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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 319504-III

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

JOETTA RUPERT,

Appellant,

v.

KENNEWICK IRRIGATION DISTRICT,

Respondent.

APPELLANT'S BRIEF

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I. INTRODUCTION

Plaintiff, Joetta Rupert, brought this lawsuit against her former public employer, the Kennewick Irrigation District (“District”), alleging discrimination and hostile work environment under Chapter RCW 49.60 et seq., Washington’s Law Against Discrimination (“WLAD”); retaliation in violation of WLAD and Chapter RCW 42.40 et seq., Washington State Employee Whistleblower Protection Act; common law tort of wrongful discharge in violation of a recognized public policy; a claim for unpaid wages under Chapter RCW 49.48 et seq.; and negligent hiring, supervision and retention.

Ms. Rupert later amended her original lawsuit voluntarily dismissing the negligent hiring, supervision and retention claim. The parties resolved the wage claim through a negotiated settlement. The amended lawsuit also clarified that it was being brought, in part, under Chapter RCW 42.41 et seq. the Washington Local Employee Whistleblower Protection Act.

For purposes of this appeal as set forth in Ms. Rupert’s Assignment of Errors and Issues Pertaining to those Errors, she asserts that the trial court improperly granted summary judgment to the District on her claims of retaliatory discharge under WLAD and common law tort claim for

wrongful discharge arising out of a recognized public policy protecting whistleblowers.

Ms. Rupert worked for the District commencing 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 was an *Ex-officio*¹ member of the Board of Directors (“Board”), which at the time was comprised of all males. CP 002 Ms. Rupert reported directly to the District’s Board. Ms. Rupert never received any oral warnings, letters of counseling or reprimand or a negative performance evaluation during her employment with the District. CP 186-187, CP 191-193, CP 196, CP 198, CP 206

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, 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. Ms. Rupert also complained to more than one Board member that she was being discriminated against

¹ The term is defined by Black’s Law Dictionary Abridged Fifth Edition pg. 297 as follows: “From office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office. Powers may be exercised by an officer which are not specifically conferred upon him, but are necessarily implied in his office; these are *ex officio*.”

based upon her gender and subjected to a hostile work environment. 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 that 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 and executive session by the Board. No specific reason was provided to Ms. Rupert at the time of her termination. CP 011, CP 336-337

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the District's motion for summary judgment and dismissing Ms. Rupert's claim of retaliation under RCW 49.60.210.
2. The trial court erred in granting the District's motion for summary judgment and dismissing Ms. Rupert's common law tort claim of wrongful discharge in violation of a recognized public policy that protects whistleblowers.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the record demonstrates genuine issues of material fact precluding the granting of summary judgment on Ms. Rupert's claim of retaliation under RCW 49.60.210? (First assignment of error.)
2. Whether the record demonstrates genuine issues of material fact precluding the granting of summary judgment on Ms. Rupert's common law tort claim of wrongful discharge in violation of a recognized public policy?
3. Are the remedies available to a public employee under chapter 42.41 RCW adequate as a matter of law, such that the employee may not assert a tort claim for wrongful discharge in violation of public policy?

IV. STATEMENT OF THE CASE

Ms. Rupert was hired by the District in 2003. Ms. Rupert received a series of promotions throughout her career with the District. The last promotion she received was manager of the Real Estate Department. Ms. Rupert worked on the District's Real Estate Committee which one or more Board members also served on. CP 187 Ms. Rupert, at all times, performed her duties in a satisfactory manner. There is no evidence in the record that Ms. Rupert ever received any verbal counseling, written warnings, letter of reprimand or a negative performance evaluation prior

to her unlawful discharge on July 27, 2010. The District did not come forward with any evidence of unsatisfactory job performance until after the lawsuit commenced in the form of declarations from current and former board members in support of its Motion for Summary Judgment, which contradict Ms. Rupert's *without cause* termination on July 27, 2010. CP 110-113; CP 117-120; CP 124-128 Ms. Rupert vigorously denied the allegations of unsatisfactory job performance as contained in the record of the summary judgment proceeding. None of the allegations of unsatisfactory job performance were ever brought to Ms. Rupert's attention prior to her termination. CP 186, CP 191-199, CP 206

Throughout Ms. Rupert's employment with the District and up to the time of her termination she had complained to the Board about the District's reserve fund (with an original value of \$15,000,000) being improperly used and accounted for. A District employee, Judy Smith, was aware of her complaints to the Board. CP 207, CP 250-259, CP 380, CP 318-325 Several Board members were aware of her complaints. CP 112, CP 120, CP 127-128, CP 340-341

Ms. Rupert had been told by several Board members to not put her complaints in writing. CP 276-278 Ms. Rupert had been specifically told by one Board member, Dr. Bill Kinsel ("Kinsel"), that the Board would "circle the wagons" and "fire" her if she ever filed a formal complaint,

including a whistleblower complaint under the District's policy. CP 278-280, CP 383

Ms. Rupert was urging the Board to adopt a new policy (a prior one Policy 67 had been repealed on or around 2006 by the Board) to govern how reserve funds should be spent. CP 250-251 Policy 67 required a supermajority before the funds could be accessed. CP 341 Ms. Rupert had opposed the dissolution of Policy 67. CP 195-196, CP 324-325

Ms. Rupert was concerned that the Board was not meeting its fiduciary duties because there was absolutely no public discussion by the Board as to how the reserve funds should be spent, how much of the reserve funds were being spent or where it was being spent. CP 189

Ms. Rupert was also concerned about inconsistent information on investment reports prepared by the District's treasurer and, as a result, she brought those concerns to the Board. CP 252-258, CP 320-325

After the dissolution of Policy 67 Ms. Rupert became concerned about unauthorized expenditures being made by District staff. CP 195-196

Ms. Rupert had shown the Board President, John Jaksch ("Jaksch"), evidence of mature investments (certificates of deposit) being cashed out instead of being reinvested and transferred to the operations

account without Board authority and then used to purchase unauthorized vehicles and compensate District employees for overtime. As a result, some employees in 2009 received more in overtime compensation in 2009 than their annual salary. When Ms. Rupert showed Jaksch the documentation he commented, "somebody could go to jail for this." CP 086-088, CP 192, CP 271-273 Jaksch complimented Ms. Rupert for sharing this documentation with him. CP 192

Board members Jaksch, John Pringle ("Pringle") and Gene Huffman ("Huffman") did not dispute that Ms. Rupert complained about decisions affecting the reserve fund and the accounting of those funds. CP 112, CP 120, CP 127

As a result of Ms. Rupert's complaints being brought to the attention of the Board, on her recommendation, the Board hired an outside auditor, LeMaster & Daniels, to perform an outside audit for calendar years 2006-2009. CP 089, CP 189, CP 196, CP 201, CP 252-259, CP 267, CP 274 Ms. Rupert spoke with the auditor and shared her complaints. CP 267-270 The results of the audit were shared with the Board in May of 2010. The results confirmed many of Ms. Rupert's complaints, and directly contradict the testimony of several Board members. CP 082, CP 268-270

The results of the audit disclosed that the Board was not being provided with “routine financial reports.” CP 051 Furthermore, the audit noted that the District’s investments during the calendar years subject to the audit continued to decrease as the District’s certificates of deposit were redeemed monthly by the accounting division to cover operating expenses. The auditor also disclosed that she was unable to identify documentation supporting the appropriate authorization of the transfer of investment funds to the operating cash account. The auditor also noted that the Board was not receiving and reviewing monthly investment reports. CP 052, CP 059

In November of 2009, the District’s all male board hired a new district manager, Charles Freeman (“Freeman”). CP 224, 235 Freeman refused to communicate in person with Ms. Rupert because she was a woman. CP 235-239 On the other hand, Freeman communicated with male managers, including Scott Revell, the District’s planning department manager who was under Freeman, as well as the all male Board. CP 200, 223, 227

On June 17, 2010 (one month before she was placed on administrative leave) she informed Huffman that she needed to speak to Freeman about 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 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, 227, 235-239 As a result, Ms. Rupert was not allowed to have contact with a male manager. CP 239

Ms. Rupert also had properties under her supervision and control, in particular, a District property known as Red Mountain taken from her department and given to Revell in March of 2010. CP 196 Revell had never had job duties or responsibilities taken away from him by the all male board. This was in response to Ms. Rupert raising concerns about selling or leasing properties on Red Mountain. Ms. Rupert had retained a legal firm in Portland, Oregon for advice and had been advised that a state statute did not allow for more than a year to year lease. CP 246-247, CP 318-319 Board member Gene McGuire (“McGuire”) was extremely angry about Ms. Rupert retaining a legal firm and receiving the advice, and, as a result, those responsibilities were transferred to Revell. CP 246-247 Ms.

Rupert was also harshly criticized by not only McGuire, but other Board members. CP 246-247, CP 320-322, CP 378

Revell was also trying to convince the Board to move all real estate responsibilities to his department and was in constant conflict with Ms. Rupert over a request to have a second office, in a remote District office for his personal use. Ms. Rupert had also complained to the Board in 2010 about Revell's use of a remote office for personal reasons as it was not a justified use of public funds. Ms. Rupert had been advised to have Revell vacate the office by a Board member, but he was refusing to do so. CP 248-249 Revell had made the comment to another District employee that no women would ever tell him what to do. CP 223, CP 077

In June of 2010, Ms. Rupert also brought concerns to both Huffman and Pringle relating to Revell disclosing confidential negotiations for a land purchase deal at an open meeting with the Richland City Council with a Tri-City Herald representative present. Ms. Rupert was concerned because this was strictly a realty function and since the negotiations were confidential, she was concerned it could result in a negative outcome. Ms. Rupert was also concerned that Revell's father sat on the Richland City Council and was Mayor Pro Tem at the time. Huffman and Pringle never spoke to Revell about Ms. Rupert's concerns. CP 197

Ms. Rupert had also complained to Board member Huffman on July 15, 2010, and Board Member David McKenzie (“McKenzie”) on July 17, 2010, about Revell destroying District property. CP 079, CP 382

In July of 2010, Ms. Rupert notified the entire Board and Freeman that she would be attending a personal injury trial for one week and how to contact her while she was out of the office. Ms. Rupert had been rear ended in her own personal car on her lunch hour. CP 193

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 and a half hours. The meeting in Ms. Rupert’s office was precipitated by her earlier in the week notifying the District’s Board President, 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 McGuire, for hostile work environment based upon a series of incidents with McGuire. CP 195, CP 242-244, CP 246-247, CP 258, CP 382-383

Ms. Rupert had been contacted to join a study group relating to the best use of some property. Ms. Rupert had been contacted by the Executive Director who had asked her to join the study group. Ms. Rupert

had been advised that even though Revell had sat in on a previous study that had been done, they did not want Revell to be part of this particular study group. Ms. Rupert had attempted to contact the Board to let them know about this because she was concerned about McGuire's prior conduct and behavior directed towards her. CP 242-244, CP 246-247, CP 258, CP 287-292, CP 378, CP 383

McGuire contacted the Executive Director of the Port of Kennewick and accused Ms. Rupert of lying about what the Executive Director had told her relating to Revell after McGuire had called the Executive Director to confirm what Ms. Rupert had told him. Ms. Rupert had also informed Jaksch at the same time that she was getting tired of the continuing hostile work environment that she had been subjected to on the basis of her gender and that, as a result, she was not able to perform her best work under the current hostile conditions. Jaksch responded that he would get back to her, but he never did prior to her termination. CP 195

McGuire had been extremely hostile to Ms. Rupert in Board meetings in 2010 leading up to her decision to personally inform both Jaksch and Huffman that she intended upon filing a formal complaint against McGuire for gender harassment. CP 242-44, CP 246-247, CP 258 On March 6, 2010, Ms. Rupert had given a presentation to the Board on obtaining an easement on District land as an extension for Antinori Road.

Ms. Rupert had given similar presentations over the course of her career to Boards made up of different members for all District properties. McGuire, in response to Ms. Rupert's presentation, became angry and hostile towards Ms. Rupert and suggested to other Board members that it not pass. Also, on that same day, McGuire berated Ms. Rupert for a full minute at the Board meeting. Present at the meeting was District employees Revell and Freeman, and Board members Jaksch, Huffman, McKenzie, McGuire and Pringle. CP 242-244, CP 382

McGuire had also been critical of Ms. Rupert bringing concerns to the Board about the use and accounting for of the District's reserve fund and had directed those criticisms towards Ms. Rupert in front of the full Board. CP 258

At a Board retreat on the same day of the presentation by Ms. Rupert, both Jaksch and Huffman made comments about not wanting to sit next to her which she thought was offensive. CP 283-284, CP 382

Ms. Rupert had also complained to Board Member Pringle that she was not being treated in the same manner as the 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 what she was told and not to question the authority of the Board. CP 189

Ms. Rupert had also complained to Jaksch about Freeman refusing to communicate with her, as well as Revell “bad mouthing” her to Freeman and the rest of the Board. CP 193

The meeting with Huffman on July 15, 2010, was an investigation into Ms. Rupert’s complaints to Jaksch the prior week. However, during the course of this investigatory meeting lasting over two and a half hours, Huffman never took a single note. Instead, at the conclusion of the meeting with Ms. Rupert in her office, Huffman got up to leave. Huffman told Ms. Rupert that he was going to make things better for her. Ms. Rupert thanked him and offered her hand to say good bye. Huffman immediately grabbed her hand and brought her close to him, hugging her tightly and moving his chest in a left to right motion without her consent. Ms. Rupert was immediately “shocked” and “pulled away from him” and “opened the door and told him goodbye.” CP 200-201, CP 222, CP 287-292

At this same meeting on July 15, 2010, Huffman broached the topic of how Ms. Rupert was going to claim her time off from work for a personal injury trial she had to attend as a plaintiff relating to an automobile accident while she was in the scope of her employment with the District. CP 193 Ms. Rupert candidly told Huffman she was going to use her accrued sick leave benefits and inquired as to whether this was an

issue. Huffman responded by stating to Ms. Rupert, "No, there isn't." CP 194, CP 286 Ms. Rupert reiterated that if there was a problem that she could use her accrued vacation benefits. Huffman responded by again telling Ms. Rupert, "No, don't change it." CP 188, CP 200, CP 286 Ms. Rupert was later advised by Freeman via e-mail communication that her request to use her sick leave while she was absent from work to attend the personal injury trial was denied. CP 285-286

At a Board meeting on July 20, 2010, the agenda was changed to reflect that an employee issue would be discussed. Ms. Rupert was in attendance at the meeting and inquired of the Board if they wished for her to stay for the following executive session and the response was "no." When Ms. Rupert went back to her office she was notified by the Board's attorney Brian Iller via telephone call that he was on his way over to her office for the purpose of escorting her off the property and further notifying her that she was the subject of a fraud investigation by the Board. CP 193

On that same day, Ms. Rupert was notified by the Board's attorney Brian Iller in writing that she was being placed on administrative leave "pending an investigation of the charge that you attempted to use sick leave for time off to attend a personal injury trial for approximately one week." CP 313

The motion by the Board to place Ms. Rupert on administrative leave was made by Board member Jaksch and was seconded by McGuire. CP 359

On July 27, 2010, Ms. Rupert was terminated from employment with the District *without cause* by the Board. CP 335-336 No specific reason was given by the Board for its decision to terminate her employment *without cause*. CP 336-37

Prior to her termination, Ms. Rupert was offered the option to resign and she refused. Ms. Rupert was never offered severance in exchange for executing a waiver and release of claims. CP 188, 195

After the lawsuit was commenced and during discovery depositions, the District's attorney instructed Board members not to answer questions posed during deposition relating to the reasons for Ms. Rupert's *without cause* termination on the basis of *executive privilege*. CP 336-339

Later on in declarations provided in support of the District's motion for summary judgment, Pringle, Huffman and Jaksch asserted that Ms. Rupert's employment with the District was terminated for cause based upon "poor performance." CP 093, CP 110-113, CP 117-120, CP 124-128

V. ARGUMENT

A. Summary Judgment Standard in Employment Cases

A summary dismissal is entitled to de novo review by the appellate court. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706, 50 P.3d 602 (2002) (citing *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000)). “Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 707 (quoting *Ellis*, 142 Wn.2d at 458) A material fact is one upon which the outcome of the litigation depends. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). “If there is a dispute about a material fact, then summary judgment is improper.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). The moving party bears the burden of showing there is no genuine issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

On summary judgment, “the trial court has no authority to weigh evidence or testimonial credibility” and nor can the appellate court do so on appeal. *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 623 (2002). 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." *Id.* at 623

When reviewing a motion for summary judgment the trial court must look at the evidence and reasonable inferences to be drawn from the evidence in a light most favorable to the non-moving party in making a determination to grant or deny a motion. *Hubbard*, 146 Wn.2d at 707 (citing *Ellis*, 142 Wn.2d at 458). Summary judgment should only be granted "if, from all the evidence, reasonable persons could reach but one conclusion." *Id.* In cases of this nature involving employment discrimination and retaliation for complaining about discriminatory conduct or behavior on the part of the employer, the plaintiff when faced with a summary judgment motion needs to "produce very little evidence in order to overcome the employer's motion for summary judgment." *Chuang v. University of California Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000).

Summary judgment in favor of the employer in an employment discrimination and retaliatory discharge case "is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury." *Kuyper v. Dep't of Wildlife*, 79 Wn. App. 732, 739 (1995) (citing and quoting *Carle v. McChord Credit Union*, 65 Wn. App.

93, 102, 827 P.2d 1070 (1992)). “Conflicting reasons or evidence rebutting their accuracy or believability are sufficient to create competing inferences. Such inconsistencies cannot be resolved at the summary judgment stage.” *Sellsted v. Washington Mutual Savings Bank*, 69 Wash. App. 852, 861-863, 851 P.2d 716 (1993), *review denied*, 122 Wn.2d 1018 (1993). Such is the case here.

B. Genuine Issues of Material Fact Exist on Ms. Rupert’s Retaliatory Discharge Claim under RCW 49.60.210 Warranting a Trial of this Matter.

In circumstantial evidence cases involving claims of discrimination or retaliation or both, the courts apply a shifting burdens of proof analysis. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 185-187, 23 P.3d 440 (2001).

To make out a prima facie case of retaliation, 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, *review denied*, 141 Wn.2d 1017 (2000). These are burdens of production and not persuasion. *Renz v. Spokane Eye Clinic*, 114 Wn. App. at 623.

Gender discrimination and harassment is prohibited by statute in this state. RCW 49.60.180(3); *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 405, 693 P.2d 708 (1985); *Kahn v. Salerno*, 90 Wn. App. 110, 117-118, 951 P.2d 321 (1998).

Courts have recognized two distinct types of sexual harassment cases: (1) “quid pro quo” cases where an employer conditions employment on the benefit of sexual favors; and (2) “non-quid pro” cases, or otherwise known as “hostile work environment” cases, where the sexual harassment involves offensive or abusive environments. *Ellison v. Brady*, 924 F.2d 872, 875 (1991).

It is important to note “because RCW 49.60 substantially parallels Title VII, federal cases interpreting Title VII are persuasive authority for the construction of RCW 49.60.” *Estevez v. Faculty Club of University of Washington*, 129 Wash. App. 774, 793, 120 P.3d 579, 587 (citing *Oliver v. Pac. Northwest Bell Tel. Co.*, 106 Wash. 2d 675, 678, 724 P.2d 1003 (1986)). WLAD protects employees from sexual harassment, including the non-quid pro quo sexual harassment in the form of a “hostile work environment.” RCW 49.60; *see also Kahn v. Salerno*, 90 Wn. App. 110, 117-118 (1998) (noting “gender based harassment is not required to be sexual in nature and is actionable under this statute.”)

According to the Equal Employment Opportunity Commission (“EEOC”) “environment harassment” is defined as “conduct [which] has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” *Ellison*, 924 F.2d at 876 (quoting 29 C.F.R. section 1604.11 (a) (3)). The EEOC, in accord with a substantial body of judicial decisions, has firmly held that “employees have the right to work in an environment free from discriminatory intimidation, ridicule, and insult.” *Ellis*, 924 F.2d at 876 (quoting U.S. Supreme Court in *Meritor Sav. Bank, FSB v. Vinson*, 447 U.S. 57, 67 (1986)).

The Washington Supreme Court has echoed this anti-discrimination sentiment, stating “sexual harassment as a working condition unfairly handicaps an employee against whom it is directed in his or her work performance and as such is a barrier to sexual equality in the workplace.” *Glasgow*, at 405.

The legislature has declared “it is an unfair practice for an employer . . . [t]o discriminate against any person in compensation or other terms or conditions of employment because of such person’s sex.” RCW 49.60.180(3); *see also Glasgow*, 103 Wash. 2d at 404. Another provision regarding the statute requires a liberal construction to achieve its purpose. RCW 49.60.020. Additionally, a person injured by

such violations “shall have a civil action to recover actual damages, costs and attorney fees.” RCW 49.60.030(2); *Glasgow*, 103 Wash. 2d at 405.

RCW 49.60.210(1) provides:

It is an unfair practice for any employer . . . to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter . . .

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. “An employee who opposes employment practices reasonably believed to be discriminatory is protected by the ‘opposition clause’ whether or not the practice is actually discriminatory.” *Renz v. Spokane Eye Clinic*, 114 Wn. App. at 619 (citing *Graves v. Department of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994) (quoting *Gifford v. Atchison, Topeka & Santa Fe Ry.*, 685 F.2d 1149, 1157 (9th Cir. 1982)). Thus, whether Ms. Rupert can prove that her belief was well founded (i.e., that the District actually engaged in gender discrimination and subjected her to a hostile work environment) is not dispositive of the viability of her retaliatory discharge claim. “Rather, she need only demonstrate that her belief was reasonable under the circumstances.” *Renz*, at 619.

With regard to the second element of the prima facie case, there is no dispute among the parties. Ms. Rupert was fired by the District without cause. *Renz*, at 621.

With regard to the third element of the prima facie case, Ms. Rupert must produce sufficient evidence to raise a genuine issue of material fact of a causal link between her complaints of gender discrimination and harassment. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 482, 205 P.3d 145 (2009).

Ms. Rupert must show that retaliation was a *substantial factor* motivating the adverse employment action. *Id.* at 482. “A factor supporting the decision is substantial if it so much as tips the scales one way or the other.” *Renz*, at 621. Ms. Rupert does not have to prove that the District’s sole motivation was retaliation. *Wilmot v. Kaiser Aluminum & Chemical Corporation*, 118 Wn.2d 46, 70, 821 P.2d 18 (1991). Ms. Rupert also does not have to put on direct evidence of retaliation, since circumstantial evidence “is typical in these retaliation claims under RCW 49.60.210.” *Burchfiel*, 149 Wn. App. at 482 (citing *Estevez v. Faculty Club of University of Washington*, 129 Wn. App. 774, 799 (2005)). “Employers, of course, rarely reveal that retaliation was a motive for adverse actions.” *Renz*, at 621. Proximity in time between the protected activity and the adverse employment action is a factor that suggests retaliation. *Burchfiel*, at 482.

Once an employee establishes a prima facie case of retaliation the burden of proof shifts to the employer to rebut the employee’s rebuttable

presumption of retaliatory discharge. *Estevez*, 129 Wn. App. at 797-798. This requires that the employer show a legitimate, non-discriminatory reason for the employment decision. *Id.*

If the employer does so, the burden of production shifts back to the employee who must then show the reason advanced by the employer is pretextual or unworthy of belief. *Renz*, at 622. Multiple incompatible reasons may support an inference that none of the reasons given is the real reason. *Sellsted*, 69 Wn. App. at 861. Conflicting reasons or evidence rebutting their accuracy or believability are sufficient to create competing inferences. *Id.* at 862-63. Such inconsistencies cannot be resolved at the summary judgment stage. *Id.* at 861.

In this case, Ms. Rupert has met her burden of production relating to establishing first a prima facie case of retaliatory discharge. There is evidence of proximity in time between Ms. Rupert bringing her 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 378, CP 382-83

The Board 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 reason for Ms. Rupert's termination citing *executive privilege*. CP 336-339

At summary judgment, the District claimed additional reasons that "performance problems" were the reason for Ms. Rupert's termination. Yet the District never 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.)

The District attempted to assert that the *without cause* termination was made so Ms. Rupert would remain eligible for severance in exchange for a release and waiver of potential claims against the District. CP 119

Ms. Rupert produced conflicting evidence that she was never offered severance in exchange for a release and waiver of claims, but instead was given the option to resign in lieu of termination. CP 188, 195

The District further attempted to assert that Ms. Rupert's attempt to use accrued sick leave while absent from work to attend a personal injury trial for one week was the "final straw". CP 119 Ms. Rupert has produced conflicting evidence that she made the District and Board aware of what she was doing before she ever received any sick leave benefits. Ms. Rupert candidly told Huffman on July 15, 2010 in response to his inquiry as to how she was going to claim her leave that she was going to use her accrued sick leave and 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 to place 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 her 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

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. *Sellsted*, at 861-63

C. Genuine Issues of Material Fact Exist on Ms. Rupert's Wrongful Discharge Claim Warranting a Trial of this Matter.

The Washington Supreme Court first recognized a common law cause of action for wrongful discharge in violation of a clear mandate of public policy in the landmark case of *Thompson v. St. Regis Paper Company*, 102 Wn.2d 219, 685 P.2d 1081 (1984). In cases following *Thompson*, the Washington Supreme Court acknowledged that public policy tort claims generally arise in four areas: (1) where the discharge was a result of refusing to commit an illegal act, (2) where the discharge resulted due to the employee performing a public duty or obligation, (3)

where the discharge resulted because the employee exercised a legal right or privilege, and (4) where the discharge was premised on employee whistleblowing activity. *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989).

In *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996) the Washington Supreme Court adopted a 4-part test to assess when an employee like Ms. Rupert may recover for wrongful discharge in violation of public policy. Ms. Rupert must establish (1) the existence of a clear public policy (*clarity* element), (2) whether discouraging the conduct in which the employee engaged would jeopardize the public policy (*jeopardy* element), (3) whether the public policy linked conduct caused the dismissal (*causation* element), and (4) whether the employer is able to offer an overriding justification for the dismissal (*absence of justification* element).

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

a. Jeopardy Element

In order to meet the jeopardy element, Ms. Rupert at the summary judgment stage of proceedings had to provide sufficient evidence to

support the *jeopardy* element; that is, whether current laws or regulations provided an adequate means of promoting the public policy of protecting local governmental employees who report improper governmental action or omissions, and, as a result, also provides protection to the citizens of the state of Washington. *Hubbard v. Spokane County*, 146 Wn.2d 699, 713, 50 P.3d 602 (2002).

For purposes of this appeal, one of the issues pertaining to Ms. Rupert's assignment of error 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? (Short Answer: 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 Wash.2d 604, 306 P.3d 879 (2013).

There the Washington Supreme Court determined that the statutory remedies contained within chapter 41.56 RCW, when compared with available tort remedies, were 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. *Piel*, 177 Wash.2d at 609. The reason why the remedies were not adequate is because the plaintiff in *Piel* could only

recover partial remedies for his wrongful discharge. The statute at issue did not allow for the recovery of emotional distress damages and other tort damages. *Id.* at 613.

The Washington Supreme Court in *Piel* compared and contrasted other statutes which were at issue in *Korlund v. Dyncorp Tri-Cities Servs.*, 156 Wn.2d 168, 181-182 (2005) and *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530 (2011). In *Korlund* and *Cudney* the Washington Supreme Court, as noted in *Piel*, required a different result because both statutes at issue provided adequate alternative and comprehensive remedies to plaintiffs thereby precluding a common law tort of wrongful discharge claim. *Piel*, at 614-15. “Neither *Korlund* nor *Cudney* involved an administrative scheme that this court had previously recognized is inadequate to vindicate an important public policy.” *Piel*, at 616 (citing *Korlund*, at 181, 183 and *Cudney*, at 526-27).

Chapter 42.41 RCW does not allow a local governmental employee, like Ms. Rupert, to recover comprehensive remedies, in particular, the recovery of emotional distress damages and other tort damages. RCW 42.41.040(7) provides that relief may be granted by an administrative law judge after an administrative hearing, but the relief is limited to reinstatement, with or without back pay, injunctive relief and

discretionary costs and reasonable attorneys' fees to the prevailing party.
RCW 42.41.040(7).

Therefore, the trial court's ruling must be reversed dismissing Ms. Rupert's wrongful discharge claim because she can satisfy the *jeopardy* element.

b. Causation Element

In order to survive summary judgment, Ms. Rupert was obligated to come forward with evidence that her public policy linked conduct caused the dismissal. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d at 941.

Similar to Ms. Rupert's retaliatory discharge claim under RCW 49.60.210, she had to show that she was engaged in public policy linked conduct, the District discharged her, and that the public policy linked conduct caused the dismissal. *Gardner*, at 941. Ms. Rupert need not, however, prove that the District's sole motivation was retaliation for raising concerns or complaints about the use and accounting for of the reserve fund. *Wilmot*, 118 Wn.2d at 70. Ms. Rupert can meet her burden of production at summary judgment by showing that "her discharge may have been motivated by reasons that contravene a clear mandate of public policy . . ." *Wilmot*, at 68 (quoting and citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d at 232-233).

The record contains sufficient evidence that Ms. Rupert met her burden of production at time of summary judgment that her public policy linked conduct caused her dismissal. *Gardner*, at 941.

The District asserted on July 27, 2010, that it terminated Ms. Rupert *without cause*. The record, however, is replete with evidence of pretext and of a retaliatory purpose or motivation behind Ms. Rupert's *without cause* termination which establishes a genuine issue of material fact relating to the causation element. *Renz*, at 618. Such facts and evidence relating to Ms. Rupert's *without cause* termination by the Board include that (1) the reasons have no basis in fact, (2) even if based in fact, the employer was not motivated by the reasons, or (3) the reasons are insufficient to motivate an adverse employment decision. *Chen v. State*, 86 Wn. App. 184, 190, 937 P.2d 612 (1997).

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 between Ms. Rupert and Huffman 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*, at 190; CP 188, CP 200, CP 286.

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

One Board Member, Jaksch, commented, after being shown evidence of her concerns or complaints relating to the use and accounting for of the reserve fund and mature investments being cashed out 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 notified other Board members of her intent to file a formal complaint of hostile work environment against prior 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, 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

As discussed above relating to the retaliatory discharge claim under RCW 49.60.210, there is sufficient evidence in the record of proximity in time between her complaints and sharing of information with the auditor which suggests an improper motive, as well as conflicting and competing inferences which require a jury to resolve and not a judge at summary judgment. *Burchfiel*, at 483; *Sellsted*, 861-63, CP 051-052, CP 059CP 079, CP 082, CP 086-089, CP 112, CP 120, CP 127-128, CP 189, CP 192, CP 195-196, CP 201, CP 207, CP 242-244, CP 250-259, CP 267-270, CP 271-274, CP 276-280, CP 286, CP 324-326, CP 340-341, CP 380, CP 384-385

VI. 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 5th day of December,
2013.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing and/or attached was served by the method indicated below to the following this 5th day of December, 2013.

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