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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA Cause No. 319504 III

**COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III**

JOETTA RUPERT

Appellant,

vs.

KENNEWICK IRRIGATION DISTRICT

Respondent,

BRIEF OF RESPONDENT

JERRY J. MOBERG, WSBA No. 5282
Attorney for Respondent
P.O. Box 130
124 3rd Ave S.W.
Ephrata, WA 98823
(509) 754 2356

TABLE OF CONTENTS

A. INTRODUCTION 1

B. COUNTER STATEMENT OF THE CASE..... 2

C. ARGUMENT..... 5

 1. Standard of Review..... 5

 2. The Trial Court Correctly Found That Appellant’s Claim For
 Retaliatory Discharge Under RCW 49.60.210 Lacked Sufficient
 Support as a Matter of Law 5

 a. Ms. Rupert did not oppose and unlawful practice 5

 i. No causal connection..... 14

 3. Appellant’s Common Law Wrongful Discharge Claim Based Upon
 Protection of Whistleblowers was Properly Dismissed..... 17

 a. Plaintiff cannot establish the jeopardy element 18

 b. Plaintiff cannot establish the causation element 31

D. CONCLUSION..... 33

TABLE OF AUTHORITIES

Cases

<i>Burchfiel v. Boeing Corp.</i> , 149 Wn.App. 468, 482, 205 P.3d 145, <i>rev. denied</i> , 166 Wn.2d 1038 (2009)	14
<i>Cagle v. Burns & Roe, Inc.</i> , 106 Wn.2d 911, 726 P.2d 434 (1986)	19
<i>Campbell v. State</i> , 129 Wn.App. 10, 23, 118 P.3d 888 (2005), <i>rev. denied</i> , 157 Wn.2d 1002, 136 P.3d 758 (2006).....	15
<i>Clark County School Dist. v. Breeden</i> 532 U.S. 268, 269-270, 121 S.Ct. 1508, 1509 (U.S.,2001).....	7
<i>Cudney v. ALSCO, Inc.</i> , 172 Wash.2d 524, 530, 259 P.3d 244 (2011).....	19, 20, 22, 25, 27, 28
<i>Danny v. Laidlaw Transit Services</i> , 165 Wn.2d 200, 222, 193 P.3d 128 (2008).....	20, 21
<i>E.E.O.C. v. Luce, Forward, Hamilton & Scripps</i> , 303 F.3d 994, 1005 (C.A.9 (Cal.),2002)	7
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 460, 13 P.3d 1065 (2000).....	19
<i>Estevez v. Faculty Club of the Univ. of Wash.</i> , 129 Wn.App. 774, 798–99, 120 P.3d 579 (2005)	13, 15
<i>Gardner v. Loomis Armored, Inc.</i> , 128 Wn.2d 931, 941, 913 P.2d 377 (1996).....	18, 19, 20, 30, 32
<i>Graves v. Department of Game</i> , 76 Wn.App. 705, 712, 887 P.2d 424 (1994).....	7
<i>Havens v. C & D Plastics, Inc.</i> , 124 Wn.2d 158, 177, 876 P.2d 435 (1994)	19, 30, 32
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 23 P.3d 440 (2001)	14, 15
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 717, 50 P.3d 602 (2002).....	20, 21
<i>Korlund v. DynCorp Tri-Cities Services, Inc.</i> 156 Wash.2d 168, 181-82, 125 P.3d 119, 127 (2005)	18, 19, 20, 21, 25, 26, 27, 29, 30, 32
<i>Little v. Windermere Relocation, Inc.</i> 301 F.3d 958, 969 (C.A.9 (Wash.),2002)	8
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).....	14
<i>Miller v. Likins</i> , 109 Wn.App. 140, 144, 34 P.3d 835 (2001)	31, 32
<i>Moyo v. Gomez</i> , 40 F.3d 982, 984 (C.A.9 (Cal.),1994).....	7
<i>Piel v. City of Federal Way</i> , 177 Wash.2d 604, 306 P.3d 879 (2013).....	23, 24, 25
<i>Ray v. Henderson</i> , 217 F.3d 1234, 1240 n. 3 (9th Cir.2000).....	8
<i>Renz</i> , 114 Wn.App. at 621	14

<i>Rose v. Anderson Hay and Grain Co.</i> , 168 Wn.App. 474, 478, 276 P.3d 382, 384 (2012).....	22, 28
<i>Smith v. Bates Technical Coll.</i> , 139 Wn.2d 793, 801, 991 P.2d 1135 (2000).....	20, 28
<i>Trent v. Valley Elec. Ass'n Inc.</i> 41 F.3d 524, 525 (C.A.9 (Nev.),1994)	8
<i>Vasquez v. State, Dep't of Soc. & Health Serv.</i> , 94 Wn.App. 976, 985, 974 P.2d 348 (1999)	7
<i>Villiarimo v. Aloha Island Air, Inc.</i> , 281 F.3d 1054 (9th Cir.2002)	8
<i>Weiss v. Lonnquist</i> , 293 P.3d 1264, 1266 (Feb. 4, 2013)	17, 22, 28
Statutes	
RCW 41.56.160	24
RCW 42.41	25, 29
RCW 42.41.040(7).....	23, 29, 30
RCW 42.41.040(8).....	30
RCW 49.60.210	1, 6
Other Authorities	
Random House Dictionary of the English Language 1010 (1966).....	6, 7
Webster's New International Dictionary 1709–1710 (2d ed.1953)	6

A. INTRODUCTION

The Appellant Employee, Joetta Rupert, was an at-will employee of the Kennewick Irrigation District. She was in charge of the District's real estate department and was involved with marketing properties owned by the District. She reported directly to the Board of Directors of the District. The Board became dissatisfied with her work and the overall cost of the real estate department. The Board decided to dismiss Ms. Rupert and transfer the duties of the real estate department to another existing department. This resulted in a significant cost savings to the District. Sometime after Ms. Rupert was dismissed she started making complaints of gender discrimination. Importantly, while employed at the District she never made any documented complaint about being discriminated against or mistreated.

She then sued the District claiming that her termination was the result of gender bias or in violation of public policy related to complaints of governmental impropriety. The trial court dismissed her gender bias claim under the Washington Law Against Discrimination (WLAD RCW 49.60.210) because Ms. Rupert did not establish that she opposed any

practice forbidden by WLAD and she did not come forward with any evidence to establish a gender based hostile work environment.¹

The trial court also ruled that she had not established the essential elements of a wrongful discharge in violation of public policy tort claim. Specifically, Ms. Rupert could not establish the jeopardy element or the causation element of the public policy tort based on her alleged reports of governmental misconduct (whistleblowing). Since the Whistleblower statute and District whistleblower policy provided adequate protection for the public policy at issue that public policy was not in jeopardy. Furthermore, Ms. Rupert did not come forward with any evidence that her alleged whistleblower activities were the direct cause of her dismissal. She now seeks review by this honorable court of the summary judgment dismissal of her claims.

B. COUNTER STATEMENT OF THE CASE

Plaintiff was hired by the Kennewick Irrigation District, (KID), to work in their real estate department. On June 1, 2003, she was hired as an administrative assistant and a few years later she was promoted to manager of that department. (CP 136, 146, 147) She was an at-will

¹ In her appeal Ms. Rupert only raises the opposition claim. She does not challenge the trial court's ruling that dismissed her hostile work environment claim.

employee and reported directly to the KID Board. (CP 420) She was terminated by the Board on July 27, 2010 for poor performance. (CP 110-113, 124-128, 117-120)

Plaintiff claims she opposed a hostile work environment directed at her based on her gender. She hostile work environment claim is based on a few sporadic instances that she viewed as gender based discrimination. They include a claim that her supervisor would not meet with her alone.. (CP 136, 238-239, 420-421, 424); a claim that Patrick McGuire, a board member, was angry with her at a meeting (CP 41); a claim that she had a conflict with a co-worker who had stated to another co-worker that he would never let a woman tell him what to do (CP 136); a claim that on March 6, 2010 Gene Huffman, a Board member, made the statement “Don’t make me sit next to her” referring to Plaintiff before he sat next to her at a meeting. (CP 136); a claim that a board member hugged her, She did not report the incident to anyone and did not indicate at the time that she was offended. (CP 37) These are the sum total of the incidents Plaintiff claims constitute gender based harassment while working for KID. She did not report any of these events as being discriminatory.

In regards to her public policy tort claim, Plaintiff alleges that she complained about alleged misfeasance or malfeasance in the handling of the KID Endowment fund. (CP 127) She also claimed that KID Board

member John Pringle lead an effort to repeal Board Resolution 67 which prohibited the Board from spending the corpus of the Endowment fund for improvement projects. She claims that Mr. Pringle was intending to buy some KID land in an area called Red Mountain and the repeal of the Resolution would provide additional money to improve the Red Mountain property.² (CP 136-137) The Board did repeal that policy based on its understanding that a current Board is not bound by policy decisions made by a previous Board. (CP 127-128) The Board had decided to use those funds for operations and maintenance. (Id) This decision was clearly within the authority of the Board.

KID is annually audited by the State Auditor. The State Auditor has never made any findings that supported Ms. Rupert's allegations. (CP 128) Nonetheless, after hearing Ms. Rupert's concerns the KID Board hired an outside accounting firm, Lemaster Daniels, to review those concerns. (CP 128) The accountant found some procedural deficiencies in the record keeping on the account but did not find any malfeasance in the handling of the funds. The independent auditor did not find that any funds were missing. (CP 48-60; 120; 128)

² There is no evidence presented that Mr. Pringle has ever had an interest in land in that area.

The Kennewick Irrigation District had a whistleblower policy and Ms. Rupert was aware of it, however, she never attempted to avail herself of it. (CP 67-74; 278)

C. ARGUMENT

1. STANDARD OF REVIEW

The District does not quarrel with Ms. Rupert's statements regarding the standard of review. This court should review the summary judgment dismissal *de novo*.

2. THE TRIAL COURT CORRECTLY FOUND THAT APPELLANT'S CLAIM FOR RETALITORY DISCHARGE UNDER RCW 49.60.210 LACKED SUFFICIENT SUPPORT AS A MATTER OF LAW

a. Ms. Rupert did not oppose an unlawful practice.³

Ms. Rupert alleges that she opposed a practice forbidden by RCW 49.60 et. seq. the Washington Law Against Discrimination (WLAD). Her alleged opposition was that she complained to the District about the discriminatory conduct and hostile work environment. She never did make a complaint that would be fairly considered as oppositional conduct.

³ Ms. Rupert does not appeal the trial court's ruling dismissing her gender-based hostile work environment claim. That decision remains unchallenged before this court and that claim is effectively dismissed with prejudice.

The WLAD protects employees engaged in statutorily protected activity from retaliation by their employer. See RCW 49.60.210. It provides:

It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

RCW 49.60.210(1) The statute provides protection in two circumstances: (1) when an employee opposes forbidden practices and (2) when an employee files a charge, testifies, or assists in a proceeding. The first, known as the “opposition clause,” is at issue here. The term “oppose,” undefined in the statute, carries its ordinary meaning. Ms. Rupert must oppose activity that violates the WLAD. In this case, she did not take any action that could fairly be considered as opposition of a forbidden practice.

The primary definitions of the term “oppose” requires conduct that is active and purposive. See Webster's New International Dictionary 1709–1710 (2d ed.1953); Random House Dictionary of the English Language 1010 (1966) (hereinafter Random Dict.); 10 Oxford English Dictionary 866–867 (2d ed.1989). Opposition would require one “to act against or provide resistance to; combat. 2. to stand in the way of; hinder; obstruct. 3. to set as an opponent or adversary.” Random Dict. 1359 (2d ed.1987).

Opposition requires some positive resistance. Merely stating that she intended to talk to a manager about her concerns is not enough. Likewise, talking to a manager about some incident but not indicating that she believed it was a forbidden practice would not be sufficient. She must take some action that fairly signals to her employer that she is opposing a forbidden practice. See for example, *Moyo v. Gomez*, 40 F.3d 982, 984 (C.A.9 (Cal.),1994)(Opposition can consist of a refusal to carry out an order or policy believed to be discriminatory) The employee must engage in some oppositional activity of which the employer was aware. *Vasquez v. State, Dep't of Soc. & Health Serv.*, 94 Wn.App. 976, 985, 974 P.2d 348 (1999); *Graves v. Department of Game*, 76 Wn.App. 705, 712, 887 P .2d 424 (1994); See also, *Clark County School Dist. v. Breeden* 532 U.S. 268, 269-270, 121 S.Ct. 1508, 1509 (U.S.,2001)(Specific complaints of a gender based discrimination made to Assistant Superintendent, the employee's supervisor, and to another assistant superintendent constitute opposition);. c.f. *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 1005 (C.A.9 (Cal.),2002)(Employees refusal to sign a compulsory arbitration agreement was not protected opposition conduct); See also, *Little v. Windermere Relocation, Inc.* 301 F.3d 958, 969 (C.A.9 (Wash.),2002)(Employee's report to her supervisor that she was raped by a representative of client was sufficient oppositional activity); *Trent v.*

Valley Elec. Ass'n Inc. 41 F.3d 524, 525 (C.A.9 (Nev.),1994)(Employee verbal report and written report to her general manager of offensive sexual language in workplace sufficient opposition); *Ray v. Henderson*, 217 F.3d 1234, 1240 n. 3 (9th Cir.2000) (making an informal complaint to a supervisor about discriminatory conduct is a protected activity); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir.2002)(filing internal complaint to company management about discriminatory conduct was protected activity under Title VII) In every case that has found sufficient oppositional activity the complainant has made a report of specific forbidden or discriminatory conduct. In this case Ms. Rupert's complaints were not specific and she did not claim that the actions were discriminatory. She was simply complaining about workplace issues.

Ms. Rupert did not make any complaints that would fairly be considered opposition under the case law. In her answers to interrogatories she details her reports.⁴

⁴ In her Interrogatories she was asked to detail every incident that she contended was gender based harassment, which she did. However, at the time of summary judgment she contradicted her answer in a variety of ways including attempting to add additional events that were not detailed in her Interrogatories or her deposition testimony. This included Ms. Rupert claims that she once complained to Mr. Pringle that she was not treated like the male managers and he became upset. (CP 189) The court should not consider matters in a declaration that contradict her other sworn testimony.

In July 2010, she told Gene Huffman, a board member and David McKenzie, a co-employee, about an incident in September 2009, where Scott Revell, a co-worker, got mad and tried to pry open a file cabinet. (CP 226) She did not claim that this was discriminatory conduct.

Ms. Rupert relates an incident where Mr. Jaksch was invited to sit by her in a public meeting and he jokingly said to Gene Huffman “why do I have to sit next to her?” referring to Ms. Rupert. Both gentlemen laughed about the comment. Ms. Rupert admits that she did not report the conduct to anyone. (CP 226) In her deposition Ms. Rupert remembered the event differently from the report she made in her Interrogatory. She recalled that Mr. Huffman came to the meeting looking for a place to sit and Mr. Jaksch, who was sitting next to Ms. Rupert, moved his materials over and said that he could sit next to Ms. Rupert. Mr. Huffman then responded “Why do I have to sit next to her?” He then” made this kind of “haha’, good-old-boy laugh.” He then sat down next to Ms. Rupert. Ms. Rupert “thought that was weird” and she did not appreciate it. She did not report it to anyone as gender-based harassment. (CP 283-284)

She complained that on March 6, 2010, Patrick McGuire, a board member, “berated her for a full minute” at an executive board meeting where other board members were present. She admits that she “tried to

discuss my displeasure of this” with Mr. Pringle and Mr. Huffman. She did not report this conduct to anyone as being discriminatory. (CP 226) She further explained the “meeting” in her deposition. She admits that it was really an evaluation session between her and the board. She was directly supervised by the board. The board members were unhappy with her performance and let her know how they felt. (CP 244-247) She never reported that she perceived the evaluation session to be gender based harassment.

She complained about incident that occurred in May of 2010 where Patrick McGuire and his wife, Penney approached her at a board meeting break and said that Patrick McGuire was going to come down hard on her because she had been rude to him at an earlier meeting. (CP 226) She “told Gene Huffman and John Jaksch” (board members) about a conversation. She did not claim that this was sex-based discrimination. (Id)

She states that she met with Gene Huffman about her wanting to speak to Mr. Freeman (the manager) about Scott Revell working outside the scope of responsibility and interfering with realty business. Gene Huffman stated that Mr. Freeman would not speak to a female employee on a one-on-one basis. She stated that Gene Huffman told her that Mr.

Freeman “had been burned before” by female employees and he was not comfortable being alone with another woman.⁵(CP 238) She told Mr. Huffman that she thought it was “unprofessional conduct on his part and that it was hampering business.” (CP 223) In her sworn deposition testimony she admits that she did not recall the substance of the conversation but recalled her displeasure that Realty business was being hampered because of two managers not being able to communicate one-on-one. (CP 236) She could not recall if she met one-on-one with Mr. Freeman after that. (CP 239) She admits that she did not report this conversation to anyone in management although she may have mentioned it to her administrative assistant Judy Smith. (Id) ⁶ She did not report to anyone that she believed this was discrimination.

She states that she told Jon Jaksch about a May 2010 realty committee meeting where Gene Huffman and John Pringle “belittled me

⁵ In her contradictory declaration that she filed at summary judgment she stated that she told Mr. Huffman that Mr. Freeman would not meet one-on-one with her “because I am a woman.” This is directly contrary to her sworn testimony in her deposition and in her answers to Interrogatories and should be disregarded.

⁶ In a later declaration she contradicts her under-oath Interrogatory answers by stating that she met privately one time at the Country Gentlemen restaurant with Mr. Jaksch’s, a board member, to express her concerns “regarding Mr. Freeman’s (KID manager) disregard to communicate with me and Mr. Revell’s bad mouthing me to him and the rest of the board.” (CP 193) Again, this contradictory declaration should not be considered by the court.

and were very condescending in their responses to my questions and concerns.” The concerns were about her posting and advertising a job position for an office assistant. She did not suggest that this was gender based nor did she make a complaint about it. She simply told Mr. Jaksch about it and confronted Mr. Freeman (who was not at the meeting) to ask what his involvement was with the decision to not post the position.. (CP 227)

She claims that Mr. Huffman tried to give her a hug as she left a meeting and she thought that was sexual harassment. She admits that she did not report that alleged conduct to anyone.⁷

Ms. Rupert did not allege that she has opposed any forbidden practice. She does not establish any factual basis for this claim. She did not complain to any supervisor or the HR department of any activity that was forbidden by WLAD. Her complaints were mostly about financial issues related to the Endowment Fund were not issues related to any allegation of gender based discrimination. Other than complaints about financial issues, Ms. Rupert cannot recall making complaints about other improper board actions. (CP 82-92) It was not until after her termination that the Plaintiff claimed she was discriminated because of her gender.

Ms. Rupert has to come forward with some evidence of her opposition. *See e.g., Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn.App. 774, 798–99, 120 P.3d 579 (2005) In this case, Ms. Rupert has never opposed unlawful action. Because she did not complain about being discriminated against she cannot come forward with any credible evidence that the District retaliated against her based upon her alleged opposition action. Her work place complaints were just that, concerns about the workplace. She never identified any unlawful or discriminatory conduct that she perceived to be gender-based discrimination directed at her. The trial judge was correct in dismissing her opposition claim because she did not come forward with any evidence of oppositional conduct that was known to her employer.

If this court were to allow an oppositional claim to proceed in this setting, employers would be faced with potential claims every time they terminated an at-will employee. After termination the employee could simple recount any alleged misconduct that might have occurred and argue that it was a violation of WLAD. The reason for the oppositional activity requirement is to put the employer on notice of potential discriminatory conduct so that the employer can take steps to eliminate the behavior. It is

⁷ She did not list this event as an incident of gender harassment in her sworn answers to Interrogatories. (CP 227-228)

not asking a lot to have an experienced manager to make a clear and concise report of conduct that she observed that she believed violated WLAD. Her failure to make such a report is fatal to her oppositional claim. This Court should affirm the trial judge's ruling dismissing this claim.

i. No causal connection.

To establish causation at the prima facie stage, a claimant must demonstrate that retaliation for her oppositional conduct was a “substantial factor” motivating the employer's adverse employment action.⁸ *Burchfiel v. Boeing Corp.*, 149 Wn.App. 468, 482, 205 P.3d 145, *rev. denied*, 166 Wn.2d 1038 (2009); *Renz*, 114 Wn.App. at 621. In this case the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001) should be applied. First, the plaintiff bears the burden of setting out a prima facie case of retaliation. *Id.* at 181. Such a showing creates a rebuttable presumption that the employee was discriminated against, and shifts the evidentiary burden to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action

sufficient to raise a genuine issue of material fact as to whether the defendant discriminated against the plaintiff. *Id.* If the defendant meets this burden, the presumption is rebutted, and the burden of proof shifts back to the plaintiff, who must then show the defendant's stated reason for the adverse action was in fact pretext. *Id.* at 182. If the plaintiff fails to show pretext, the defendant is entitled to judgment as a matter of law. *Id.*

Thus, 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. 10, 23, 118 P.3d 888 (2005), *rev. denied*, 157 Wn.2d 1002, 136 P.3d 758 (2006). The employee must demonstrate that she participated in an opposition activity; that the employer knew of the opposition activity; and that the employer still took adverse action against the employee. *Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn.App. 774, 799, 120 P.3d 579 (2005). Here, it is clear that Ms. Rupert did not involve herself in any oppositional activity and that it is reasonable to conclude that the employer was not aware of her opposition, if any. Therefore, she has not established a *prima facie* claim of causation.

⁸ Since Ms. Rupert did not take any oppositional action causation is a moot issue. However, it is argued here to the extent that the court may find it relevant.

In addition, the District had a legitimate reason to take action against her. The District board had been dissatisfied for some time with Ms. Rupert's performance in the real estate division. (CP 110-113; 124-128; 117-120) She had not been preparing property properly for sale and sales were flat. The board had confronted her directly about their concerns in an executive session that she now claims was an act of gender discrimination. On the top of this dissatisfaction, the Board discovered that Ms. Rupert had taken sick leave when she was actually attending her own personal trial for her own benefit. (CP 111; 119) This was the proverbial straw that broke the camel's back. The Board decided to terminate her, for reasons unrelated to any claim she may have of gender discrimination. In fact, the record is devoid of any evidence that the board was even aware that she had opposed some conduct forbidden by WLAD.

Ms. Rupert cannot make out a prima facie claim of retaliation. She did not involve herself in oppositional activity, she made no complaints to the Board, supervisors or HR regarding any protected activity and she was terminated for reasons entirely unrelated to her gender. It is clear that Ms. Rupert's "Johnny-come-lately" claim of oppositional conduct is simply an attempt to get around her at-will status. The board had every right to terminate Ms. Rupert at any time without having to establish good cause. Before her termination, Ms. Rupert never made any sufficient claim that

she was being discriminated against because of her gender. It was only after her termination and the filing of this suit that she claimed gender discrimination. This was clear to the trial court and should be clear to this court. The trial court's dismissal of the WLAD claim should be affirmed.

3. APPELLANT'S COMMON LAW WRONGFUL DISCHARGE CLAIM BASED UPON PROTECTION OF WHISTLEBLOWERS WAS PROPERLY DISMISSED.

Ms. Rupert also claims a *Discharge in Violation of Public Policy* tort. While her complaint is not completely clear on this claim, it appears that she basis the claim on her termination in violation of WLAD and in reporting her concerns about financial issues in the use of the Endowment Fund.⁹ These are insufficient basis to ground this complaint.

A civil lawsuit for wrongful discharge in violation of public policy is available to an employee only where no other adequate remedy exists to vindicate the public policy at issue *Weiss v. Lonquist*, 293 P.3d 1264, 1266 (Feb. 4, 2013). In order to prevail on a claim of wrongful discharge in violation of public policy, plaintiff must be able to show three things: (1) Washington has a clear public policy related to the protection of whistleblowers (the *clarity* element), (2) discouraging the conduct would jeopardize the public policy, including proof that the current means of

promoting that policy are inadequate, (the *jeopardy* element), and (3) that policy-protected conduct actually caused the dismissal (the *causation* element). *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). If these three elements are met, an employer will still prevail if able to offer an overriding justification for the termination decision (the *absence of justification* element). *Id.*

a. Plaintiff cannot establish the jeopardy element.

The mandate for courts to “proceed cautiously” when litigants seek to expand the confines of the public policy tort remains in force, and it includes the jeopardy element. The jeopardy element sets up a relatively high bar. Ms. Rupert must show that she engaged in particular conduct and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy. She must prove that discouraging the conduct that she engaged in would jeopardize the public policy. Of particular importance here, this means the Ms. Rupert also must show that other means of promoting the public policy are inadequate. *Korslund v. DynCorp Tri-Cities Services, Inc.* 156 Wash.2d 168, 181-82, 125 P.3d 119, 127 (2005). If there are other adequate means available, the public policy is not in jeopardy and a private cause of action need not be

⁹ Again, the District believes that to the extent that her claim is based on a violation of WLAD it fails for substantive reasons. See brief, *supra*.

recognized. *Korslund*, 156 Wn.2d at 184. “The jeopardy element guarantees an employer's personnel management decisions will not be challenged unless a public policy is genuinely threatened.” *Gardner*, 128 Wn.2d at 941–42. The appellant has to prove that discouraging the conduct that she engaged in would jeopardize the public policy. *Ellis v. City of Seattle*, 142 Wn.2d 450, 460, 13 P.3d 1065 (2000). The claim of wrongful discharge in violation of public policy is a claim of an intentional tort—the plaintiff must establish wrongful intent to discharge in violation of public policy. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994); *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 726 P.2d 434 (1986); *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119, 124 - 125 (2005).

The question of whether adequate alternative means for promoting a public policy exist presents a question of law as long as “the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy.” *Korslund at* 82; In accord, *Cudney v. ALSCO, Inc.*, 172 Wn.2d at 528-529 (holding that WISHA and DUI laws are adequate to protect the public policy of workplace safety and protection of workers who report safety violations). The other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard

the public policy.” *Hubbard v. Spokane County*, 146 Wn.2d 699, 717, 50 P.3d 602 (2002).

In order to establish the jeopardy element, Ms. Rupert must show that other means of promoting the public policy were the “*only available adequate means*” to promote the public policy. *Danny v. Laidlaw Transit Services*, 165 Wn.2d 200, 222, 193 P.3d 128 (2008) Since *Gardner*, this court has repeatedly applied this strict adequacy standard, holding that a tort of wrongful discharge in violation of public policy should be precluded unless the public policy is inadequately promoted through other means and thereby maintaining only a narrow exception to the underlying doctrine of at-will employment. *See Gardner*, 128 Wn.2d at 945; *Hubbard*, 146 Wash.2d at 713; *Korlund*, 156 Wn.2d at 181–82; *Danny*, 165 Wn.2d at 222; *Cudney*, 172 Wn.2d at 530.

Moreover, “the tort of wrongful discharge is not designed to protect an employee's purely *private interest* in his or her continued employment; rather, the tort operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy.” *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000). The court must examine existing laws and remedies to determine whether they provide adequate alternative means of promoting the public policy.

In *Korsland*, three employees brought a public policy tort claim against their employer alleging that they were fired for reporting safety violations. The employees contended that the public policy contained in the Energy Reorganization Act (ERA), 42 U.S.C. 2011 et. seq. protected them from termination. Our Supreme Court ruled as a matter of law, that the plaintiffs did not satisfied the jeopardy element of the tort of wrongful discharge in violation of public policy because there was an adequate alternative means of promoting the public policy on which they rely. *Id.* at 181. The *Korsland* court noted that the ERA provided an administrative process for adjudicating whistleblower complaints and provided for orders to the violator to “take affirmative action to abate the violation;” reinstatement of the complainant to his or her former position with the same compensation, terms and conditions of employment; back pay; compensatory damages; and attorney and expert witness fees. 42 U.S.C. § 5851(b)(2)(B). The ERA thus provided comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs. *Id.* at 182.

The Supreme Court ruled:

We conclude that the remedies available under the ERA are adequate to protect the public policy on which the plaintiffs rely. Therefore, as a matter of law, Korslund's and Miller's claims of wrongful discharge in violation of public policy fail. (Footnote omitted)

Id. at 183 See also, *Cudney*, 172 Wn.2d at 528-29 (holding that WISHA and DUI laws are adequate to protect the public policy of workplace safety and protection of workers who report safety violations); *Rose v. Anderson Hay and Grain Co.*, 168 Wn.App. 474, 478, 276 P.3d 382, 384 (2012) (Federal law adequately protected employee who refused to operate a vehicle in violation of federal regulations or standards related to commercial vehicle safety. 49 U.S.C. § 31105(a)(1)(B)). See also, *Weiss v. Lonquist*, 293 P.3d 1264, 1268-69 (2013)(Bar Association Disciplinary rules are adequate to protect employee from being terminated for refusal to commit perjury)

Ms. Rupert argues that the public policy issue at stake in this case is the right of a public employee to be free from wrongful termination when reporting alleged governmental misconduct or when claiming discrimination. Assuming, *arguendo*, that this is the public policy in issue, Ms. Rupert had a remedy available to her in order to ensure that she would not be terminated for reporting alleged government misconduct. She could have sought protection under the District's Whistleblower policy. (CP 67-74)

This policy specifically prohibits retaliation against 'whistleblowers' and provides the employee with any appropriate relief provided by law. (*Id.*) The policy also gives the employee the right to

appeal any decision made by the District to the State Office of Administrative Hearings. (CP 72). The administrative law judge has the authority to reinstate an employee who has been retaliated against, issue out awards for back pay, issue out injunctive relief necessary to return the employee to his or her position held before the retaliation, and to award the employee costs and reasonable attorney fees. RCW 42.41.040(7). The protections provided to plaintiff by the District's "Whistleblower" Policy are certainly adequate to protect the public policy against retaliation of whistleblowers. Therefore, this policy is not in "jeopardy." The court does not have to provide another specialized tort remedy to the plaintiff in order to protect this public policy. *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d at 183.

Likewise, Ms. Rupert can avail herself to WLAD if she believes that she was terminated because of her gender. RCW 49.60 provides her with a full range of remedies for being wrongfully terminated in violation of WLAD. She does not need a separate common law tort claim to vindicate herself as well as the public policy at stake.

Ms. Rupert argues that the recent case of *Piel v. City of Federal Way*, 177 Wash.2d 604, 306 P.3d 879 (2013) controls and that the court should determine as a matter of law that the jeopardy element is

automatically established in this case. A close review of *Piel* reveals that the case is not helpful to her argument.

In *Piel* a police officer was fired in violation of his rights to form a union and collectively bargain under the Public Employment Relations Act (PERC), RCW 41.56.160. Despite a well-reasoned and vigorous dissent, the *Piel* court held that the administrative protections in RCW 41.56 were not adequate to protect the public policy at stake. The court noted that:

Each public policy tort claim must be evaluated in light of its particular context. We must carefully consider the PERC administrative scheme before us and acknowledge that we have previously held it is not adequate to vindicate public policy when an employee is terminated for asserting collective bargaining rights. *Korslund* and *Cudney* addressed different statutory schemes and do not dictate the outcome here. Consistent with *Smith*, we hold that the statutory remedies available to public employees through PERC are inadequate—and a wrongful discharge tort claim is therefore necessary—to vindicate the important public policy recognized in chapter 41.56 RCW. (Emphasis added)

Id. at 617-18

However, since the case at bar does not involve the administrative bargaining rights available to tenured public employees Ms. Rupert's reliance on *Peil* is misplaced. In this case the underlying statute is a Whistleblower statute, RCW 42.41 that provides for a very specific set of remedies in the event of retaliation of an employee for reporting

governmental misconduct. This statute has never been declared by our courts as inadequate to protect the public policy at stake. The protections of the Whistleblower's statute are significant and at least comparable to the protections provided in *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119, 124 – 125 (2005) and *Cudney v. ALSCO, Inc.*, 172 Wash.2d 524, 530, 259 P.3d 244 (2011), both of which are whistleblower claims.

In *Korslund*, three employees of DynCorp Tri-Cities Services (DynCorp) brought suit alleging retaliation and harassment by DynCorp management after the plaintiffs had reported safety violations and mismanagement. Two of the employees claimed constructive termination in violation of the public policy expressed in the federal Energy Reorganization Act of 1974(ERA), 42 U.S.C. § 5851(a)(1)(A). 156 Wash.2d at 181. The ERA prohibits an employer from discharging or discriminating against an employee who reports a violation of the Atomic Energy Act of 1954, 42 U.S.C. § 2011. *Id.* The trial court granted summary judgment in favor of DynCorp, which the Supreme Court affirmed. The *Korslund* court noted the ERA provides an administrative process for adjudicating whistleblower complaints and the remedies under the ERA may require the violator to take affirmative action to abate the violations, reinstate the complainant with back pay, or pay compensatory

damages, attorney fees, and expert witness fees. *Id.* (citing 42 U.S.C. § 5851(b)(2)(B)). The Supreme Court determined these remedies were adequate as a matter of law to protect the public policy expressed in the ERA. *Id.* at 182-83. Accordingly, the Korslund plaintiffs' Public Policy Tort claim was barred. *Id.*

Cudney alleged he was terminated in violation of public policy for reporting that one of his managers drove a company vehicle while intoxicated. *172 Wash.2d 524, 527.* The case was removed to the United States District Court for the Eastern District of Washington. The federal district court certified to the Washington Supreme Court the questions paraphrased here: (1) whether WISHA adequately promoted the public policy of ensuring workplace safety and protecting workers who report safety violations so as to preclude a terminated employee's Public Policy Tort claim and (2) whether the State's driving under the influence laws adequately promoted the public policy of protecting the public from drunk drivers so as to preclude a terminated employee's Public Policy Tort claim. *Id.*

The Court recognized that Korslund was “[t]he controlling case, governing whether statutory remedies are adequate to promote a given public policy.” *Cudney*, *172 Wash.2d* at 532. The Court therefore used the ERA as a guidepost, as it had been found to be adequate in Korslund. *Id.*

Both WISHA and the ERA allow an administrative agency to perform investigations and allow plaintiffs to bring claims if the administrative agency does not take action. *Id.* Moreover, WISHA authorizes the superior court to order all appropriate relief, not limited to back pay. *Id.* at 531–32, 259 P.3d 244. Remedies available under the ERA are more limited but were still found adequate in *Korslund*. Therefore, the Court held the remedies available under WISHA to be “more than adequate.” *Id.* at 533.

Furthermore, the Court considered it irrelevant that the lawsuit available under WISHA was handled by an administrative agency and not the complainant. This is because a Public Policy Tort claim exists to protect the public policy not private concerns. *Id.* at 534 n. 3, 259 P.3d 244. The point of the jeopardy prong of the analysis is to consider whether the statutory protections are adequate to protect the public policy, not whether the claimant could recover more through a tort claim.

Ms. Rupert argues that one reason that the Whistleblower Act is inadequate to protect the public policy interests is because it does not provide for adequate compensatory damages, i.e. damages for emotional distress. This consideration is irrelevant as the remedies that are available are adequate to protect the public policy. In *Cudney*, the Court emphasized that whether the jeopardy element is met hinges on the adequacy of the alternative remedies available to protect the public policy, not on whether

the remedies fully compensate the individual claimant. 172 Wash.2d at 534 n. 3, 259 P.3d 244. The tort of wrongful discharge is not designed to protect an employee's purely *private interest* in his or her continued employment; rather, the tort operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy. *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000).

Courts have found other statutes that do not provide for compensatory damages adequate to protect the public's interest. See for example, *Rose v. Anderson Hay and Grain Co.*, 168 Wn.App. 474, 478, 276 P.3d 382, 384 (2012) (Federal law adequately protected employee who refused to operate a vehicle in violation of federal regulations or standards related to commercial vehicle safety. 49 U.S.C. § 31105(a)(1)(B)). See also, *Weiss v. Lonnquist*, 293 P.3d 1264, 1268-69 (2013)(Bar Association Disciplinary rules are adequate to protect employee from being terminated for refusal to commit perjury)

RCW 42.41, the Local Government Whistleblower Protection Act (LGWPA) specifically prohibits retaliation against 'whistleblowers' and provides the employee with any appropriate relief provided by law. The policy also gives the employee the right to appeal any decision made by the KID to the State Office of Administrative Hearings. The

administrative law judge has the authority to reinstate an employee who has been retaliated against, issue out awards for back pay, issue out injunctive relief necessary to return the employee to his or her position held before the retaliation, and to award the employee costs and reasonable attorney fees. RCW 42.41.040(7). The protections provided to plaintiff by the District's "Whistleblower" Policy are certainly adequate to protect the public policy against retaliation of whistleblowers. Therefore, this policy is not in "jeopardy." The court does not have to provide another specialized tort remedy to Ms. Rupert in order to protect this public policy. *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d at 183.

The LGWPA and District Policy specifically protect employees from any form of retaliation. If she had been threatened in the fashion she alleges she would have been protected under the policy and the Act. She makes the argument that she could not avail herself to the policy because she was terminated in retaliation for making the complaint. The Policy and Act specifically protect her from such actions and the Administrative Law Judge has the right to order her reinstated and to award her back pay and benefits. She does not have to be an active employee to bring a claim under the policy or the Act.

The District's policy grants to her a right to a hearing before an ALJ to adjudicate her rights and provide appropriate remedies. (CP 67-74) The statute also provides her with a right to a hearing and a number of remedies, including reinstatement, injunctions and penalties. RCW 42.41.040(7) & (8).

The statutory scheme protecting local government employees who report government misconduct is sufficient to protect and vindicate the public policy that the statute is designed to promote. Therefore, an additional Public Policy Tort claim is neither warranted nor permitted. The trial judge properly dismissed this public policy tort claim as a matter of law.

b. Plaintiff cannot establish the Causation Element.¹⁰

Under the causation element, a plaintiff must show that his public-policy-linked conduct actually caused termination of his employment. *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). Wrongful discharge in violation of public policy is an intentional tort; therefore, the plaintiff must establish wrongful intent to discharge. *Korlund*, 156 Wn.2d at 178. There must be sufficient evidence of a nexus between the discharge and the alleged policy violation. *Havens*

¹⁰ If the court determines that the jeopardy element has not been established there is no need to even address the causation element.

v. C & D Plastics, Inc., 124 Wn.2d 158, 179, 876 P.2d 435 (1994). A court may determine causation as a matter of law when reasonable minds can reach but one conclusion. *Miller v. Likins*, 109 Wn.App. 140, 144, 34 P.3d 835 (2001). This causation element is stricter than the causation element related to Ms. Rupert's retaliation claim.

It is clear at bar that the Board had been unhappy with Ms. Rupert's performance and the performance of her department for some time. The misuse of sick leave was the final straw. The Board decided that it was in the best interests of the District to replace her. 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 her any animus for bringing to their attention her concerns.

Ms. Rupert's argument that she must only prove that a discriminatory motive was a substantial factor in her discharge is interesting but irrelevant. The District does not argue the issues related to dual motives. It was not an issue in the motion for summary judgment. She argues that the District misstates the law by claiming that she must establish that her public policy linked conduct actually caused her

termination. She cites no case to support her argument. She forgets that the claim she makes is a very specialized tort with rigorous threshold requirements, including the requirement that she must prove her public policy linked conduct actually caused her termination. *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). Wrongful discharge in violation of public policy is an intentional tort; therefore, the plaintiff must establish wrongful intent to discharge. *Korslund*, 156 Wn.2d at 178. There must be sufficient evidence of a nexus between the discharge and the alleged policy violation. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 179, 876 P.2d 435 (1994). A court may determine causation as a matter of law when reasonable minds can reach but one conclusion. *Miller v. Likins*, 109 Wn.App. 140, 144, 34 P.3d 835 (2001). Ms. Rupert has not proffered any evidence to support her supposition that she was terminated because she made a whistleblowers complaint regarding the handling of the Foundation funds. Again, Ms. Rupert's arguments are an attempt to avoid the consequences of being an at-will employee. The trial court's summary judgment dismissal of this specialized public policy tort was proper and should be affirmed.

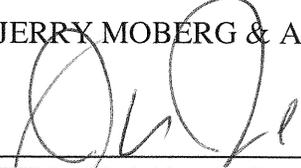
D. CONCLUSION

The trial court properly dismissed Ms. Rupert's claims of opposition under WLAD and her public policy tort claim. As a matter of law Ms. Rupert failed to come forward with sufficient evidence to establish that did any "oppositional" activity that would justify her WLAD claim. She was an at-will employee that had few if any complaints during the time she was employed. It was only after she was terminated that she decided that she had been discriminated against because of her gender. Her attempt to establish that claim now is simply an attempt to avoid her at-will status. The trial court properly dismissed this claim.

Ms. Rupert was protected against an adverse employment action for reporting improper governmental activity. The District's whistleblower policy was adequate to protect her from any job interference. She was aware of the policy but elected to not use it. If she really believed that her termination was the result of her expressing concerns about the use of the Land Endowment funds she had every opportunity to challenge her termination on this basis. She did not. Her failure to invoke this policy speaks volumes about her actual belief in this regard. Importantly, the District's policy would have fairly protected the public policy at stake and therefore she cannot avail herself to the specialized tort of wrongful termination in violation of public policy. The

trial court properly dismissed this claim as a matter of law. This court should affirm that ruling.

RESPECTFULLY SUBMITTED this 27th day of January, 2014.

For
JERRY MOBERG & ASSOCIATES
 JAMES E. BAYER
WSBA No. 9455

JERRY J. MOBERG WSBA No. 5282
Attorney for Kennewick Irrigation District

CERTIFICATE OF SERVICE

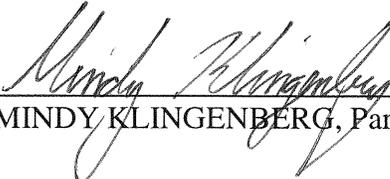
I certify that on this date, I mailed a copy of this brief by first class mail, postage prepaid, and electronic mail to:

Michael B. Love
Workland & Witherspoon, PLLC
601 W Main Ave Ste 714
Spokane, WA 99201-0613
mlove@workwith.com
RClayton@workwith.com

AND TO:

Michael F. Cressey
Attorney at Law
2910 East 57th Ave., Suite 5
Spokane, WA 99223-7028
mfcres@comcast.net

DATED this 27th day of January, 2014 at Ephrata, WA.



MINDY KLINGENBERG, Paralegal