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NO. 319504-III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JOETTA RUPERT,

Appellant,

v.

KENNEWICK IRRIGATION DISTRICT,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Plaintiff, Joetta Rupert, commenced her employment with the Kennewick Irrigation District (“District”) in 2003. Ms. Rupert worked her way up within the organization through a series of promotions until she was manager of the Real Estate Department. Ms. Rupert reported to the Board of Directors (“Board”), which at the time of her termination was comprised of all males. CP 002. Contrary to the assertions made by the District in its Response Brief, Ms. Rupert never received any oral warnings, letters of counseling or reprimand, or a negative written performance evaluation during her employment with the District. CP 186-187, CP 191, CP 193, CP 196, CP 198, CP 206. The District claims that the “Board became dissatisfied with her work and the overall costs of the Real Estate Department”. See page 1 of Respondent’s Brief. Unfortunately, there is no evidence in the record to support this bold assertion other than the self-serving statements in the post-termination Declarations of former and current Board members. CP 093, CP 110-113, CP 117-120, CP 124-128.

During Ms. Rupert’s employment with the District she had, in close temporal proximity to her termination, complained to several members of the District’s Board that she was being discriminated against based upon her gender and subjected to a hostile work environment. CP

079, CP 207, CP 250-253, CP 380. The District's assertion that Ms. Rupert did not make any complaints of gender discrimination until after she was terminated is simply not supported by the record and, nevertheless, is a credibility determination which cannot be made by the trial court at summary judgment. *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 623 (2002) ("The trial court has no authority to weigh evidence or testimonial credibility".)

During Ms. Rupert's employment with the District she also, in close temporal proximity to her termination, complained to several members of the District's Board, in part, relating to the District's use of its reserve funds and accounting for those reserve funds, inconsistent investment reports and complaints about the Board not meeting its fiduciary duties relating to the reserve funds. CP 079, CP 207, CP 250-253, CP 380.

Ms. Rupert was placed on administrative leave by the District's Board of Directors through its attorney, Brian Iller, on July 20, 2010, pending an investigation of a charge that Ms. Rupert had "attempted to use sick leave for time off to attend a personal injury trial" as a plaintiff arising out of a motor vehicle accident she had been involved in during the scope of her employment with the District. CP 313, CP 395.

Ms. Rupert was terminated *without cause* on July 27, 2010, after an open meeting in executive session by the Board. No specific reason was provided to Ms. Rupert at the time of her termination. CP 011, CP 336-337. The District's assertion in its Response Brief that Ms. Rupert was terminated by the Board for "poor performance" on July 27, 2010, is again not supported by the record and is not supported with any written documentation. CP 093, CP 110-113, CP 117-120, CP 124-128.

II. ARGUMENT

A. Ms. Rupert met her burden of production on the elements of retaliatory discharge under RCW 49.60.210.

The assertion that Ms. Rupert did not oppose an unlawful practice as it relates to her retaliatory discharge claim under RCW 49.60.210 is again not supported by the record or the law. The District goes on to state that "she never did make a complaint that would be fairly considered as oppositional conduct". See page 5 of Response Brief. The District, in fact, relied upon a United States Supreme Court case which held that specific complaints of gender based discrimination made to an Assistant Superintendent, the employee's supervisor, and to another Assistant Superintendent constitutes opposition. *Clark County School District v. Breeden*, 532 U.S. 268, 269-270 (U.S. 2001). That is exactly what Ms. Rupert did in close proximity to her termination.

On July 17, 2010, (one month before she was placed on administrative leave) she informed Board member, Gene Huffman (“Huffman”) that she needed to speak to the District Manager, Charles Freeman (“Freeman”) about another male employee, Scott Revell (“Revell”) working outside the scope of his responsibilities and interfering with her job. CP 191, CP 223, CP 236-239, CP 383. Huffman, in response, ordered Ms. Rupert not to contact Freeman because he had been “burned before” stating that he was not comfortable working with women and that he was not comfortable being alone with another woman. CP 235-239, CP 379. Huffman specifically told Ms. Rupert “Don’t talk to the guy”, and “stay away from him”. CP 238. Ms. Rupert opposed Huffman’s response by protesting that this was an unprofessional practice and further that she did not appreciate the discriminatory treatment. CP 200, CP 227, CP 235-239. As a result, Ms. Rupert was not allowed to have contact with a male manager. CP 239.

Also, as another example of oppositional and protected activity in close proximity to her termination, on July 15, 2010, (five days before Ms. Rupert was placed on administrative leave and less than two weeks before her termination *without cause*) she met with Huffman in her office for over two hours. The meeting in Ms. Rupert’s office was precipitated by earlier in the week notifying the District’s Board President, John Jaksch,

(“Jaksch”) in a private meeting at a local restaurant and later after she called him on the telephone, to complain that she believed she was being discriminated against on the basis of her gender and that she intended upon filing a formal complaint against Board member Gene McGuire (“McGuire”) for hostile work environment based upon a series of incidents with McGuire over the course of her employment. CP 195, CP 242-244, CP 246-247, CP 258, CP 382-383.

Ms. Rupert had also complained to Board member, John Pringle, (“Pringle”) that she was not being treated in the same manner as other male managers, Freeman and Revell, and that she believed this unequal treatment was based upon gender. In response, Pringle became “very upset, his face was red and his eyes bulged out” and Ms. Rupert was told to do as she was told and not to question the authority of the Board. CP 189.

The case law cited by the District in its Response Brief asserting Ms. Rupert’s failure to present evidence that she opposed the unlawful practice actually supports Ms. Rupert and not the District and, therefore, supports a reversal of the trial court’s order granting summary judgment to the District on this particular claim. See *Ray v. Henderson*, 217 F.3d 1234, 1240 Note 3 (9th Cir. 2000) (Making an informal complaint to a supervisor about discriminatory conduct is a protected activity.)

B. The District failed to file a motion striking Ms. Rupert's Declaration in opposition to summary judgment.

Furthermore, the District, realizing that there is substantial evidence in the record of both discriminatory and non-discriminatory inferences which must be resolved in favor of Ms. Rupert at time of summary judgment, incredibly asserts now that the appellate court should not consider the Declaration that Ms. Rupert signed and provided in opposition to the District's Motion for Summary Judgment. See page 8 and 11 of Respondent's Brief. See also CP 464-466.

Unfortunately, the District never filed a Motion to Strike Ms. Rupert's Declaration on the basis that it allegedly contradicted her prior sworn deposition testimony. See page 8 of Respondent's Brief at fn. 4.

It is the appellate court's task to review a ruling on a Motion for Summary Judgment based on the precise record considered by the trial court. *Washington Federation of State Employees v. Office of Financial Management*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993). That record includes those documents designated in an Order Granting Summary Judgment. RAP 9.12. As a result, if an Order of the trial court indicates that it considered certain evidentiary submissions in reaching its determination, those items designated in the trial court's Order are part of the record upon which the appellate court must base its review. See *Noble*

Manor Company v. Pierce County, 133 Wn.2d 269, 284, note 9, 943 P.2d 1378 (1997); *Tanner Electric Operation v. Puget Sound Power and Light*, 128 Wn.2d 656, 675, note 6, 911 P.2d 1301 (1996).

In ruling on the District's Motion for Summary Judgment, the trial court specifically noted that it had reviewed the Declaration of Joetta Rupert in granting the District's Motion for Summary Judgment. Accordingly, the Declaration of Joetta Rupert constitutes a part of the record upon which the appellate court must base its review. RAP 9.12; *Tanner Electric Cooperative*, 128 Wn.2d at 675, note 6.

If the District had believed that Ms. Rupert's Declaration was not properly before the trial court, it should have brought a motion to strike such evidence from the record. Here, the District did not file a Motion to Strike the evidence contained in Ms. Rupert's Declaration and which is now part of the record. *Owners v. Plateau*, 139 Wn. App. 743, 755 (2007). Where the trial court does not strike evidence, the appellate court will not strike such evidence on its own initiative. It is the duty of the appellate court to review evidentiary rulings made by the trial court; it is not the duty of the appellate court to make evidentiary rulings. *Id* at 756. Similarly, it is the duty of the appellate court to review a trial court's ruling on summary judgment on the record actually before the trial court. *Washington Federation of State Employees*, 121 Wn.2d at 163. Thus,

because the evidence proffered by Ms. Rupert in her Declaration in opposition to the District's Motion for Summary Judgment was reviewed by the trial court as referenced in the Order, and because the trial court made no ruling on the admissibility of this evidence to which any error has been assigned, the evidence constitutes a part of the record which was before the trial court at the time of summary judgment and is, consequently, properly before the appellate court as well. *Owners v. Plateau*, 139 Wn. App. at 756.

Ms. Rupert has met her burden of production relating to establishing first a prima facie case of retaliatory discharge. Ms. Rupert must show that (1) she engaged in a statutorily protected activity, (2) the District took an adverse employment action against her, and (3) there is a causal link between the activity and adverse action. *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 862, 991 P.2d 1182 (2000).

With regard to the first element of Ms. Rupert's prima facie case, it is not necessary that the conduct she complained about to the District actually be unlawful. *Renz v. Spokane Eye Clinic*, 114 Wn. App. at 619.

With regard to the third element, the District correctly cites the law holding that evidence of close proximity in time between the adverse employment action and the protected activity, along with evidence of

satisfactory work performance, can suggest an improper motive. *Campbell v. State*, 129 Wn. App. 1023, 118 P.3d 888 (2005).

In this case, Ms. Rupert has met her burden of production relating to establishing first a prima facie case for retaliatory discharge. There is evidence of proximity in time between Ms. Rupert bringing her good faith and reasonable concerns of gender discrimination and harassment to the Board, and the Board's subsequent refusal to do anything about it, and her termination on July 27, 2010. CP 189, CP 191, CP 195, CP 196, CP 200-201, CP 223, CP 227, CP 235-239, CP 379.

Ms. Rupert also met her burden of production that the District's decision was unworthy of belief. The Board placed Ms. Rupert on administrative leave in close proximity to her complaints about Freeman, Revell, and McGuire, as well as her notice to the Board that she was going to file a formal complaint of hostile work environment against McGuire. CP 195, CP 287-292, CP 379, CP 382-382.

The Board subsequently fired her without cause without providing a specific reason. CP 335-336. Yet the Board placed her on administrative leave alleging a violation of the District's sick leave policy. CP 313. During the course of depositions taken in this lawsuit, Board members were instructed on the advice of counsel to refuse to answer

questions as to the reasons for Ms. Rupert's termination, citing *executive privilege*. CP 336-339.

The District asserts in its Response Brief that the Board had been dissatisfied for some time with Ms. Rupert's performance in the Real Estate Division. The District further contends that the Board discovered that Ms. Rupert had taken sick leave when she was actually attending her own personal trial for her own benefit. CP 110-113, CP 124-128, CP 117-120. The District then goes on to state that "this was the proverbial straw that broke the camel's back." See Respondent's Brief at page 16.

However, careful review of the record reveals there are genuine issues of material fact that should have precluded summary judgment. First, there is no evidence in the record that the District ever documented any of her alleged shortcomings or informed her that these same problems were a basis for her *without cause* termination. CP 186-187, CP 110-113, CP 117-120, CP 124-128, CP 191-193, CP 206; see *Renz* at 625 (summary judgment reversed where employer failed to document any of the employee's shortcomings until it decided to fire her.). Secondly, Ms. Rupert has produced conflicting evidence in the record that she made the District and Board aware of what she was doing before she ever received any sick leave benefits. The records reflects that Ms. Rupert candidly told Huffman on July 15, 2010, in response to his question as to how she was

going to claim her leave to attend her personal injury trial, that she was going to use her accrued sick leave. Ms. Rupert then inquired as to whether this was an issue. Huffman responded by stating, “No, there isn’t.” CP 194, CP 286. Ms. Rupert reiterated to Huffman that if there was a problem that she could change it and claim accrued vacation benefits instead. Huffman responded by again telling her, “No, don’t change it.” CP 188, CP 200, CP 286.

When Ms. Rupert is placed on administrative leave on July 20, 2010, the motion that placed her on leave is made by Jaksch who Ms. Rupert had notified of her complaints of gender discrimination and harassment a few weeks before. The motion is then seconded by McGuire, the target of her hostile work environment claim. CP 359.

When Ms. Rupert is terminated *without cause* on July 27, 2010, no specific reason was provided by the Board. Yet attorney Iller’s letter notifying Ms. Rupert of the District’s decision to place her on administrative leave implies that her conduct in attempting to “use sick leave for time off to attend a personal injury trial for approximately one week,” was tantamount to fraud. CP 313.

On appeal from a summary judgment motion being granted, the issue is “whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury’s role, once a burden of

production has been met.” *Renz v. Spokane Eye Clinic*, 114 Wn.App. at 623.

This mountain of evidence of conflicting reasons or evidence rebutting the accuracy or believability of the District’s decision to terminate Ms. Rupert *without cause* requires a jury to resolve these competing inferences which cannot be resolved at summary judgment relating to her retaliatory discharge claim under RCW 49.60.210. *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 861-863, 851 P.2d 716 (1993), review denied 122 Wn.2d 1018 (1993).

C. Ms. Rupert met her burden of production on the jeopardy and causation elements of her tort of wrongful discharge claim.

The District’s Response Brief attempts to assert that Ms. Rupert is basing her wrongful discharge claim on a violation of WLAD. The record is clear that Ms. Rupert’s wrongful discharge claim is based upon her activities as a whistleblower in reporting her concerns about the financial issues, in particular, the use of the reserve fund, which the District admits prior to her termination had been brought to the Board. CP 110-113, CP 117-120, CP 124-128.

The District then proceeds to argue that she cannot satisfy the jeopardy element. *Gardner v. Loomis Aramored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996).

As a procedural matter, the District at summary judgment conceded the existence of the *clarity* element and did not address the absence of *justification* element. Therefore, only the *jeopardy* and *causation* elements are at issue on appeal. CP 106-108.

In Ms. Rupert's Appellate Brief, one of the Assignment of Errors she identified is whether the remedies available to a public employee under Chapter 42.41 RCW are adequate as a matter of law, such that the employee may not assert a tort claim for wrongful discharge in violation of public policy? The answer is clearly no. The basis for this answer and which mandates a reversal of the trial court's Order Granting Summary Judgment to the District on Ms. Rupert's tort of wrongful discharge claim, is based upon the Washington Supreme Court's recent holding in *Piel v. Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013). In *Piel*, the Washington Supreme Court, in reviewing a similar statute, Chapter 41.56 RCW, determined that it was not adequate as a matter of law because it did not allow for the recovery of emotional distress damages and other tort damages. *Id* at 613. As a result, Chapter 41.56 RCW was not adequate as a matter of law and, therefore, an at-will public employee may assert a tort claim for wrongful discharge in violation of public policy. *Id.* at 609.

Chapter 42.41 RCW, is similar to Chapter 41.56 RCW, because it does not allow a local governmental employee, like Ms. Rupert, to recover

comprehensive remedies, in particular, emotional distress damages and other tort damages. The District concedes that RCW 42.41.040(7) provides no recovery for emotional distress damages and other tort damages. The relief under RCW 42.41.040(7) is limited to the potential for an administrative law judge after an administrative hearing, and assuming the public employee prevails, to award relief which is limited to reinstatement, with or without back pay, injunctive relief and discretionary costs and reasonable attorney fees to the prevailing party. RCW 42.41.040(7).

The District attempts to cite as authority several Court of Appeals decisions which were decided before the Washington Supreme Court's decision in *Piel* for the proposition that other courts have found statutes that do not provide for compensatory damages adequate to protect the public's interest. *Rose v. Anderson Hay and Grain Company*, 168 Wn.App. 474, 478, 276 P.3d 382, 384 (2012); *Weiss v. Lonquist*, 293 P.3d 1264, 1268-69 (2013). Those lower court appellate decisions, however, are clearly superseded and have no controlling authority based upon the Washington Supreme Court's majority decision in *Piel*.

The District then goes on to contend in its Response Brief that there is no evidence in the record that the admitted public policy linked

conduct caused her dismissal. *Gardner v. Loomis Armored, Inc.*, 128 Wn.3d at 941; see Respondent's Brief at page 30.

Again, the District raises the same unpersuasive arguments "that the Board had been unhappy with Ms. Rupert's performance and the performance of her department for some time." See Respondent's Brief at page 31. The District then asserts in its Response Brief the following:

The decision had nothing to do with her complaints about how the District was using the Endowment Fund or any claim that she had been discriminated against because of her gender. The District willingly investigated her concerns and even hired an independent auditor to determine if the funds had been mishandled. The Board did not bear any animus for bringing to their attention her concerns.

See Respondent Brief at page 31.

All of these assertions in the District's Response Brief raise material questions of fact precluding summary judgment. *Kuyper v. Dep't of Wildlife*, 79 Wn.App. 732, 739 (1995)

In this case, there is conflicting evidence and competing inferences in the record which preclude summary judgment as well on this tort claim based upon the last conversation Ms. Rupert and Huffman had as to whether her attempt to use sick leave under the District's policy because of her one-week absence from work was a basis, in fact, for her termination, or whether the District was motivated by that reason, or whether the reason is sufficient to even motivate an adverse employment

action against a long-term employee who had been promoted and had no documented performance problems. *Chen v. State*, 86 Wn.App. 184, 190, 937 P.2d 612 (1997); CP 188, CP 200, CP 286.

The District admitted that more than one Board member was aware of Ms. Rupert's concerns or complaints about the reserve fund, which are well documented in the record prior to her termination. CP 110-113, CP 117-120, CP 124-128.

On Board member, Jaksch, commented, after being shown evidence of her concerns or complaints relating to the use and accounting for the reserve fund and mature investments being cashed and used to cover operating expenses, which were not authorized by the Board, that "someone could go to jail for this." CP 192.

Another Board member, McGuire, for whom Ms. Rupert had notified other Board members of her intent to file a formal complaint of hostile work environment (in close proximity to her termination), was extremely critical of Ms. Rupert for disclosing this evidence to the Board. CP 258.

Board members were concerned that they had not been aware of this and, therefore, meeting their fiduciary duties. CP 258.

One Board member, Dr. Bill Kinsel ("Kinsel"), had warned Ms. Rupert that any whistleblower complaints would result in the Board

“circling the wagons” and implying that she would be “fired” if she ever brought any formal complaints of this nature to the Board. CP 276-279. Kinsel did not have any criticisms of the work performed by Ms. Rupert while she was an employee of the District. CP 206.

Ms. Rupert had recommended to the Board that an outside auditor come in to perform an audit relating to her complaints. CP 189, CP 196. The auditor’s report also corroborated her complaints. CP 052.

III. CONCLUSION

Based on the foregoing, Ms. Rupert requests that the Division III Court of Appeals reverse the trial court’s ruling and order dismissing her claims of retaliatory discharge under RCW 49.60.210 and her tort of wrongful discharge claim because genuine issues of material fact exist on both claims which warrant a trial of this matter.

RESPECTFULLY SUBMITTED this 26th day of February, 2014.

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