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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

DANIEL BRAY, individually, and JOEY TRACY, individually,

Respondents,

V.

PIERCE COUNTY,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal arises from an employment dispute between appellant Pierce County (“the County”) and Respondents Daniel Bray and Joey Tracy (collectively, “Respondents”), two former deputies with the Pierce County Sheriff’s Department. After resigning from their positions as deputies in late 2016, Respondents sued the County for wrongful constructive discharge in violation of public policy. Specifically, Respondents claim that they were constructively discharged in retaliation for reporting the alleged misconduct of two other deputies. The alleged “misconduct” boils down to an assertion that the deputies were negligent. Respondents have repeatedly failed to identify any law that the County violated that could establish a wrongful termination in violation of public policy claim. Nor have Respondents identified any other public policy that the County violated when it allegedly “constructively discharged” them. Because Respondents have failed to establish an essential element to their wrongful discharge claim, the trial court erred in denying the County’s motion for summary judgment dismissing that cause of action. This Court should reverse.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering its December 21, 2018 Order Denying Pierce County's Motion for Partial Summary Judgment. (CP 273-75)

III. STATEMENT OF ISSUES

1. Did the trial court err in denying summary judgment dismissal of wrongful termination in violation of public policy claims premised on alleged "whistleblowing" activity where the employees failed to establish that the employer violated any law?
2. Did the trial court err in denying summary judgment dismissal of a wrongful termination in violation of public policy claim where the employees failed to identify a "clear mandate of public policy"?

IV. STATEMENT OF THE CASE

A. Respondents resigned from the Pierce County Sherriff's Department in December 2016.

Respondents Daniel Bray and Joey Tracy both resigned from their positions as deputies for the Pierce County Sherriff's Department in December 2016. (CP 200, 227; *see* CP 14) Respondents subsequently sued the County, claiming that they had been wrongfully constructively discharged in violation of public policy for reporting "whistleblowing" activity. (CP 1-15) In particular, Respondents claimed that two other Pierce County Sherriff's deputies, Zachary Spencer and Ara Steben (the

“Deputies”), committed misconduct when they served a Temporary Protection Order (“TPO”) on David Annas in April 2015. (See CP 1-15, 378-91)

Mr. Annas’ estranged wife, Regina Annas, obtained an ex parte TPO against him on April 17, 2015. (CP 38) The court issued the TPO “without notice [to] the respondent” and scheduled a hearing for April 30, 2015. (CP 38) In its “Warnings To The Respondent,” the TPO expressly stated: “*If* the court issues a final protection order, the respondent may not possess a firearm or ammunition for as long as that final protection order is in effect.” (CP 41, emphasis added) The TPO further provided: “*If* the respondent is convicted of an offense of domestic violence, the respondent will be forbidden for life from possessing a firearm or ammunition.” (CP 41, emphasis added)

The Deputies met with Ms. Annas later that same day before serving Mr. Annas with the TPO at his residence. (CP 92) The Deputies informed Mr. Annas that they “had an order removing him from the residence,” “that he had a few minutes to gather his belongs and that he needed to find a place to stay until his court date” on April 30, 2015. (CP 92) Deputy Steben asked Mr. Annas where his guns were located, as Ms. Annas had informed the Deputies that Mr. Annas “had guns in the house.” (CP 92) Mr. Annas “stated that he only had one gun in the house and it

was a loaded pistol.” (CP 92) After locating the pistol, Deputy Steben unloaded and cleared the handgun while Mr. Annas gathered his belongings. (CP 92) Deputy Steben then handed the unloaded pistol to Deputy Spencer and Sergeant Alvin Mierke, who had also arrived at the scene, for temporary handling. (CP 92, 95, 112)

As was his legal right, Mr. Annas “wanted to keep his pistol in his possession.” (CP 112, 92) The Deputies confirmed that the TPO had not been “check[ed]” to warn law enforcement that the “Brady Bill”¹ was implicated; in fact, “there was nowhere in the order which stated that [Mr. Annas] was not allowed to have guns.” (CP 92) Because the TPO did not order, or otherwise require, that the Deputies confiscate Mr. Annas’ firearm, Deputy Steben “placed the magazine, handgun and holster on the back driver’s side floorboards of the car that was on the tow truck.” (CP 92) Mr. Annas assured the Deputies that “he would not do anything to violate the order.” (CP 92, 96) Mr. Annas “was relatively calm” when he left the residence (CP 96) and “did not make any threats of violence toward” Ms. Annas. (CP 112) The Deputies left the scene at approximately 7:00pm. (CP 92)

¹ The Brady Handgun Violence Protection Act, 18 U.S.C. § 921, *et seq.*, regulates the purchase and possession of firearms.

Several hours later on April 17, 2015, the Deputies and “numerous other units,” including Respondents, responded to a shooting at the Annas residence. (CP 91-92, 95-96) Mr. Annas had shot and killed Ms. Annas and wounded her friend before killing himself. (CP 91-92, 95-96)

B. Respondents sued the County for wrongful termination in violation of public policy.

Respondents sued the County on March 12, 2018 for wrongful termination in violation of public policy; negligence, outrage, and the negligent infliction of emotional distress; and abuse of process and malicious prosecution. (CP 1-15, 378-91) Respondents alleged that they were constructively terminated in retaliation for reporting to their superiors the Deputies’ failure to confiscate Mr. Annas’ firearm. (CP 1-15, 378-91)

On August 6, 2018, the County moved to dismiss the wrongful termination claim on the basis that Respondents had failed to identify any law that the Deputies or the County violated. (CP 139-50) Pierce County Superior Court Judge Susan K. Serko (“the trial court”) denied the County’s motion to dismiss without prejudice on August 17, 2018, deciding instead “to revisit this issue on summary judgment.” (CP 373-74) Aside from their own self-serving affidavits, Respondents provided no evidence that they actually reported any “concerns” to the County. (*See*

CP 204, 228-29) Despite Respondents’ failure to establish not only that the County violated the law, but that Respondents then actually reported that alleged misconduct to their superiors—both essential elements for a prima facie whistleblowing wrongful termination claim—the trial court denied the County’s motion for partial summary judgment on December 21, 2018. (CP 273-75)

Recognizing that the County’s motion for summary judgment was “a really close call” (12/21 RP 17), the trial court granted the County’s motion to certify the order denying partial summary judgment for discretionary review under RAP 2.3(b)(4) on January 25, 2019. (CP 321-22) A Commissioner of this Court granted the County’s motion for discretionary review on April 8, 2019.

V. ARGUMENT

A. **Summary judgment is appropriate where, as here, the plaintiffs fail to establish an essential element of a claim.**

This Court reviews de novo the grant or denial of a motion for summary judgment. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 134, ¶ 15, 317 P.3d 1074 (2014). A defendant can move for summary judgment “based on the contention that there is an absence of evidence to support the plaintiff’s claim.” *Sherman v. Pfizer, Inc.*, ___ Wn. App. 2d ___, 440 P.3d 1016, 1021, ¶ 20 (2019). Where the defendant satisfies this

burden, the burden shifts to the plaintiff “to show a genuine issue of material fact.” *Sherman*, 440 P.3d at 1021, ¶ 20. To defeat a motion for summary judgment, a party must submit admissible evidence that is “more than ‘[u]ltimate facts’ or conclusory statements.” *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, ¶ 27, 331 P.3d 40 (2014) (alteration in original) (quoted source omitted). Summary judgment is thus appropriate if “a plaintiff fails to present sufficient evidence on all essential elements of the claim.” *Sherman*, 440 P.3d at 1021, ¶ 20.

The trial court erred in denying the County’s motion for partial summary judgment because Respondents failed to establish an essential element of their wrongful termination claim. Washington is generally an at-will employment state. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 225, 685 P.2d 1081 (1984). Under the at-will employment doctrine, an employee is “terminable at will by either the employer or employee for any reason without either incurring liability.” *Thompson*, 102 Wn.2d at 225. However, in *Thompson*, our Supreme Court recognized a “narrow” exception to the at-will employment doctrine for wrongful discharge in violation of public policy. 102 Wn.2d at 232.

The wrongful discharge tort “has generally been limited to four scenarios”: (1) an employee is fired for refusing to commit an illegal act; (2) an employee is fired for performing a public duty or obligation, such as

serving jury duty; (3) an employee is fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) an employee is fired in retaliation for reporting employer misconduct, i.e., whistleblowing. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, ¶ 15, 425 P.3d 837 (2018) (citing *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996)).

Respondents' wrongful termination claim is primarily premised on their alleged whistleblowing of the Deputies' failure to confiscate Mr. Annas' firearm. Alternatively, Respondents argued below that they were terminated in violation of the public policy of "preventing domestic violence." In reality, Respondents merely complain about the alleged negligence of their fellow employees, the Deputies. But even if the County allegedly retaliated against Respondents in response to their complaints about the claimed negligent—as opposed to unlawful or illegal—conduct, such "retaliation" does not give rise to a claim under the narrowly-defined tort of wrongful discharge. Summary judgment is thus appropriate because Respondents have failed to establish an essential element of their claim.

B. Respondents’ whistleblower wrongful termination claims fail as a matter of law because Respondents fail to establish any employer misconduct.

The trial court erred in denying the County’s motion for partial summary judgment because Respondents failed to establish that the County committed any misconduct—an essential element of a whistleblower wrongful termination claim.

1. An employee must establish employer misconduct in order to maintain a cause of action for wrongful termination in retaliation for whistleblowing.

A whistleblowing wrongful termination claim is predicated on the “public policy found in protecting employees who are discharged in retaliation for reporting employer misconduct, *i.e.*, employee ‘whistleblowing’ activity.” *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989). Thus, unlike the other three recognized categories of a wrongful termination claim in which the plaintiff must first establish that the employer violated a clear mandate of public policy in terminating the employee, the public policy allegedly violated in a whistleblower claim is already known. Contrary to Respondents’ claims below, however, merely identifying “whistleblowing” as a public policy is insufficient to establish a *prima facie* case for the wrongful termination claim. Nor is allegedly being “retaliated” against for complaining about a fellow employee’s

supposed negligence sufficient to maintain a cause of action for wrongful termination.

Rather, the employee in a whistleblowing wrongful termination claim must establish that the employer actually engaged in misconduct or wrongdoing in order to maintain the cause of action—in other words, that there was unlawful conduct for Respondents to “blow the whistle” on.² This is only logical: an employer cannot violate the public policy in favor of protecting employees from retaliation for reporting employer misconduct where no such employer misconduct exists. Accordingly, the “focus for whistle-blowing matters is on *the employer’s level of wrongdoing*, not [the employee’s] actions to address what he perceived as wrongdoing.” *Martin*, 191 Wn.2d at 725, ¶ 19 (emphasis added).

In determining the employer’s “level of wrongdoing,” *Martin*, 191 Wn.2d at 725, ¶ 19, this Court considers “whether the employer’s conduct constituted either a violation of the letter or policy of the law.” *Dicomes*, 113 Wn.2d at 620; *Bott v. Rockwell International*, 80 Wn. App. 326, 335,

² In granting discretionary review, the Commissioner ruled that whether “Deputies Spencer’s and Steben’s conduct violated any *public policy*” is not relevant to this Court’s inquiry into whether the County engaged in misconduct. (Ruling Granting Discretionary Review 4 n.6, emphasis added) However, even if the Commissioner is correct, whether or not the Deputies’ conduct violated any *law* or constituted “improper governmental action” is critical to this Court’s analysis on appeal and was properly raised below. *See, e.g.*, CP 17, 26-31, 145-50; 12/2 RP 11: trial court correctly asserting, “[T]he question is, what is the misconduct? Where is the misconduct?”)

908 P.2d 909 (1996) (employee must prove employer “violated either the letter or policy of the law”); *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 668–69, 807 P.2d 830 (1991) (“the court examines ‘the degree of alleged employer wrongdoing, together with the reasonableness of the manner in which the employee reported, or attempted to remedy, the alleged misconduct’”) (quoting *Dicomes*, 113 Wn.2d at 619). Accordingly, “the cause of action fails if the employer acted within the law.” *Bott*, 80 Wn. App. at 336.

2. Respondents are not entitled to whistleblowing protection because they failed to follow Pierce County’s whistleblowing procedures.

In the context of public employment, the Washington legislature has “recognized the importance of encouraging employees to report ‘improper governmental actions’” and enacted state and local government whistleblower protection statutes. *Dicomes*, 113 Wn.2d at 619 (quoting RCW 42.40.010); *see also* ch. RCW 42.41 (local government whistleblower protection statutes). Pierce County has adopted its own local whistleblower protection procedures, which govern here. *See* RCW 42.41.050 (local government that has adopted “a program for reporting alleged improper governmental actions and adjudicating retaliation resulting from such reporting” is exempt from RCW ch. 42.41).

The Pierce County Code defines an “[i]mproper governmental action” as one “by a County officer or employee that is undertaken in the office or which is related to an employee’s performance of his or her official duties” *and* (1) “[v]iolates any state or federal law or County ordinance; (2) “[c]onstitutes an abuse of authority; (3) “[c]reates a substantial and specific danger to the public health or safety; or (4) “[r]esults in a gross waste of public funds.”³ PCC § 3.14.010.

Pierce County’s whistleblower regulations are clear that, “except in the case of an emergency, an employee shall submit a written report” of the alleged improper governmental action before externally disclosing such information. PCC § 3.14.030. “An employee who fails to make a good faith attempt to follow this policy shall not receive the protections of this Chapter.” PCC § 3.14.030.

As a threshold matter, even if Respondents had identified an “improper governmental action”—and they have not—their whistleblower claim fails as a matter of law because they failed to submit a written report as required by PCC § 3.14.030. In fact, aside from Respondents’ own self-serving affidavits, there is no evidence whatsoever that they ever

³ Respondents have never claimed that the County’s actions resulted “in a gross waste of public funds” and have thus waived any such argument on appeal. *Rapid Settlements, Ltd.’s Application for Approval of Transfer of Structured Settlement Payment Rights*, 166 Wn. App. 683, 695, ¶ 27, 271 P.3d 925 (2012) (“appellate courts will not entertain issues raised for the first time on appeal”).

actually reported their “concerns” to the Pierce County Sheriff’s Department or any other appropriate internal entity. As such, Respondents are not entitled to any whistleblower protection.

Regardless, Respondents’ failure to establish that the County violated the law is fatal to their whistleblowing wrongful termination claim.

3. Respondents’ whistleblowing wrongful termination claims fail as a matter of law because the County “acted within the law.”

The trial court erred in denying the County’s motion for summary judgment because it is undisputed that the Deputies, as public officials, “acted within the law.” *Bott*, 80 Wn. App. at 336. Respondents premised their alleged “whistleblowing” not on any illegal conduct, but on the Deputies’ allegedly negligent conduct. Even *if* Respondents were constructively discharged in “retaliation” for complaining about the Deputies’ allegedly negligent, as opposed to unlawful, conduct, such negligence does not and cannot give rise to a claim under the narrowly-defined tort of wrongful discharge. *See Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 756, ¶ 33, 257 P.3d 586 (2011) (tort of wrongful discharge “should be narrowly drawn so that it does not swallow the general rule of at-will employment”).

a. The Deputies did not violate any law by allowing Mr. Annas to retain possession of his firearm, as he was legally entitled to do.

It is undisputed that the Deputies did not violate any law by allowing Mr. Annas to retain possession of his firearm, as he had a statutory and constitutional right to do so in the absence of a court order directing the Deputies otherwise.⁴ See RCW 9.41.098 (authorizing a court to order the forfeiture and confiscation of a firearm only where certain statutory requirements are satisfied). The Deputies had no authority under RCW 9.41.098, or any other statute, to confiscate Mr. Annas' firearm. For instance, RCW 9.41.098(1)(c) allows a court to order the confiscation of a firearm "[i]n the possession of a person prohibited from possessing the firearm under RCW 9.41.040 or 9.41.045." It is undisputed that Mr. Annas was not prohibited from possessing a firearm under either statute.

Under RCW 9.41.040, it is unlawful for a person who is subject to an order "issued under chapter . . . 26.09 ... or 26.50 RCW" to possess a firearm *only* where the order: (1) "[w]as issued after a hearing of which the person received actual notice, and at which the person had an

⁴ In a separate, but related, lawsuit brought by Ms. Annas' estate against the County, the Pierce County Superior Court recently held as a matter of law that the Deputies "did not have legal authority to confiscate David Annas' firearm." See July 31, 2018 Order Clarifying Court's July 12, 2019 Decision re: Pierce County's Ability to Take a Firearm for Safekeeping and Denying Defendant's Motion for Reconsideration in *Kinney et al. v. Pierce County*, Pierce County Superior Court Cause No. 18-2-07321-4. Consistent with GR 14.1, the County cites this case only for "such persuasive value as the court deems appropriate."

opportunity to participate”; (2) restrains the person from harassing, stalking, threatening, or “engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child”; (3) “[i]ncludes a finding that the person represents a credible threat to the physical safety of the intimate partner or child”; and (4) “[b]y its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.” RCW 9.41.040(2)(a)(iii).

The TPO here was issued ex parte under RCW ch. 26.09 and 26.50. (*See* CP 38-41) It is undisputed that the court did not have a hearing of which Mr. Annas “received actual notice” or otherwise “had an opportunity to participate.” As such, Mr. Annas retained the right to legally possess a firearm under RCW 9.41.040.

Similarly, RCW 9.41.045 only prohibits “offenders under the supervision of the department of corrections” from owning, using, or possessing a firearm. Mr. Annas had no prior criminal convictions and was not an “offender” subject to the supervision of the Department of Corrections.

While it had no authority to do so under RCW 9.41.098, the trial court commissioner could have ordered Mr. Annas to surrender his firearm under RCW 9.41.800 when the court issued the TPO. *See* RCW

9.41.800(4) (court “may order temporary surrender of a firearm or other dangerous weapon without notice to the other party if it finds . . . that irreparable injury could result if an order is not issued until the time for response has elapsed”); RCW 9.41.800(5) (court may order surrender of a firearm “if it finds that the possession of a firearm . . . by any party presents a serious and imminent threat to public health or safety”); RCW 9.41.800(7) (“court may require the party to surrender any firearm . . . to the sheriff of the county having jurisdiction of the proceeding”). The trial court commissioner chose not to do so. Instead, the TPO merely warned Mr. Annas that he may not possess a firearm “[i]f the court issues a final protection order” or “[i]f [he] is convicted of an offense of domestic violence.” (CP 41, emphasis added)

The court never issued a final protection order, nor was Mr. Annas ever convicted of domestic violence. Accordingly, Mr. Annas had a legal right to possess a firearm even while the ex parte TPO was in effect. The Deputies acted well “within the law” when they allowed Mr. Annas to retain his firearm. In fact, the Deputies would have broken the law if they had *not* allowed Mr. Annas to take his firearm. *See, e.g.*, 18 U.S.C. § 925A (a person erroneously denied a firearm under the Brady Act “may bring an action against the State or political subdivision responsible for

providing the erroneous information”). The Deputies did not violate any law.

b. Even if the Deputies were negligent, such negligence cannot form the basis of a wrongful discharge claim.

As the Pierce County Superior Court recently confirmed as a matter of law, the Deputies had no legal authority to confiscate Mr. Annas’ firearm when they served him with the TPO. The Deputies simply followed the TPO’s directive when they allowed Mr. Annas to gather his personal belongings and ensured that he left the property without incident. The Deputies did not abuse their authority in doing so; their assessment that Mr. Annas was not a threat was entirely reasonable and supported by all of the surrounding circumstances. Mr. Annas had never been convicted of domestic violence. He also assured the Deputies that “he would not do anything to violate the order” (CP 92, 96), “did not make any threats of violence toward” Ms. Annas (CP 112), and “was relatively calm” when he left the residence. (CP 96) The Deputies did not abuse their authority by acting, at all times, within the bounds of the law.

Because they did not violate the law, the Deputies were, at most, potentially negligent in allowing Mr. Annas to leave with his firearm. However, to prove a prima facie case of wrongful termination based on whistleblowing and survive summary judgment, Respondents must

establish that the County violated the letter or policy of the law. *Dicomes*, 113 Wn.2d at 620. Liability for negligence does not similarly require such unlawful conduct. See *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, ¶ 11, 108 P.3d 1220 (2005). (“[l]iability for negligence does not require a direct statutory violation”). Therefore, even if the Deputies *were* negligent (and the County does not so concede), such negligence is insufficient to establish that the Deputies’ actions were also unlawful—an “essential element” of a whistleblower wrongful termination claim. Accordingly, Respondents’ claim fails because the employees *and* “the employer acted within the law.” *Bott*, 80 Wn. App. at 336.

4. Respondents’ alleged “good faith belief” that the County engaged in misconduct is insufficient to survive summary judgment.

An employee’s “good faith belief” that the employer’s conduct constituted misconduct is insufficient to establish this requisite element of a whistleblower wrongful termination claim. The case law is instructive.

In *Dicomes*, the Court concluded that the employee failed to establish any employer misconduct where she “was not confronted with the choice of violating the law or sacrificing her job,” but was simply “faced with a difference of opinion as to her superior’s chosen course of action.” 113 Wn.2d at 624. The Court held that, “[i]n the arena of discretionary political decisionmaking, plaintiff’s arguably good faith

belief in the righteousness of her conduct is too tenuous a ground upon which to base a claim for wrongful discharge.” *Dicomes*, 113 Wn.2d at 624. In so holding, the Court cautioned that it must be “cognizant of the need to avoid frivolous lawsuits and employer liability when the employee’s conduct is merely praiseworthy from a subjective standpoint, or when the public may derive some remote benefit.” *Dicomes*, 113 Wn.2d at 624.

Similarly, in *Bott*, the employee claimed that he was fired from his waste management position at a nuclear reservation after expressing concerns about his employer’s waste-disposal accounting practices. Division Three rejected the employee’s argument that the trial court erred in refusing “to instruct on his theory that a good faith belief is enough to support his cause of action for wrongful discharge in violation of public policy.” 80 Wn. App. at 334. The Court held that a “good faith” standard “would expand the public policy exception” beyond its narrow confines. *Bott*, 80 Wn. App. at 336. Because the employee “was unable to demonstrate that [its employer] “had violated the law, a policy, or even a regulation in regards to its accounting practices,” the trial court appropriately dismissed that claim. *Bott*, 80 Wn. App. at 336.

Most recently, in *Martin*, the Washington Supreme Court rejected the employee’s whistleblower wrongful discharge claim premised on his

assertion “that he was fired in retaliation for voicing safety complaints about the need for wall padding in the basketball courts.” 191 Wn.2d at 724, ¶ 17. The Court rejected the employee’s assertion that “student safety, specifically wall padding in the basketball courts, is a clear mandate of public policy.” 191 Wn.2d at 725, ¶ 19. The Court held that the employee’s whistleblower claim failed because he could not establish that Gonzaga violated any “court decision, statute, or regulation . . . requiring Gonzaga University to install the wall padding”:

Without roots in regulation or judicial precedent, [the employee’s] mere opinion that wall padding should be installed does not constitute a clear mandate of public policy. Even if [the employee] truly believed the unpadded walls posed a danger to students, this does not change the analysis, as the focus for whistle-blowing matters is on the employer’s level of wrongdoing, not [the employee’s] actions to address what he perceived as wrongdoing.

Martin, 191 Wn.2d at 725, ¶ 19.

The case law is clear that, even if Respondents here had a “good faith belief that there was misconduct” (12/21 RP 11), such belief does not give rise to a whistleblower wrongful termination claim. As in *Dicomes*, Respondents were not “confronted with the choice of violating the law or sacrificing [their] job.” 113 Wn.2d at 624. They simply had a “difference of opinion” as to the Deputies “chosen course of action” in serving Mr. Annas with the TPO. *Dicomes*, 113 Wn.2d at 624. Even if Respondents

“truly believed” in good faith that the Deputies’ lawful conduct “posed a danger,” “this does not change the analysis, as the focus for whistleblowing matters is on *the employer’s* level of wrongdoing.” *Martin*, 191 Wn.2d at 725 (emphasis added). This separate inquiry into the employer’s conduct is necessary to ensure that *Dicomes’* “limited” holding does not swallow the at-will employment doctrine whenever an employee simply believes that their employer engaged in misconduct.

For that reason, the *employer’s* good-faith belief in the legality of its conduct *does* factor into the Court’s analysis. *See Farnam*, 116 Wn.2d at 671 (taking into consideration employer’s “good faith belief that . . . tube removal was permitted under” the Natural Death Act in determining that employer’s actions did not rise “to the level of wrongdoing that would support a tort of wrongful discharge in violation of public policy”). Here, the Deputies not only acted based on their good faith belief that they were in compliance with the letter and policy of the law; their actions *were* entirely within the law. Respondents’ cause of action thus fails as a matter of law. *See Bott*, 80 Wn. App. at 336 (whistleblowing wrongful termination claim “fails if the employer acted within the law”).

C. Respondents have failed to identify any other “clear mandate of public policy” that the County violated by allegedly constructively terminating their employment.

Even if not premised on their alleged “whistleblowing” activity, Respondents’ wrongful termination claim fails because they have not identified any “clear mandate of public policy” that the County violated in allegedly constructively terminating their employment. Respondents argued below that the County’s constructive termination of their employment violated the public policy of the “prevention of domestic violence.” (12/21 RP 14) However, such a public policy exists to protect domestic violence *victims*, not law enforcement officers. Respondents again fail to establish an essential element of their claim. Accordingly, the trial court erred in denying summary judgment.

1. Respondents must establish a “clear mandate of public policy” to survive summary judgment.

Respondents’ alternative argument that their termination violated the public policy of the “prevention of domestic violence” does not fall within any of the other recognized three categories of a wrongful termination claim: Respondents were not “fired for refusing to commit a legal act,” “for performing a public duty or obligation,” or “for exercising a legal right or privilege.” *Martin*, 191 Wn.2d at 723, ¶ 15 (quoting *Gardner*, 128 Wn.2d at 936). Where a wrongful discharge suit does not “fit neatly into one of those four recognized categories,” the employee

must satisfy the four-part Perritt test our Supreme Court adopted in *Gardner. Martin*, 191 Wn.2d at 723, ¶ 16.

Under the Perritt test: (1) the employee must prove “the existence of a clear public policy” (the “clarity element”); (2) the employee must prove that “discouraging the conduct in which they engaged would jeopardize the public policy” (the “jeopardy element”); (3) the employee must prove that the public-policy-linked conduct caused the dismissal (the “causation element”); and (4) the defendant employer “must not be able to offer an overriding justification for the dismissal” (the “absence of justification element”). *Martin*, 191 Wn.2d at 723, ¶ 16 (quoting *Gardner*, 128 Wn.2d at 941).

Respondents’ claim fails because they have not (and cannot) establish any of the Perritt factors.⁵ Critically, Respondents have failed to establish the very first element of their claim: the “existence of a clear public policy.” “[F]indings of public policy must be *clearly grounded* in legislation or prior jurisprudence in order to protect employers from frivolous lawsuits and to assure balance between the interests of the employer and the interests of the employee.” *Sedlacek v. Hillis*, 145

⁵ Because the Commissioner granted review on the issue of whether a clear mandate of public policy exists, the County focuses its argument on this element of the Perritt test. However, Respondents have failed as a matter of law to establish *any* of the four essential elements to its wrongful discharge claim.

Wn.2d 379, 385, 36 P.3d 1014 (citing *Thompson*, 102 Wn.2d at 232-33). In particular, “courts should inquire whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy.” *Thompson*, 102 Wn.2d at 232; *Sedlacek*, 145 Wn.2d at 387 (“This court has found Washington statutes and case law to be primary sources of Washington public policy.”). Courts “should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.” *Thompson*, 102 Wn.2d at 232. *See also Sedlacek*, 145 Wn.2d at 390 (“we should not create public policy but instead recognize only clearly existing public policy under Washington law”).

2. The public policy in favor of protecting victims of domestic violence does not extend to the protection of law enforcement officers.

Respondents’ claim that “preventing domestic violence” is a clear mandate of public policy (*see* CP 74) is insufficient to satisfy their burden on summary judgment because this Court’s inquiry “does not end with the determination that a policy is expressed in an approved source.” *Sedlacek*, 145 Wn.2d at 393. Rather, the “source must also state a clear mandate of Washington public policy” *that affects the employee that was terminated*. *Sedlacek*, 145 Wn.2d at 393.

For instance, in *Sedlacek*, the plaintiff alleged that she was “wrongfully discharged from her position as a member of a husband-wife apartment management team because of her association with her disabled husband,” in violation of public policy. 145 Wn.2d at 381-82. The Court rejected the plaintiff’s argument that the Americans with Disabilities Act (“ADA”) “provides a clear mandate of Washington public policy” satisfying that element of her wrongful discharge claim. *Sedlacek*, 145 Wn.2d at 390. While Washington courts have previously accepted “a federal statute as a source of public policy,” the *Sedlacek* Court refused to “conclude that a clear mandate of public policy exists merely because the plaintiff can point to a potential source of public policy that addresses the relevant issue.” 145 Wn.2d at 389.

Rather, “[i]n order to balance the interests of employer and employee, and to ensure judicial restraint,” the Court has “imposed additional limitations on the establishment of public policy.” *Sedlacek*, 145 Wn.2d at 389. Crucially, the asserted public policy “must be truly public” and it “must be clear.” *Sedlacek*, 145 Wn.2d at 389. Accordingly, the Court in *Sedlacek* held that the plaintiff’s wrongful discharge claim failed as a matter of law because the ADA “does not provide a clear mandate of Washington public policy in favor of protecting from

discrimination able-bodied persons who are related to or associated with a disabled person.” *Sedlacek*, 145 Wn.2d at 393.

Similarly, in *Roe*, the plaintiff brought a wrongful termination claim after being fired for using medical marijuana. Our Supreme Court held that neither Washington’s Medical Use of Marijuana Act nor any court decision “provided ‘an authoritative public declaration’ declaring an unimpeded right to use medical marijuana or prohibiting an employer from discharging an employee for medical marijuana use.” *Roe*, 171 Wn.2d at 758, ¶ 39 (“Washington court decisions do not recognize a broad public policy that would remove any impediment to medical marijuana use or impose an employer accommodation obligation.”). Consistent with *Sedlacek*, the Court reiterated that a “clear mandate of public policy sufficient to meet the clarity element must be clear and truly public; it does not exist merely because the plaintiff can point to legislation or judicial precedent that addresses the relevant issue.” *Roe*, 171 Wn.2d at 757, ¶ 35.

As in *Sedlacek* and *Roe*, Respondents here have failed to identify a “clear and truly public” policy. Although Washington has recognized a public policy of “protecting domestic violence survivors and their children and holding domestic violence perpetrators accountable,” the “state’s clear and forceful public policy against domestic violence supports liability for

employers who thwart their employees' efforts to protect *themselves* from domestic violence.” *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 220-21, ¶ 33, 193 P.3d 128 (2008) (emphasis added). This public policy does not establish a clear mandate of public policy that the County violated in allegedly constructively terminating *Respondents*.

For instance, in *Danny*—upon which Respondents misplaced their reliance in the trial court—the *plaintiff* was the victim of domestic violence. Her employer terminated her after she missed work to move her and her children into a domestic violence shelter. In a two-justice majority opinion, the Court held that discouraging domestic violence victims from seeking help runs afoul of the public policy aimed at encouraging domestic violence victims to leave their abusers, protect their children, and cooperate with law enforcement and prosecution efforts to hold the abuser accountable. *Danny*, 165 Wn.2d at 213, ¶ 19. None of these public policy concerns are implicated here. While Washington has recognized a public policy of protecting *victims* of domestic violence, there is no “clear or truly public” policy extending that same rationale to law enforcement officers.

VI. CONCLUSION

This Court should reverse the trial court's denial of the County's motion for partial summary judgment and order the trial court to dismiss Respondents' claim for wrongful termination in violation of public policy.

DATED this 5th day of August, 2019.

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

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