citizen.** 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.**

CP 519 (Paragraph 1) (emphasis added).

Appendix D then outlines the rights afforded exclusively for administrative matters:

Whenever the employer decides to initiate an investigation that may lead to disciplinary action involving a loss of pay, the employer shall promptly provide the employee notice of the investigation. . .

The employee will be informed in writing not less than forty-eight (48) hours prior to conducting an investigatory interview, that the employee is a subject in an inquiry that may lead to disciplinary action that involves a potential loss of pay. . .

CP 519 (Paragraphs 3 and 4).

As expressly stated, the rights set forth in Appendix D apply only to the investigation of administrative matters, not criminal matters.

3. Jail Investigations Regarding the Telmate System

An inmate at the Kitsap County jail is able to make phone calls or have video visits with friends and family. CP 40 (§8). The jail uses a private company called Telmate to manage both phone calls and video visits. CP 40 (§8). Inmates pay Telmate directly for each visit or call. CP 40 (§8). By approximately early 2012, jail staff became aware inmates were manipulating Telmate to obtain free visitation sessions. CP 40-41 (§9). Jail staff, including Hamilton, prepared incident reports documenting this issue. CP 61. On March 13, 2012, Sergeant Keith Hall reported the problem to Telmate so Telmate could fix what was believed to be an issue with the software. CP 40-41 (§9).

On April 6, 2012, Hamilton prepared an incident report in which he reported inmate Aaron Caseria was manipulating the Telmate system to get free video visits with his wife Ashley Caseria. CP 61. Hamilton admits he was never asked to do any specific follow-up regarding his report nor was he assigned to conduct any further investigation into the Telmate issue. CP 97-98; CP 126-127. After his report on April 6, 2012, Hamilton did not prepare any other report or write any inmate infraction regarding an abuse of the Telmate system, and he did not document any follow-up “investigation” efforts he may have been making regarding this issue. CP 40-41(¶9); CP 126. However, he continued to watch video visits between Mr. and Mrs. Caseria. CP 99.

4. Hamilton’s Harassing Text Messages

On May 28, 2012, almost two months after preparing his incident report on April 6, 2012, Hamilton began sending text messages, using his son’s phone, to a phone in the possession of Ashley Caseria, wife of inmate Aaron Caseria. CP 100-102. Mrs. Caseria and Hamilton exchanged the following messages between May 28 and June 7, 2012:

Hamilton: “I love you hon.”

Hamilton: “I love u so much ash plss call me babe.”

Ms. Caseria: “This is Ashley. Who is this?”

CP 155 (¶6); CP 162.¹

On June 10, 2012, Hamilton learned inmate Aaron Caseria had requested a furlough to attend the funeral of Ashley Caseria's mom who passed away the prior day, June 9, 2012. CP 103-105. Hamilton then sent the following text message in which he purported to be Ashley Caseria's deceased mother, only one day after she had died:

Hamilton: "Never forget how much I love u ash everything will be ok I will keep u safe im here for u even in death see u soon."

Ms. Caseria: "Who is this?"

Caseria's Father: "Hey you have been texting my daughter Ashley don't know who you are but I will find out come clean or stop calling."

Hamilton: "I'm sorry Ash I leave you alone now no worry I wish all good for you always."

CP 162.

Later that day, in a joking manner, Hamilton shared his text messages with several co-workers, including Officers Kearney, Sherman, and Uch. CP 106-107. Lieutenant Elton became aware of Hamilton's conduct and brought it to the attention of Chief Newlin. CP 41 (¶10); CP

¹ The pages that constitute CP 162 and CP 161 were originally filed with the trial court in reverse order. CP 162 was intended to precede CP 161 such that CP 162 would be the fourth page of "Exhibit A" of the Declaration of E.J. Martin.

34-35 (¶3). Lieutenant Elton reported Hamilton's conduct to the Port Orchard Police Department for criminal investigative purposes. CP 41 (¶10); CP 34-35 (¶3).

5. POPD's Criminal Investigation

On or about June 12, 2012, Detective E.J. Martin with the City of Port Orchard Police Department ("POPD"), opened a criminal file and initiated a criminal investigation into Hamilton's conduct. CP 153-154 (¶3). Detective Martin's criminal investigation was conducted on behalf of POPD. CP 154 (¶4). On June 16, 2012, Detective Martin visited Hamilton's home and displayed his badge to Hamilton. CP 108. Hamilton followed Detective Martin to Detective Martin's POPD-issued vehicle. CP 163. Inside the vehicle, Detective Martin interviewed Hamilton regarding Mrs. Caseria and the text messages. CP 163-164. A portion of this interview was recorded, with the audio file being over 39 minutes in length. CP 163. During the interview, Hamilton denied knowing who Ashley Caseria was, denied sending the text messages, and denied telling his fellow officers he sent the text messages. CP 154 (¶5); CP 163-167.

On July 19, 2012, three days later, Hamilton visited Detective Martin and provided a prepared statement in which he admitted to sending the text messages to Ashley Caseria. CP 154-155(¶6); 158-160; CP 167-169. In the statement, Hamilton asserted for the first time he sent the text

messages as part of an investigation he was conducting regarding the Telmate system. CP 158-160.

Concluding his criminal investigation, Detective Martin prepared a Statement of Probable Cause in which he stated Hamilton lied and withheld information from him and in which he concluded Hamilton fabricated the story that he sent the text messages as part of an investigation. CP 171-172. As a result of Detective Martin's investigation, criminal charges of telephone harassment and false statement to a public servant were filed against Hamilton. CP 113-115. Hamilton entered into a pre-trial diversion agreement regarding those charges. CP 111.

Mrs. Caseria sought and obtained an anti-harassment order against Hamilton. CP 66. On July 23, 2012, Hamilton appeared at a hearing on Mrs. Caseria's petition for an anti-harassment order. *Id.* During the hearing, Hamilton told the court he sent the text messages as part of an investigation he was conducting but admitted he had not notified any of his supervisors about his investigation. *Id.*; CP 118. The court found Hamilton's conduct was unreasonable and warranted an anti-harassment order. CP 122-123.

6. KCSO's Administrative Investigation

When a KCSO employee's conduct is subject to both criminal and administrative investigations, KCSO's practice is to postpone its administrative investigation until the criminal investigation is substantially

completed. CP 147-148 (§4-5). The reason behind this practice is to avoid interfering with or compromising the criminal investigation. CP 148 (§5).

On June 19, 2012, after Detective Martin concluded his criminal interviews with Hamilton, Sergeant James McDonough of KCSO's Office of Professional Standards notified Hamilton in writing that KCSO would be initiating an administrative investigation to determine if Hamilton had violated any administrative policies. CP 148 (§6); CP 152. In accordance with KCSO's practice, Sergeant McDonough did not initiate his administrative investigation until Hamilton's criminal case was resolved through the pre-trial diversion agreement. CP 148 (§6); CP 41-42 (§§11-12). While the criminal investigation was ongoing, McDonough only monitored the criminal case and attended the hearings. CP 148 (§6).

7. Hamilton's Termination

On January 18, 2013, Chief Newlin prepared a letter to Hamilton outlining the results of the administrative investigation and outlining his preliminary determination that Hamilton's employment should be terminated. CP 42 (§13). On February 6, 2013, there was a pre-termination hearing which was attended by Chief Newlin, Hamilton, Hamilton's Guild representative, and the Guild's attorney. *Id.* Following the pre-termination hearing, Chief Newlin directed a follow-up investigation into allegations made by Hamilton that he did not know Detective Martin was a law

enforcement officer when he gave false statements to Detective Martin. Id. The follow-up investigation was conducted by KCSO Sergeant VanGesen who inspected and photographed the POPD-issued vehicle in which Detective Martin's interview with Hamilton took place. CP 69-74. The results of this follow-up investigation were outlined in a summary prepared by Sergeant VanGesen, and verify that Detective Martin's vehicle was equipped with police equipment that would have been visible to Hamilton. CP 69-74.

A second pre-termination hearing was held on March 22, 2013. Hamilton attended with his Guild representative and his Guild's attorney. CP 43 (¶15). Ultimately, Chief Newlin found there was no corroborating evidence to suggest Hamilton sent the text messages as part of an investigation of inmates use of the Telmate system, Hamilton had been untruthful to a police detective, and Hamilton had also been untruthful while under oath in the court proceedings regarding Ms. Caseria's anti-harassment order. CP 42-43 (¶¶14-15); CP 77-81.

On March 26, 2013, Chief Newlin prepared a termination letter outlining his findings and the basis for Hamilton's termination. CP 43 (¶15); CP 76-87. The letter contains the following findings by Chief Newlin:

There is no independent, corroborating evidence which support your statements (to Detective Martin or Judge Clucas) that you were conducting an

investigation. None of your sergeants or lieutenant had any knowledge of your investigation and had not assigned you to conduct any investigation(s) on behalf of the agency during the time period of May or June 2012. There were no reports on file with the agency concerning your investigation nor had you told your immediate supervisor, both of which are violations of agency policies.

I find that there was never an official, agency-sanctioned investigation and that more than likely you have fabricated this story in an attempt to limit or reduce your criminal and administrative culpability.

CP 79-80.

The termination letter outlines several “sustained” violations of the Sheriff’s Policy Manual, Sheriff Civil Service Rules, and Hamilton’s failure to fulfill his oath of office, among other things. CP 82-86.

8. Facts Regarding the 2011 “Emergency Injunction[s]”

Despite the overwhelming findings of “sustained” policy violations, Hamilton alleges he was terminated because in 2011 he prepared two documents titled “Emergency Injunction[s]” which address safety issues in the jail. CP 8 (¶¶5.2-5.5); CP 553-566.

Hamilton testified he prepared these “injunctions” in the fall of 2011 after his then-Guild President, Terry Cousins, instructed him to create a document she could present to a sergeant so it could be discussed at the next sergeant’s meeting. CP 443-445.

Although the documents are each titled “Emergency Injunction,” they are not court orders and appear to have no legal force or effect. CP 476-479. The typed language of the two “injunctions” are identical and each contains the signatures of thirty corrections officers. Id. The “injunctions” propose Kitsap County “suspend” the practice of assigning three officers to the “Central Pod” during swing shift. CP 476 and 478. They state “several officer safety concerns have arisen” and inadequate staffing “seems to be the cause of the problem.” Id. The “injunctions” indicate that those who sign the document petition to “amend the current procedure.” Id. Although Mr. Hamilton signed one of the “injunctions” (along with 59 other officers), neither of the “injunctions” otherwise mention his name or indicate he was the author. CP 476-479.

Hamilton testified he prepared the “injunctions” and personally took them “around” to get them signed by fellow officers. CP 444-445. Hamilton then gave the “injunctions” to Ms. Cousins. CP 445. Hamilton believes Ms. Cousins provided the “injunctions” to Sergeant Dick but Hamilton does not know what happened to the “injunctions” after he gave them to her. CP 445.

There is no evidence to suggest that, at the time of Hamilton’s termination, Chief Newlin was aware that these “injunctions” had been prepared by Hamilton. When questioned about the “injunctions” during his deposition, Chief Newlin testified as follows:

Q: Did you become aware of any safety-related concerns being raised by Officer Hamilton or any other officer under your employ?

A: Not being raised by Officer Hamilton, but I knew that the guild, from time to time, would meet me, both in labor-management meeting, 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.

But that's a norm in the world of corrections. It's not unusual in our world.

CP 482-483.

According to a declaration provided by Terry Cousins, there was a Guild meeting in 2011 to discuss the "Emergency Injunction." CP 498. Chief Newlin did not attend this meeting. CP 498.² Ms. Cousins testified, through her declaration, that on December 30, 2011, she had a face-to-face meeting with Chief Newlin regarding staffing levels. CP 498-499. During this meeting, they discussed the "Emergency Injunction[s]." CP 498-499. Ms. Cousins never directly provided Chief Newlin with a copy of the "injunctions." CP 499. Instead, she provided a copy to "the Administration." CP 499.

While Chief Newlin might have known about the existence of the

² Chief Newlin was not a member of a union, and corrections lieutenants and sergeants belong to a union separate from corrections officers. CP 445.

“injunctions,” there is no evidence to suggest he knew Hamilton had any role in preparing these documents, an allegation which Chief Newlin denies. CP 482-483. Hamilton has failed to present any evidence to dispute Chief Newlin’s lack of knowledge and thus, has failed to raise an issue of fact regarding the same.

V. ARGUMENT

A. Standard of Review

The Court of Appeals reviews summary judgment motions de novo by engaging in the same inquiry as the trial court. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013). 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. *Id.*

B. Negligent Supervision Claim was Properly Dismissed

Hamilton’s claim of negligent supervision was properly dismissed because: (1) it is really a breach of contract claim which is precluded by a prior judgment, (2) no evidence supports Hamilton’s claim, (3) no evidence supports the elements of a negligent supervision cause of action, and (4) it is barred by the statute of limitations.

1. **Claim Barred Pursuant to Doctrine of Claim Preclusion**

Dismissal of Hamilton’s claim for negligent supervision is proper because it is barred by the doctrine of claim preclusion. Claim preclusion

prohibits the re-litigation of claims previously litigated, or could have been litigated, in a prior action. *Chavez v. Dep't of Labor & Indus.*, 129 Wn.App. 236, 239–40, 118 P.3d 392 (2005) (citing *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995)). This doctrine applies when a prior judgment has the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of parties (interests). *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn.App. 37, 43, 321 P.3d 266 (2014). All four elements are met here.

While Hamilton has labeled his claim “negligent supervision,” it is nothing more than a breach of contract claim regarding the provisions of Appendix D. The negligent conduct alleged by Hamilton is that Chief Newlin and Lieutenant Elton allowed or “directed” the criminal investigation without giving Hamilton prior notice, in violation of the terms of Appendix D. Thus, Hamilton has plead a breach of contract claim, not a negligence claim. Hamilton cannot proceed in tort for a breach of contract unless there is an independent breach of a tort law duty of care. *Eastwood v. Horse Harbor Found. Inc.*, 170 Wn.2d 380, 393-394, 241 P.3d 1256 (2010). Hamilton has failed to identify or articulate any such breach.

Hamilton’s claim for breach of contract regarding alleged violations of Appendix D was previously adjudicated in prior proceedings involving the exact same parties before the United States District Court of Western

Washington. In that case, the court rejected Hamilton's breach of contract claim because he failed to exhaust his administrative remedies as required under Washington law (or to establish an exception to this requirement). CP 131-45. Hamilton is precluded from attempting to re-litigate this failed breach of contract claim by disguising it as a tort claim.

2. Factual Assertions Are Unsupported And Incorrect

Hamilton's negligent supervision claims fails on a fundamental level because the factual assertions which form the basis of his claim are unsupported and incorrect. Hamilton asserts Chief Newlin and Lieutenant Elton directed the investigation conducted by Detective Martin without giving him prior notice in violation of his rights under Appendix D. There is no evidence Lieutenant Elton or Chief Newlin "directed" the criminal investigation.

The undisputed facts are that Lieutenant Elton reported Hamilton's conduct to POPD for potential criminal investigation. POPD is a department of the City of Port Orchard, a separate, independent municipality. Detective E.J. Martin with the POPD opened a file and initiated a criminal investigation. He did not conduct the investigation on KCSO's behalf and KCSO had no authority over his investigation. CP 147-148 (¶4-5); CP 154 (¶4).

Lieutenant Elton communicated and cooperated with Detective Martin during his criminal investigation. CP 34-35 (¶3-5). She requested that any interview of Hamilton not take place at work but in no way did she control or have authority to control Detective Martin's investigation. CP 35. Hamilton has presented no evidence to the contrary and relies solely on unsupported assertions to attempt to raise an issue of fact on this matter.

Whether Lieutenant Elton and/or Chief Newlin directed the criminal investigation conducted by Detective Martin is irrelevant and fails to create an issue of fact for the jury. Regardless of who directed the criminal investigation, there is no evidence Hamilton's rights under Appendix D were violated.

Hamilton asserts KCSO violated his rights under Appendix D, contending he was entitled to advance notice of the criminal investigation. Appendix D requires advance notice only of administrative investigations, not criminal investigations. Appendix D expressly provides that the rights afforded therein apply only to administrative matters. CP 519 (¶2). Because Hamilton has failed to provide any evidence in support of the factual assertions which form the basis of his negligent supervision claim, this claim fails as a matter of law.

3. No Evidence To Support Elements of Negligent Supervision Claim

Hamilton's negligent supervision claim also fails because Hamilton has failed to present any evidence in support of the elements of a negligent supervision cause of action. As Hamilton concedes in his brief, he must provide evidence to support the following elements: (1) an employee acted outside the scope of his or her employment; (2) that employee presented a risk of harm to him or others; (3) Kitsap County knew, or in the exercise of reasonable care should have known, that the employee posed a risk of harm; and (4) the County's failure to supervise was the proximate cause of the injury. *Niece v. Bellevue Group Home*, 131 Wn.2d 39, 48- 51, 929 P.2d 420 (1997). Hamilton asserts Chief Newlin and Lieutenant Elton intentionally violated his rights under Appendix D by failing to give him advance notice of Detective Martin's criminal investigation. These assertions fail to give rise to or state a cause of action for negligent supervision.

a. No Evidence of Action Beyond Scope of Employment

Hamilton has offered no evidence to suggest Lieutenant Elton or Chief Newlin acted outside the scope of their employment when they reported Hamilton's conduct to POPD, requested that any investigation and interviews take place outside of his workplace, and did not give Hamilton advance notice he was the subject of a criminal investigation. Reporting,

communicating, and cooperating with regard to criminal investigations of conduct occurring in the workplace are not beyond the scope of employment for a corrections officer or law enforcement officer. Hamilton's argument is that Lieutenant Elton and Chief Newlin acted beyond the scope of employment because they intentionally violated Appendix D. As discussed above, there is no evidence to support this assertion.

b. No Evidence of Injury or Bodily Harm or Knowledge Thereof

To recover on a negligent supervision claim, Hamilton must provide evidence to suggest Lieutenant Elton and/or Chief Newlin posed a risk of harm to him and the County knew or should have known about the risk of harm. Hamilton has failed to present any evidence to support these required elements.

Negligent supervision claims in Washington arise only when there is a risk of harm to others. *See Smith v. Sacred Heart Med. Ctr.*, 144 Wn.App. 537, 184 P.3d 646 (2008) (sexual abuse); *Lynn v. Labor Ready, Inc.*, 136 Wn.App. 295, 151 P.3d 201 (2006) (murder); *Betty Y. v. Al-Hellou*, 98 Wn.App. 146, 988 P.2d 1031 (1999) (sexual assault). Washington courts have dismissed negligent supervision claims brought in the context of an adverse employment action when the plaintiff was unable to show that that a coworker presented a risk of harm to other employees. *Briggs v. Nova Servs.*, 135 Wn.App. 955, 147 P.3d 616 (2006).

For example, in *Briggs*, former managers of a company raised concerns about the executive director's management capabilities. *Id.* at 959-60. When the executive director fired the managers for insubordination, the managers sued the company alleging the company had negligently supervised the executive director. The court dismissed the negligent supervision claims because the managers presented no evidence the executive director presented a risk of harm to other employees. *Id.* at 966-967.

An employer is not liable for negligent supervision unless the employer "knew, or in the exercise of reasonable care, should have known that the employee presented a risk of danger to others." *Niece*, 131 Wn.2d at 48-49. This necessarily imposes a knowledge element which "Washington cases have generally interpreted [] to require a showing of knowledge of the dangerous tendencies of the particular employee." *Id.* at 52.

Hamilton has failed to present any evidence an employee posed a risk of harm to him and his employer knew or should have known the employee posed a risk of harm. The only harm or injuries claimed by Hamilton are a violation of Appendix D and his termination. With regard to the former, there is no evidence of a violation of Appendix D. With regard to the latter, there is no evidence an employee caused Hamilton to be

terminated. To the contrary, all evidence reveals it was Hamilton's own conduct which led to his termination.

Hamilton's theory supposedly is that if he had been given advance notice of Detective Martin's criminal investigation, as he claims was required under Appendix D, he would not have lied to a police detective and supposedly would not have been terminated. The "termination" injuries of which Hamilton is claiming was caused by his own conduct. No one forced him to lie. No one induced him to send the harassing text messages. No evidence exists Kitsap County had notice of allegedly wrongful conduct by Chief Newlin or Lieutenant Elton.

c. No Evidence Deficient Supervision Proximately Caused Injuries

Finally, Hamilton' claim was properly dismissed because he failed to present any evidence to suggest deficient supervision was the proximate cause of his alleged harms. There is no evidence that Kitsap County's supervision over Chief Newlin or Lieutenant Elton was deficient or additional supervision would have led to a different result.

Additionally, as the language in Appendix D was a negotiated term of the CBA covering Hamilton's employment—and Appendix D does not require prior notice of a criminal investigation, additional supervision would not have prevented the allegedly intentional conduct of failing to give

prior notice of the criminal investigation. This is especially true where the criminal investigation, of which Hamilton claims he was entitled to advance notice, was conducted and directed by the POPD, an independent law enforcement agency, and not KCSO.

4. Negligent Supervision Claim Barred by Statute of Limitations

Hamilton's claim of negligent supervision was properly dismissed because it is time barred pursuant to the applicable statute of limitations. RCW 4.16.080(2) provides that an action for personal injury shall be commenced within three years. The factual basis for Hamilton's negligent supervision claim appears to be that he did not receive advance notice of the criminal investigation or interview conducted by Detective E.J. Martin. This interview occurred on June 16, 2012. CP 6 (¶4.14); CP 108. Accordingly, the statute of limitations ran on or about June 16, 2015. Hamilton did not file the present lawsuit until March 26, 2016. His claim for negligent supervision is time barred.

C. Negligent Infliction of Emotional Distress Claim Properly Dismissed

Hamilton's claim of negligent infliction of emotional distress was properly dismissed because (1) Hamilton has failed to provide any evidence of negligent conduct by Kitsap County or its agents, (2) Washington law

does not recognize a negligent infliction of emotional distress arising from employee discipline, and (3) this claim is barred by the statute of limitations.

1. No Evidence of Negligent Conduct

To succeed on a claim of negligent infliction of emotional distress, a plaintiff must establish the following four elements of negligence: (1) duty, (2) breach, (3) cause, and (4) damages. *Colbert v. Moomba Sports, Inc.*, 132 Wn.App. 916, 925, 135 P.3d 485, 490 (2006), citing *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). Accordingly, before he can recover on his claim for negligent infliction of emotional distress, Hamilton must first identify negligent conduct on the part of Kitsap County or its agents. Hamilton has failed to allege any such conduct and can provide no evidence to establish the same.

Hamilton alleges Chief Newlin, Lieutenant Elton, and Sergeant McDonough all “engaged in a deliberate and wrongful course of conduct that knowingly and with deliberate intention violated Hamilton’s CBA, Appendix D rights.” Appellant’s Brief, page 29. Hamilton obviously asserts intentional rather than negligent acts.³ Hamilton does not appear to attribute any other conduct as giving rise to his alleged negligent infliction of

³ This claim also fails because there is no evidence to support the assertion that Hamilton’s rights under Appendix D were violated.

emotional distress claim. Hamilton has failed to articulate any duty of care allegedly breached by Kitsap County or its agents.

To the extent Hamilton's claim is based upon or relies upon the same factual allegations as Hamilton's other claims (retaliation and negligent supervision), this claim must also be dismissed as improperly duplicative. *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 864-65, 991 P.2d 1182 (2000) (a plaintiff may not maintain a separate claim for negligent infliction of emotional distress based upon the same facts that support other claims).

2. Washington Law Does Not Recognize a Cause of Action for Negligent Infliction of Emotional Distress Arising from Employee Discipline

Hamilton's negligent infliction of emotional distress claim also fails because Washington law does not recognize or support such a claim in the context of and arising from employee disciplinary actions. *Snyder v. Medical Services Corp. of Eastern Washington*, 145 Wn.2d 233, 243-244, 35 P.3d 1158 (2001). Claims arising out of "the employment and termination process" simply "do not support a cause of action" for negligent infliction of emotional distress. *Armijo v. Yakima HMA, LLC*, 868 F. Supp. 2d 1129, 1137-38 (E.D. Wash. 2012). A negligent infliction of emotional distress claim must arise from facts that are separate and apart from employment-based causes of action.

For example, in *Chea v. Men's Warehouse, Inc.*, 85 Wn.App. 405, 414, 932 P.2d 1261 (1997) the court upheld a plaintiff's negligent infliction of emotional distress claim because it was based upon the manager's physical act of grabbing the plaintiff which was separate from the factual basis that made up plaintiff's employment-discrimination claim. In contrast, the court in *Haubry v. Snow*, 106 Wn.App. 666, 678, 31 P.3d 1186 (2001) barred the plaintiff from pursuing a claim for negligent infliction of emotional distress claim because the factual basis for this claim was the same as the factual basis for employment-based discrimination and sexual harassment claims.

In the present matter, Hamilton is essentially pursuing a claim for negligent infliction of emotional distress for his wrongful termination. This claim is simply not viable under Washington law because the tortious conduct alleged is an employee disciplinary action.

Hamilton's attempts to distinguish this claim from an employee-disciplinary-action based claim fails. Hamilton asserts his claim extends beyond his employment because his termination has resulted in his dismissal from the Bremerton Police Department Reserve Program and detrimentally impacted his marital relationship. Regardless of the type of damages claimed by Hamilton, the factual allegations which form the basis of his claim remains the same—the termination of his employment.

Hamilton continues to assert it was his termination which caused him emotional and other damages. The factual basis of Hamilton's negligent infliction of emotional distress claim thus continues to be his termination. Washington law precludes this claim.

3. Negligent Infliction of Emotional Distress Claim Barred by the Statute of Limitations

Hamilton's claims of negligent infliction of emotional distress was properly dismissed because it is time barred pursuant to the applicable statute of limitations. An action for personal injury must be commenced within three years. RCW 4.16.080(2). The factual basis for Hamilton's negligent infliction of emotional distress claim is not fully articulated by Hamilton. Nonetheless this claim appears to arise from the alleged violations of Appendix D resulting from the alleged failure to receive advance notice of Detective Martin's criminal investigation. Detective Martin's interview with Hamilton occurred on June 16, 2012. CP 6 (¶4.14); CP 108. Accordingly, the three year statute of limitations ran on or about June 16, 2015. Hamilton did not file the present lawsuit until March 26, 2016. His claim is time barred.

D. Claim for Retaliation was Properly Dismissed

Hamilton's retaliation claim was properly dismissed by the trial court because there is no evidence to establish a causal connection between

Hamilton's preparation of the "Emergency Injunction[s]" in 2011 and his termination in 2013. Hamilton failed to establish a prima facie case of retaliation and present any evidence to suggest that the reasons for his termination (sending harassing text messages and lying to a police detective) were pretextual.

1. Elements of Employment Retaliation

In order to establish a prima facie case for retaliation, Hamilton must show (1) he engaged in statutorily protected activity, (2) his employer took an adverse employment action, and (3) there is a causal link between Hamilton's activity and the adverse action. *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 861–62, 991 P.2d 1182 (2000) (citing *Delahunty v. Cahoon*, 66 Wn.App. 829, 839, 832 P.2d 1378 (1992)). To present a prima facie case of retaliation, Hamilton must provide evidence to suggest his activity was a "substantial factor" in the adverse employment action. *Francom* at 861-62 (citing *Allison v. Housing Auth.*, 118 Wn.2d 79, 85–96, 821 P.2d 34 (1991)). A factor is "substantial" if it tips the scales one way or the other. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 621, 60 P.3d 106, 111 (2002) (citing *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn.App. 268, 277, 996 P.2d 1103 (2000)).

One factor that might support the existence of a retaliatory motive is the proximity in time between the protected activity and the adverse

employment action. *Francom* at 862. However, the opposite is also true—a significant passing of time between an employee’s conduct and an employer’s adverse action precludes an inference of causal connection. *Francom* at 862-62. In *Francom*, the court of appeals affirmed a trial court’s dismissal of an employee’s retaliation claim where the employment action at issue took place 15 months after the employee’s protected activity. The court held that the passage of 15 months was too long a time period to suggest the required causal nexus. *Francom* at 863.

The same is true here. Fifteen months between Hamilton’s preparation of the “Emergency Injunction[s]” and his termination is too long a time period to raise an inference of retaliatory motive.

2. Burden Shifting Scheme

Washington courts have adopted a three-part burden shifting scheme to evaluate employment retaliation cases on summary judgment. *Renz*, 114 Wn.App. at 618–19; *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68–69, 821 P.2d 18 (1991). Utilizing this scheme, a court first determines whether a plaintiff successfully establishes a prima facie case. If so, the burden shifts to the defendant employer to demonstrate a legitimate, non-retaliatory explanation for its adverse employment decision. *Renz* at 618 (if the employer produces evidence of a legitimate reason for the discharge, the temporary presumption of retaliatory discharge

established by the prima facie evidence is rebutted and removed); *Milligan v. Thompson*, 110 Wn.App. 628, 638, 42 P.3d 418 (2002). The burden then shifts back to the plaintiff, who must show that the explanation advanced is pretextual. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn.App. 616, 624, 128 P.3d 633, *review denied*, 158 Wn.2d 1015, 149 P.3d 377 (2006); *Renz* at 622.

3. No Evidence of a Causal Connection

Hamilton asserts Kitsap County retaliated against him by terminating his employment after Hamilton created two “Emergency Injunction[s]” regarding safety related issues in the Kitsap County jail. To overcome dismissal, Hamilton was required to raise an issue of fact as to a causal link between the creation of the “Emergency Injunction[s]” and his termination over fifteen months later. The trial court properly dismissed Hamilton’s claim because he failed to do so.⁴

Hamilton alleges he created the two “Emergency Injunction[s]” in 2011 regarding safety issues in the Kitsap County jail. Hamilton alleges his Guild Representative provided the “injunctions” to jail administrative staff. There is no evidence to suggest or infer that Hamilton’s creation of these “Emergency Injunction[s]” in 2011 was in any way a factor in his 2013

⁴ It is Kitsap County’s position that Hamilton also failed to establish that he engaged in statutorily protected activity, however, Kitsap County did not seek dismissal on this ground.

termination. The “injunctions” were prepared around September or October of 2011. Hamilton was terminated in March 2013. The passage of time in this case does not suggest or infer a retaliatory motive or any causal connection between the two events.

Hamilton asserts there is an issue of fact as to whether Chief Newlin had knowledge regarding Hamilton’s creation of the “Emergency Injunction[s]” and thus there is an issue of fact which precludes dismissal. This is incorrect and misstates the evidence in the record. Contrary to Hamilton’s assertions, there is no evidence Chief Newlin knew about Hamilton’s role in creating the “Emergency Injunction[s].”

The evidence offered by Hamilton to support his retaliation claim is that he prepared the “injunctions” at the direction of his former Guild President, Terry Cousins. Hamilton gave the “injunctions” to Ms. Cousins but does not know what happened to them after that. Ms. Cousins testified she gave a copy of the “injunctions” to Sergeant Dick so that he could bring them to the next sergeant’s meeting. Ms. Cousins testified she never directly provided Chief Newlin with a copy of the “Emergency Injunction[s].” While Ms. Cousins stated she had a discussion with Chief Newlin in 2011 regarding the staffing issue that was the subject of the “injunctions,” there is no evidence Ms. Cousins ever told Chief Newlin about the origin or creation of the “injunctions.” Chief Newlin denied any such knowledge

under oath at his deposition. Accordingly, there is no evidence to support Hamilton's unsupported assertion Chief Newlin knew about Hamilton's role in the making of the "injunctions."

Hamilton cannot establish a prima facie case of retaliation and, consequently, his claim for retaliatory discharge must fail.

4. No Evidence of Pretext To Support Retaliation Claim

Not only has Hamilton failed to establish a prima facie case of retaliation, Hamilton cannot provide evidence to suggest the stated reasons for his termination are pretextual. Hamilton places a lot of emphasis on his positive performance reviews and work history prior to his termination. His prior performance is irrelevant. Years of positive performance evaluations do not immunize an employee from disciplinary action, especially after that employee engages in egregious misconduct.

Hamilton was found to have engaged in misconduct which constituted violations of KCSO policy, civil service rules, and Hamilton's oath of office. These findings were made after a thorough administrative investigation involving two separate pre-termination hearings. Criminal charges were filed against Hamilton arising from his misconduct and Hamilton entered into a pre-trial diversion agreement regarding those criminal charges. Hamilton has admitted on numerous occasions (including in his complaints) he was untruthful to Detective Martin. Hamilton has no

evidence that the legitimate reasons for his termination were pretextual. His retaliation claim fails as a matter of law.

VI. CONCLUSION

For the reasons outlined above, the Court should affirm the trial court's dismissal of Hamilton's claims for negligent supervision, negligent infliction of emotional distress, and retaliation. The Court should also award Kitsap County its costs as the prevailing party pursuant to Washington Rule of Appellate Procedure 14.2.

Respectfully submitted this 21st day of December, 2017.

TINA ROBINSON
Prosecuting Attorney



JACQUELYN M. AUFDERHEIDE,
WSBA NO. 17374
Chief Deputy Prosecuting Attorney
CHRISTINE M. PALMER
WSBA NO. 42560
Deputy Prosecuting Attorney
614 Division Street, MS 35A
Port Orchard, WA 98366
(360) 337-4992

CERTIFICATE OF SERVICE

I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

Rodney R. Moody	<input type="checkbox"/>	Via U.S. Mail
Law Office of Rodney R. Moody	<input checked="" type="checkbox"/>	Via Email
2707 Colby Avenue, Suite 603	<input type="checkbox"/>	Via Hand Delivery
Everett, WA 98201		
<u>rmood@rodneymoodylaw.com</u>		

SIGNED in Port Orchard, Washington this 21st day of December, 2017.



BATRICE FREDSTI, Legal Assistant
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992

KITSAP COUNTY PROSECUTING ATTORNEY'S OFFICE - CIVIL DIVISION

December 21, 2017 - 1:09 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50570-3
Appellate Court Case Title: Brett Hamilton, Appellant v. Kitsap County, Respondent
Superior Court Case Number: 16-2-00534-1

The following documents have been uploaded:

- 505703_Briefs_20171221130816D2707026_9572.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Response Brief of Respondent Kitsap County.pdf

A copy of the uploaded files will be sent to:

- jaufderh@co.kitsap.wa.us
- rmoody@rodneymoodylaw.com

Comments:

Response Brief of Respondent Kitsap County

Sender Name: Batrice Fredsti - Email: bfredsti@co.kitsap.wa.us

Filing on Behalf of: Christine M Palmer - Email: cmpalmer@co.kitsap.wa.us (Alternate Email:)

Address:
614 Division Street, MS-35A
Port Orchard, WA, 98366
Phone: (360) 337-4992

Note: The Filing Id is 20171221130816D2707026