FILED
Court of Appeals
Division II
State of Washington
10/21/2019 4:08 PM

Case No. 53080-5-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

DANIEL BRAY, individually, and JOEY TRACY, individually,

Respondents,

v.

PIERCE COUNTY,

Appellant.

REPLY BRIEF OF APPELLANT

Blake Marks-Dias, WSBA No. 28169
John T. Bender, WSBA No. 49658
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
Telephone: 206-625-8600
Facsimile: 206-625-0900
Email: bmarksdias@corrcronin.com
jbender@corrcronin.com

Attorneys for Appellant Pierce County

TABLE OF CONTENTS

I. REPLY ARGUMENT 1

A. Summary judgment is appropriate because Respondents have failed to establish essential elements of their claims. 1

1. The existence of a clear mandate of public policy is a legal question. 2

2. Employer misconduct and a clear mandate of public policy are two essential elements of a prima facie whistleblower wrongful termination claim. 4

3. Neither credibility determinations nor conclusory expert testimony create a factual issue of a legal question. 6

B. Respondents' failure to establish employer misconduct is fatal to their claims of wrongful constructive termination in retaliation for whistleblowing. 7

1. The Deputies did not violate any law by allowing Mr. Annas to retain a firearm that he was legally entitled to possess 8

2. An employee's failure to follow internal training policies, manuals, and guidelines is, at most, negligent—not illegal. 11

a. The PCSD training bulletins, policies, and manuals did not give the Deputies legal authority to confiscate the firearm. 12

b. Even if the Deputies *did* have legal authority to confiscate the firearm, their failure to do so was, at most, negligent and not unlawful 15

c. Respondents' alleged "good faith belief" that the County's agents engaged in misconduct is insufficient to survive summary judgment. 16

C. Respondents have failed to identify any other clear mandate of public policy that was violated by their alleged constructive termination. 18

1. Respondents' reliance on broad and amorphous claims of public policy fail to establish a "clear mandate of public policy." 19
2. The public policy in favor of protecting victims of domestic violence does not extend to the protection of law enforcement officers. 21
D. Respondents are not entitled to whistleblowing protection because they failed to follow Pierce County's whistleblowing procedures. 24
II. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Bott v. Rockwell Intern., 80 Wn. App. 326 (1996) ..... passim
Danny v. Laidlaw Transit Servs., Inc., 165 Wn.2d 200 (2008) 21, 22, 23
Dicomes v. State, 113 Wn.2d 612 (1989) ..... passim
Discargar v. City of Seattle, 25 Wn.2d 306 (1946) 16
Ellis v. City of Seattle, 142 Wn.2d 450 (2000) 11
Farnam v. CRISTA Ministries, 116 Wn.2d 659 (1991) 5
Gardner v. Loomis Armored, Inc., 128 Wn.2d 931 (1996) 2, 18, 20, 21
Karstetter v. King County Corrections Guild, 193 Wn.2d 672 (2019)... 5, 6
Kinney, et al. v. Pierce County,
Pierce County Superior Court Cause No. 18-2-07321-4 9
Martin v. Gonzaga Univ., 191 Wn.2d 712 (2018) ..... passim
Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780 (2005) 16
Parkin v. Colocousis, 53 Wn. App. 649 (1989) 7
Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC ,
171 Wn.2d 736 (2011) 20
Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268 (2015) 19, 20
Sedlacek v. Hillis, 145 Wn.2d 379 (2001) ..... passim
Sherman v. Pfizer, Inc., 8 Wn. App. 2d 686 (2019) 1
Stenger v. State, 104 Wn. App. 393 (2001) 6
Terrell C. v. State, Dep't of Soc. & Health Servs.,
120 Wn. App. 20 (2004) 7
Thompson v. St. Regis Paper Co., 102 Wn.2d 219 (1984) 3, 18, 19
Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46 (1991) 3

Statutes

18 U.S.C. § 925A 11
RCW 26.50.080 ..... 12, 13
RCW 9.41 ..... 9, 10, 15
RCW 9.41.040 ..... 9, 10
RCW 9.41.098 9
RCW 9.41.800 10

Other Authorities

PCC § 3.14.030 24

I. REPLY ARGUMENT

A. Summary judgment is appropriate because Respondents have failed to establish essential elements of their claims.

Summary judgment is appropriate where "a plaintiff fails to present sufficient evidence on all essential elements of the claim" or where "there are no genuine issues of material fact." *Sherman v. Pfizer, Inc.*, 8 Wn. App. 2d 686, 694, ¶¶ 19-20, 440 P.3d 1016 (2019). As this Court recently rearticulated, "[a] genuine issue of material fact exists if reasonable minds could disagree on the conclusion of a *factual* issue." *Sherman*, 8 Wn. App. 2d at 694, ¶ 19 (emphasis added). But, as Respondents concede (Resp. Br. 14), the only question before this Court is a legal one: whether Respondents have established that the County violated a clear mandate of public policy in allegedly constructively discharging them. Because Respondents failed to establish all essential elements of their claims, and because there is no factual issue pertaining to this purely legal question, the County is entitled to summary judgment dismissal of Respondents' claims for wrongful constructive termination in retaliation for whistleblowing.

1. The existence of a clear mandate of public policy is a legal question.

As a "narrow exception to the at-will doctrine," the tort of wrongful discharge in violation of public policy "has generally been limited to four scenarios": where an employee was fired (1) for refusing to commit an illegal act; (2) for performing a public duty or obligation; (3) for exercising a legal right or privilege; or (4) "in retaliation for reporting employer misconduct, i.e., whistle-blowing." *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, ¶ 17, 425 P.3d 837 (2018) (quoting *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996)).

Just as they did below, Respondents continue in this Court to improperly conflate and misstate the elements of a wrongful termination claim. Contrary to Respondents' erroneous assertion otherwise (Resp. Br. 11), the Perritt framework[1] only applies to wrongful termination claims that do <u>not</u> "fit neatly into one of those four recognized categories." *Martin*, 191 Wn.2d at 723-24, ¶¶ 18-19 ("the Perritt framework should not be applied to a claim that falls within one of the four categories of wrongful discharge in violation of a public policy"). (*See* App. Br. 22-23)

---

[1] In *Gardner*, the Washington Supreme Court "adopted a four-part framework based on a treatise written by Henry Perritt to resolve a wrongful discharge suit that did not fit neatly into one of th[e] four recognized categories." *Martin*, 191 Wn.2d at 723, ¶ 18. Those Perritt factors include: (1) a clarity element; (2) a jeopardy element; (3) a causation element; and (4) an absence of justification element. *See Martin*, 191 Wn.2d at 723, ¶ 18. (*See also* App. Br. 23: laying out Perritt framework).

Because Respondents' claims for wrongful constructive termination in retaliation for whistleblowing *do* fit "neatly" into one of the four recognized categories, the standard articulated in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984) and *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991) applies instead of the Perritt framework. *See Martin*, 191 Wn.2d at 724-25, ¶¶ 19-20.

Under *Thompson* and *Wilmot*, an employee bears the initial burden of showing that his or her "discharge may have been motivated by reasons that contravene a clear mandate of public policy." *Martin*, 191 Wn.2d at 725, ¶ 21 (quoting *Thompson*, 102 Wn.2d at 232). In order to establish a prima facie case, the employee thus must show (1) that a "clear mandate of public policy" exists; and (2) that "the public-policy linked conduct was a 'significant factor' in the decision to discharge the worker." *Martin*, 191 Wn.2d at 725, ¶¶ 21-22 (citing *Wilmot*, 118 Wn.2d at 75).

"The question of what constitutes a clear mandate of public policy is one of law." *Martin*, 191 Wn.2d at 725, ¶ 21 (quoting *Dicomes v. State*, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989)). Washington courts have identified only four sources of public policy: "prior judicial decisions or constitutional, statutory, or regulatory provisions or schemes." *Martin*, 191 Wn.2d at 725, ¶ 21. *See also Thompson*, 102 Wn.2d at 232 ("In

determining whether a clear mandate of public policy is violated, 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.") (quoted source omitted).

2. Employer misconduct and a clear mandate of public policy are two essential elements of a prima facie whistleblower wrongful termination claim.

Unlike the other three recognized categories of a wrongful termination claim, two clear mandates of public policy must exist for an employee to maintain a whistleblower wrongful termination claim. The first is inherent to the cause of action and is always known: it is "the public policy found in protecting employees who are discharged in retaliation for reporting employer misconduct, *i.e.*, employee 'whistleblowing' activity.'" *Dicomes*, 113 Wn.2d at 618. The second—which is at issue here—is the clear mandate of public policy that the employer violated or otherwise contravened; in other words, the alleged "employer misconduct." *See Dicomes*, 113 Wn.2d at 620.

In "determining whether a discharge contravenes the public policy of protecting employees who report employer misconduct," this Court therefore "consider[s] whether the employer's conduct constituted either a violation of the letter or policy of the law," *Dicomes*, 113 Wn.2d at 620,

focusing "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, ¶ 21 (emphasis added). Employer misconduct is thus an essential element of a whistleblower wrongful termination claim. *See, e.g.*, *Bott v. Rockwell Intern.*, 80 Wn. App. 326, 335-36, 908 P.2d 909 (1996) (employee must establish that his or her employer "violated either the letter or policy of the law" in order to maintain a claim for wrongful discharge in retaliation for whistleblowing; because "the focus under the *Dicomes* test is on the employer's wrongdoing, not the employee's actions," "the cause of action fails if the employer acted within the law"); *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 671-72, 807 P.2d 830 (1991) (employee's wrongful termination claim for whistleblowing failed in light of employer's "undisputed compliance with the procedural requirements" of the Natural Death Act).

Respondents fail to cite, let alone distinguish, *Bott*. *Karstetter v. King County Corrections Guild*, 193 Wn.2d 672, 685, ¶ 22, 444 P.3d 1185 (2019), upon which Respondents rely instead (Resp. Br. 13), merely reaffirms that "the fundamental purpose of our whistle-blower statutes" is "to encourage those with knowledge of institutional wrongs to come forward in order to safeguard the public." This purpose is based on the "commonsense notion that employers *should abide by the law*."

Karstetter, 193 Wn.2d at 685, ¶ 22 (emphasis added). *Karstetter* is entirely consistent with the holdings of *Dicomes* and *Bott* that a "violation of the letter or policy of the law"— employer misconduct—is an essential element of a whistleblower wrongful discharge claim. *See Dicomes*, 113 Wn.2d at 620; *Bott*, 80 Wn. App. at 335-36.

3. Neither credibility determinations nor conclusory expert testimony create a factual issue of a legal question.

Summary judgment is appropriate for the additional reason that there are no factual issues regarding the existence of a clear mandate of public policy. Nor could there be. Respondents concede that the issue before this Court is a question of law. (Resp. Br. 14) Respondents, not the County, thus "deliberately omit[] a critical legal point": that "witness credibility issues" (Resp. Br. 8) do not create an issue of fact on questions of law. Respondents cannot rely on their own affidavits or an improper "expert" declaration to create a factual issue as to a purely legal issue. (Resp. Br. 8-9)

"Expert opinion that consists solely of legal conclusions is not admissible under the Rules of Evidence and it cannot, by its very nature, create an issue of material fact when it contains only legal conclusions." *Stenger v. State*, 104 Wn. App. 393, 408-09, 16 P.3d 655, *rev. denied*, 144 Wn.2d 1006 (2001). Respondents' "expert" declaration is replete with

impermissible legal conclusions.[2] It does not and cannot create a material issue of fact regarding the purely legal question before this Court. *See, e.g.*, *Terrell C. v. State, Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 30, 84 P.3d 899 ("Legal opinions on the ultimate legal issue are not properly considered under the guise of expert testimony and a trial court errs if it considers those opinions expressed in affidavits."), *rev. denied*, 152 Wn.2d 1018 (2004); *Parkin v. Colocousis*, 53 Wn. App. 649, 653, 769 P.2d 326 (1989) ("Neither the trial court nor an appellate court can consider conclusions of law such as were contained in [expert's] affidavit."). Because Respondents have failed to establish an essential element of their claims—employer misconduct—as a matter of law, the County is entitled to summary judgment dismissal.

B. Respondents' failure to establish employer misconduct is fatal to their claims of wrongful constructive termination in retaliation for whistleblowing.

The County is entitled to summary judgment because Respondents have failed to establish that Deputy Zachary Spencer or Deputy Ara

[2] *See, e.g.*, CP 188: "Court orders are law—they must be followed. Law enforcement violates court orders when officers add requirements or acts that are not in the court order."; CP 189: "Providing David Annas with a firearm was a clear and dangerous violation of the court order . . ." Respondents' "expert" declaration not only contains one impermissible legal conclusion after the other, but those "conclusions" are plainly erroneous. It is indisputable that the Deputies did not violate the Temporary Protection Order ("TPO"), which did not order or authorize them to confiscate Mr. Annas' firearm. (*See* Arg. § B.1, *infra*; App. Br. 14-16)

Steben ("the Deputies") engaged in any unlawful conduct—an essential element of Respondents' claims for wrongful constructive termination "in retaliation for reporting *employer misconduct*." *Dicomes*, 113 Wn.2d at 618 (emphasis added).

The Deputies never violated Pierce County Sheriff Department ("PCSD") "department rules, Washington DV law, [or] the order being served" (Resp. Br. 5) in following the TPO's directive and allowing David Annas to retain possession of his firearm. The Deputies had no legislative or judicial authority to confiscate the firearm. However, even if they *did* have such authority, the Deputies' decision not to confiscate the firearm still did not violate the "letter or policy of the law," *Dicomes*, 113 Wn.2d at 620; at most, it was negligent. Even if negligent, the Deputies at all times "acted within the law." *Bott*, 80 Wn. App. at 336. Accordingly, Respondents' cause of action fails.

1. The Deputies did not violate any law by allowing Mr. Annas to retain a firearm that he was legally entitled to possess.

It is undisputed that nothing in the TPO required the Deputies to confiscate Mr. Annas' firearm. (*See* CP 98-101) 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 Deputies did not violate

"Washington DV law" or "the order being served" (Resp. Br. 8) by following the TPO's express directive allowing Mr. Annas to gather his personal belongings and leave the property without incident. Not only did the Deputies not have a legal obligation to confiscate Mr. Annas' firearm,[3] they in fact had no legal authority to do so.[4]

Mr. Annas had a statutory right to retain possession of his firearm under RCW 9.41.098. RCW 9.41.098, which Respondents fail to even cite, authorizes a court to order the forfeiture and confiscation of a firearm only where certain statutory requirements are satisfied—none of which were satisfied here. (*See* App. Br. 14-15) 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." RCW 9.41.040, in turn, makes it unlawful for a person subject to a domestic violence protection order ("DVPO") to possess a firearm if (among other factors) the order "[w]as issued after a hearing of

---

[3] Contrary to Respondents' assertion otherwise, the record indicates that Mr. Annas "owned the gun." (Resp. Br. 3 n.1) *See* CP 92: Ms. Annas informing the Deputies "that *David* had guns in the house" (emphasis added); CP 92: Mr. Annas "stated that *he* only had one gun in the house" (emphasis added).

[4] In a separate negligence action against the Deputies, the Pierce County Superior Court recently held as a matter of law that the Deputies had no legal authority to confiscate Mr. Annas' firearm when they served him with the TPO. *See Kinney, et al. v. Pierce County*, Pierce County Superior Court Cause No. 18-2-07321-4. Consistent with GR 14.1, the County again cites to this case only for "such persuasive value as the court deems appropriate." GR 14.1.

which the person received actual notice, and at which the person had an opportunity to participate." RCW 9.41.040(2)(a)(ii).

It is undisputed that there was no hearing of which Mr. Annas "received actual notice" or "had an opportunity to participate." Because Mr. Annas retained his right to legally possess a firearm under RCW 9.41.040, that possession did not, as Respondents imply, "constitute[] unlawful possession of a firearm in the second degree." (Resp. Br. 24-25)

Respondents fail to identify any other statute that authorized the Deputies to confiscate Mr. Annas' firearm. RCW 9.41.800 does not, as Respondents insinuate, require *all* persons subject to a TPO to surrender their firearms. (Resp. Br. 24-25) Rather, RCW 9.41.800 identifies the circumstances in which the court shall, or may, order the surrender of firearms. *See, e.g.*, RCW 9.41.800(1) (court "shall, upon a showing by clear and convincing evidence, that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or is ineligible to possess a firearm under the provisions of RCW 9.41.040" order the immediate surrender of such firearms); 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").

Respondents have failed to identify any statute or "DV law" (Resp. Br. 8) that authorized the Deputies to confiscate Mr. Annas' firearm when they served him with the TPO. Notably, the aforementioned statutes confer authority to the *courts*—not law enforcement officers—to order the confiscation of firearms. Even then, the statutes only allow confiscation and forfeiture under certain circumstances, acting as an exception to the court's otherwise limited authority to confiscate an individual's firearm. Absent a court order, the Deputies' authority to do the same was also limited; they would have "violated the letter or policy of the law," *Dicomes*, 113 Wn.2d at 620, if they had *not* allowed Mr. Annas to take his firearm. *See, e.g.*, 18 U.S.C. § 925A (person erroneously denied a firearm "may bring an action under the State or political subdivision responsible for providing the erroneous information"). The Deputies thus "acted within the law" when they served the TPO. *Bott*, 80 Wn. App. at 336.

2. An employee's failure to follow internal training policies, manuals, and guidelines is, at most, negligent—not illegal.

An employee's failure to follow internal policies, manuals, or "training bulletins" cannot constitute unlawful conduct because it does not violate the letter or policy of a law.[5] The County does not "ignore" that

[5] *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000) (Resp. Br. 17) does not provide otherwise. In *Ellis*, the Court held that a municipal fire code—an

regulations can be a source of public policy. (Resp. Br. 17; *see* App. Br. 23-24) However, internal policies, training materials, and manuals that merely provide guidance to employees do not constitute "regulatory provision[s]." *Martin*, 191 Wn.2d at 725, ¶ 20. Nor do they impose any legal obligation or duty upon employees. Even if the Deputies *did* have authority from PCSD policies and training manuals to confiscate the firearm, their failure to do so constituted, at most, negligence—not "a violation of the letter or policy of the law." *Dicomes*, 113 Wn.2d at 620.

a. The PCSD training bulletins, policies, and manuals did not give the Deputies legal authority to confiscate the firearm.

Respondents' attempts to create law out of PCSD internal policies and manuals in order to argue that the Deputies had authority to confiscate Mr. Annas' firearm are both equally unavailing and, in Respondents' own words, "a complete strawman, based upon an incorrect reading of the DVPO," RCW 26.50.080(1), and the training bulletins. (Resp. Br. 27)

First, RCW 26.50.080(1) directs "a peace officer to accompany *the petitioner* and assist in placing *the petitioner* in possession of those items indicated in the order." (emphasis added). *See also* RCW 26.50.080(2) ("[u]pon order of a court, a peace officer shall accompany *the petitioner* in

---

actual regulation, not a training manual—established a clear mandate of public policy.

an order of protection and assist in placing *the petitioner* in possession of all items listed in the order") (emphasis added). The training bulletin likewise instructs officers to "assist in placing the *Petitioner* in possession <u>of those items indicated in the order</u>" and "expect[s] the court will modify the order to indicate a *petitioner* is authorized to recover 'essential personal effects.'" (CP 216 (italics added, underline in original)) Regina Annas, not David Annas, was the petitioner of the TPO. (CP 38) The Deputies therefore did not violate the TPO or RCW 26.50.080 by refusing to confiscate Mr. Annas' firearm absent a court order or statute authorizing them to do so.

Respondents similarly misplace their reliance on another training bulletin: the Weapons Identification/Surrender Program Training Bulletin instructs. (Resp. Br. 24 n.17, 28-29) The bulletin merely instructs—but does not legally require—officers to "expand their investigative questioning" when "responding to domestics where an arrest is made, or where a report is taken." (CP 213) As a practical matter, the Deputies were doing neither here; they were serving a TPO, not arresting Mr. Annas or taking a police report. Further as Respondents themselves recognize, the bulletin makes clear that there are some circumstances where officers "*may* take a DV abuser's firearms" (Resp. Br. 28, emphasis added)—meaning officers are not legally obligated to do so. Rather, officers are

instructed to "[a]sk the victim if they would like to have the firearm(s) taken for safe keeping," in which case the officers should do so. (CP 213) However, the training bulletin expressly contemplates that officers will not always take firearms for safekeeping. (*See* CP 213: "If the firearm(s) are not taken for safe keeping and only identified follow the instructions below" for recording the firearms in the police report.)

Similarly, Respondents ignore that PCSD's Policy Manual Section 320 on Domestic Violence Calls applies to officers responding to "incidents of domestic violence and *violations* of related court orders." (CP 207, emphasis added) The Deputies here were not responding to an active incident of domestic violence or the violation of a court order; they were serving Mr. Annas in the first instance with a TPO. In any event, the policy manual merely lays out guidelines that "*should* be followed by deputies"—including "[c]ollect[ing] any firearms or other dangerous weapons in the home, *if appropriate and legally permitted*, for safekeeping or as evidence." (CP 207-08, emphasis added)

Here, as previously articulated, the TPO did not authorize or require the Deputies to confiscate Mr. Annas' gun. Nor did the Deputies find it necessary or appropriate to do so at the time. (*See* CP 92: Mr. Annas assured the Deputies that "he would not do anything to violate the order"; CP 96: Mr. Annas "was relatively calm" when he left the

residence; CP 112: Mr. Annas "did not make any threats of violence toward" his wife.) All of the policies and manuals cited by Respondents merely provide guidance and instruction to PCSD officers; they are neither legally binding regulations nor a source of authority for the Deputies to disobey a direct court order. The Deputies indisputably had a "legally cognizable reason" (Resp. Br. 34) under both the TPO and ch. RCW 9.41 for not confiscating Mr. Annas' firearm.

b. Even if the Deputies *did* have legal authority to confiscate the firearm, their failure to do so was, at most, negligent and not unlawful.

Respondents fail to cite any authority supporting the proposition that an employee's violation of an employer's internal guidelines, training manuals, or policies constitutes an "illegal act." (Resp. Br. 30) Accordingly, even if the Deputies *did* have authority under these departmental policies to confiscate the firearm, they did not violate any *law* by failing to do so.

As evidenced by their references not to a clear mandate of public policy or employer misconduct, but rather to "common sense" (Resp. Br. 1, 2, 28), Respondents' wrongful termination claims are merely negligence claims in disguise. Unlike a whistleblower wrongful termination claim, liability for negligence does not require an employer to violate "the letter or policy of the law." *Dicomes*, 113 Wn.2d at 620. *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"); *Discargar v. City of Seattle*, 25 Wn.2d 306, 310, 171 P.2d 205 (1946) ("while a violation of law is negligence per se, there may be . . . circumstances and conditions which excuse an offender's disobedience of the strict wording of a statute"). Accordingly, regardless of whether they had authority to do so, the Deputies' decision not to confiscate the firearm constitutes—at most—negligence. Even if the Deputies *were* negligent, such negligence is insufficient to establish that the Deputies' actions were also unlawful.

c. Respondents' alleged "good faith belief" that the County's agents engaged in misconduct is insufficient to survive summary judgment.

Just as the Deputies' alleged negligence does not constitute a violation of the law, Respondents' alleged good faith belief that the Deputies engaged in misconduct is likewise insufficient to establish the essential element of employer misconduct. *See, e.g.*, *Dicomes*, 113 Wn.2d at 624 (employee failed to establish employer misconduct where she "was not confronted with the choice of violating the law or sacrificing her job," but rather was simply "faced with a difference of opinion as to her superior's chosen course of action"); *Bott*, 80 Wn. App. at 336 (rejecting a

"good faith" standard that "would expand the public policy exception" beyond its narrow confines).

Just last year, our Supreme Court once again reaffirmed this principle in *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 425 P.3d 837 (2018). In *Martin*, the employee alleged that "the university terminated his employment in violation of public policy for raising concerns about the lack of wall padding for the basketball court." 191 Wn.2d at 721, ¶ 11. The Court rejected the employee's argument, holding as a matter of law that no clear mandate of public policy existed because there was "no policy or regulation" or "roots in regulation or judicial precedent" requiring the university to install wall padding. *Martin*, 191 Wn.2d at 725, ¶ 21. The Court went on to clarify that its analysis would not change even if the employee "truly believed the unpadded walls posed a danger to students . . . 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, ¶ 21.

Respondents fail to distinguish *Martin* in any meaningful way, relying instead on a single, conclusory sentence in a footnote. (Resp. Br. 16 n.12) Just as in *Martin*, Respondents here also "merely had an opinion" (Resp. Br. 16 n.12) about how the Deputies performed their duties. Even assuming, *arguendo*, that the Deputies could have lawfully

confiscated Mr. Annas' firearm, the Deputies (and, as such, the County) did not violate any law by declining to do so. Respondents' "mere opinion" that the Deputies should have confiscated the firearm, and were negligent in failing to do so, "does not constitute a clear mandate of public policy"—even if Respondents "truly believed" the firearm "posed a danger."[6] *Martin*, 191 Wn.2d at 725, ¶ 21. Respondents did not, as they claim, heroically "speak up in the face of illegal acts" (Resp. Br. 2, 30), because the Deputies did not commit any "illegal acts."

C. Respondents have failed to identify any other clear mandate of public policy that was violated by their alleged constructive termination.

Although Respondents erroneously conflate the *Thompson* and Perritt standards (*see* Resp. Br. 10-11), their wrongful termination claims fail under either test. Just as they could not establish that the County violated the letter or policy of the law in their whistleblower wrongful termination claim, Respondents similarly fail to establish the "clarity element" of the Perritt test: "the existence of a clear public policy." *Martin*, 191 Wn.2d at 723, ¶ 18 (quoting *Gardner*, 128 Wn.2d at 941).

---

[6] The County maintains that the Deputies were not negligent in following the TPO's directive and declining to confiscate Mr. Annas' firearm when the Deputies lacked any legal authority to do so. Contrary to Respondents' claims, Mr. Annas was not "visibly upset" by the time the Deputies left the residence. (Resp. Br. 28) (*See* CP 96: Mr. Annas "was relatively calm" when he left the residence.)

Instead, Respondents resort to the exact type of amorphous claims of public policy that our Supreme Court has repeatedly rejected. Because Respondents still cannot establish an essential element of their claims, their wrongful termination claims fail as a matter of law.

1. Respondents' reliance on broad and amorphous claims of public policy fail to establish a "clear mandate of public policy."

The wrongful discharge "tort is a narrow exception to the at-will doctrine and must be limited only to instances involving *very clear* violations of public policy." *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 276, ¶ 9, 358 P.3d 1139 (2015) (emphasis added). "[F]indings of public policy must be *clearly grounded* in legislation or prior jurisprudence in order to protect employers from frivolous lawsuits." *Sedlacek v. Hillis*, 145 Wn.2d 379, 385, 36 P.3d 1014 (2001) (emphasis added). For this reason, courts have "imposed additional limitations on the establishment of public policy," *Sedlacek*, 145 Wn.2d at 389, and must "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 (emphasis omitted).

Consistent with these "additional limitations," 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, 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 v. TeleTech Customer Care Mgmt. (Colo.) LLC* , 171 Wn.2d 736, 757, ¶ 35, 257 P.3d 586 (2011); *see also Sedlacek*, 145 Wn.2d at 389 (asserted public policy "must be truly public" and it "must be clear"). As our Supreme Court recently reaffirmed, only "clear violations of important, recognized public policies could expose employers to liability," so as to "protect[] employers from having to defend against amorphous claims of public policy violations." *Rose*, 184 Wn.2d at 276, ¶ 9.

Respondents' claims that their alleged constructive terminations "implicate" sweeping public policies such as "general considerations against firearm violence" (Resp. Br. 23) and "protecting DV victims" (Resp. Br. 20) are so expansive that the exception would swallow the rule. *See Roe*, 171 Wn.2d at 756, ¶ 33 (tort of wrongful discharge "should be narrowly drawn so that it does not swallow the general rule of at-will employment"). Indeed, our Supreme Court warned *against* this overexpansive application of the narrow tort of wrongful discharge in *Gardner*. (Resp. Br. 25) *See Gardner*, 128 Wn.2d at 942-43 ("A limited, albeit clear, public policy can be found in the cited statutes, but Plaintiffs

give an overexpansive reading of those statutes in their attempt to present a general policy encouraging citizens to help in law enforcement.”).

While *Gardner* ultimately found a clear public policy in favor of saving a human life from “*imminent* danger,” the Court held that neither a “broad good samaritan policy” nor a general policy to “encourage citizens to come to the aid of law enforcement” satisfied the clarity element. 128 Wn.2d at 942-44 (emphasis added). Despite the existence of prior judicial and legislative expressions of both proposed public policies, the Court reasoned that such broad policies were not “of sufficient importance to warrant interfering with an employer’s workplace and personnel management.” *Gardner*, 128 Wn.2d at 949. *See also Sedlacek*, 145 Wn.2d at 387 (*Gardner* court “was careful to draw the public policy as a narrow one and rejected broader proposals, including a general policy to encourage helping others”). This Court should likewise reject Respondents’ broad and amorphous proposals of public policy.

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

In addition to being overexpansive, the public policies Respondents articulate relating to domestic violence and gun violence do not satisfy the clarity element because they do not extend to the protection of law enforcement officers.

The County does not at all "ignore the *Danny* decision" or the "judicial policy on DV." (Resp. Br. 14 n.8, 16; *see* App. Br. 26-28) On the contrary, the County acknowledges that Washington has a recognized public policy of "protecting domestic violence survivors and their children and holding domestic violence perpetrators accountable." *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 220-21, ¶ 33, 193 P.3d 128 (2008). However, 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. The "source must *also* state a clear mandate of Washington public policy . . . . in favor of protecting" *the employee* bringing the wrongful termination claim. *Sedlacek*, 145 Wn.2d at 393.

Sedlacek, which Respondents do not even attempt to distinguish, remains instructive. The Court in *Sedlacek* rejected the plaintiff's argument that she had been wrongfully discharged in violation of public policy because of her association with her disabled husband. 145 Wn.2d at 381-82. The Court held instead that the American Disabilities Act "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*"—i.e., the plaintiff. *Sedlacek*, 145 Wn.2d at 393 (emphasis added). Where "[n]either the Legislature nor Washington case law has adopted a policy to protect citizens *in*

[plaintiff's] situation from discrimination," a plaintiff fails as a matter of law to establish a clear mandate of public policy. *Sedlacek*, 145 Wn.2d at 392 (emphasis added) (remanding for summary judgment dismissal of plaintiff's wrongful termination claim).

In light of *Sedlacek*, Respondents again misplace their reliance on *Danny*. (Resp. Br. 20) The Court in *Danny* recognized a clear public policy to protect domestic violence survivors; the plaintiff herself was a domestic violence survivor. Thus, in contrast to *Sedlacek*, the public policy in *Danny* was adopted "to protect citizens in *[plaintiff's]* situation." *Sedlacek*, 145 Wn.2d at 392 (emphasis added). Respondents fail to articulate how *Danny* promulgates a public policy of protecting law enforcement officers in Respondents' situation from domestic violence.

As in *Sedlacek*, Respondents fail to identify a clear public policy expanding the protection of domestic violence victims to law enforcement officers. Neither the legislature nor Washington courts have adopted a clear mandate of public policy to protect law enforcement officers from domestic violence. Instead, the public policies that Respondents claim were violated by their discharge relate only to "protecting DV *victims* from their abusers." (*See, e.g.*, Resp. Br. 18, 21 (emphasis added)) The "[a]doption of previously unrecognized public policy is better left to the

Legislature." 145 Wn.2d at 393. Respondents' wrongful termination claims fail as a matter of law.

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

Separate from their inability to establish employer misconduct as an essential element of their whistleblower claim, Respondents are not entitled to whistleblower protection at all as a matter of law because they failed to follow Pierce County's whistleblowing procedures. As set forth more fully in the County's opening brief (App. Br. 11-13), Pierce County's whistleblower regulations make clear that, absent an emergency, "an employee *shall* submit a written report" of alleged improper governmental action before externally disclosing such information. Pierce County Code ("PCC") § 3.14.030 (emphasis added). An employee "who fails to make a good faith attempt to follow this policy shall not receive the protections" of PCC's whistleblower regulations. PCC § 3.14.030.

Respondents do not address the County's contention that they failed to submit a written report as required by Pierce County's whistleblowing procedures, effectively conceding the argument. Nor is there any evidence in either Respondent's affidavit that gives rise to even an inference that he submitted to Pierce County Sheriff's Department ("PCSD") a written report of the alleged misconduct. (*See* CP 200-05,

227-29) Accordingly, Respondents are not entitled to any whistleblower protection and their claims should be dismissed as a matter of law.

II. 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' claims for wrongful constructive termination in violation of public policy.

DATED this 21st day of October, 2019.

CORR CRONIN LLP

s/ Blake Marks-Dias

Blake Marks-Dias, WSBA No. 28169
John T. Bender, WSBA No. 49658
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
Telephone: 206-625-8600
Facsimile: 206-625-0900
Email: bmarksdias@corrcronin.com
jbender@corrcronin.com

Attorneys for Appellant Pierce County

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

On this date, I caused a true and correct copy of the foregoing Reply Brief of Appellant to be served on the following attorneys of record herein via Electronic Court Filing service and e-mail pursuant to the parties' written electronic service agreement:

John R. Connelly, Jr.
Meaghan M. Driscoll
Jackson R. Pahlke
Connelly Law Offices, PLLC
2301 N. 30th Street
Tacoma, WA 98403
jconnelly@connelly-law.com
mdriscoll@connelly-law.com
jpahlke@connelly-law.com
bmarvin@connelly-law.com
ksolt@connelly-law.com
Attorneys for Respondent

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

DATED this 21st day of October, 2019, at Seattle, Washington.

s/ *Christy A. Nelson*
Christy A. Nelson

CORR CRONIN

October 21, 2019 - 4:08 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53080-5
Appellate Court Case Title:	Daniel Bray, Respondent v. Pierce County, Petitioner
Superior Court Case Number:	18-2-06355-3

The following documents have been uploaded:

- 530805_Briefs_20191021160125D2132258_2270.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was 2019 10 21 Reply Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- JPahlke@connelly-law.com
- bmarvin@connelly-law.com
- dpatterson@corrcronin.com
- jbender@corrcronin.com
- jconnelly@connelly-law.com
- linda.morlin@lewisbrisbois.com
- matt@tal-fitzlaw.com
- mdriscoll@connelly-law.com
- phil@tal-fitzlaw.com
- sdamon@corrcronin.com
- sfogg@corrcronin.com
- tainsworth@corrcronin.com

Comments:

Reply Brief of Appellant

Sender Name: Blake Marks-Dias - Email: bmarksdias@corrcronin.com
Address:
1001 4TH AVE STE 3900
SEATTLE, WA, 98154-1051
Phone: 206-625-8600

Note: The Filing Id is 20191021160125D2132258