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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 35093-2-III

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

Daniel Vargas,

Plaintiff/Appellant,

v.

City of Asotin,

Defendant/Respondent.

RESPONDENT'S BRIEF

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I. IDENTITY OF THE PARTIES

Respondent City of Asotin (“Asotin”) was the defendant in Asotin County Superior Court Cause No.: 13-2-00282-1. Appellant is Daniel Vargas and he was the plaintiff in the trial court below.

II. STATEMENT OF THE ISSUES

1. Did the trial court error when it granted summary judgment to Asotin with regard to Mr. Vargas’s wrongful discharge claim?

Answer: No. Mr. Vargas failed to produce admissible evidence sufficient to establish a prima facie case of wrongful discharge.

For the reasons set forth herein, Asotin respectfully requests the Court affirm the trial court’s dismissal of plaintiff’s lawsuit.

III. STATEMENT OF THE CASE

A. Introduction

The lawsuit arises out of Mr. Vargas’s employment separation from his employment as a police officer with Asotin. Mr. Vargas claims he was discharged and the discharge was retaliatory in violation of public policy. Mr. Vargas has alleged that his employment was terminated in retaliation for having reported to various agencies what he alleged to be misconduct on the part of City of Asotin Chief of Police, William “Bill” Derbonne.

Mr. Vargas's lawsuit was dismissed because he failed to set forth specific and admissible facts to support two of the prima facie elements of his wrongful discharge claim. On appeal, Mr. Vargas has inexplicably abandoned the vast majority of his "reporting," yet still seeks a reversal of the dismissal of his claim. Mr. Vargas has again failed to create a genuine issue of material fact with regard to multiple mandatory elements of his wrongful discharge claim and the dismissal below should be affirmed.

B. Factual History

Mr. Vargas began working for the City as a Police/Patrol Officer on January 4, 2012. CP 32. Other than Mr. Vargas, Chief Derbonne was the only other full-time commissioned employee for the City of Asotin Police Department at that time. CP 33. During the first few months of his tenure with the City, the relationship between Mr. Vargas and Chief Derbonne appeared to be satisfactory, even pleasant. CP 33, 46.

However, over the next several months, the relationship between the two officers began to deteriorate as Mr. Vargas began to publically voice comments to Chief Derbonne and others, which comments were critical and derogatory of the Chief and the Asotin Police Department. CP 33, 46-47. Chief Derbonne verbally counseled Mr. Vargas on multiple occasions during this time period to the effect that the derogatory comments publicized by Mr. Vargas were akin to "trash-talking," were hurting

department morale, and making it difficult for the two officers to work together in protecting the public. CP 47. Chief Derbonne advised Mr. Vargas the negative public commentary was insubordinate and was denigrating the image of the Department. *Id.* Mr. Vargas's insubordinate behavior continued over the next several months. CP 33, 47.

After months of insubordinate refusal to abide by Chief Derbonne's counseling, Mr. Vargas was invited to a meeting with the Chief and Mayor Bonfield to take place on March 29, 2013, for the purpose of addressing Mr. Vargas's insubordination with him and to issue Mr. Vargas a written warning regarding his conduct. *Id.*

At the commencement of the meeting, Chief Derbonne handed Mr. Vargas a Personnel Action Form. CP 39. That form advised Mr. Vargas that he was receiving a written warning to cease the negative commentary and insubordination – what the Chief characterized as “trash-talking” – regarding Chief Derbonne and the Asotin Police Department. CP 33, 47. Chief Derbonne asked Mr. Vargas to sign the Personnel Action Form thereby acknowledging the insubordinate behavior, the written warning itself, and agreeing to take steps to correct the behavior. CP 33. Neither Chief Derbonne nor Mayor Bonfield had any intention of terminating Mr. Vargas's employment at this time. *Id.*

Mr. Vargas, consistent with his objectionable behavior, refused to sign the form and requested that Mayor Bonfield place him on administrative leave. CP 33, 47. Mayor Bonfield had no wish to do so, and asked Mr. Vargas, as well as Chief Derbonne, what could be done to improve the situation. CP 33. Mr. Vargas responded that there was no solution, and quite impractically demanded that all further communication between him and Chief Derbonne – the only two officers in the department – occur only via email. *Id.* Shortly after refusing to sign the Personnel Action Form presented by Chief Derbonne, and making his demand, Mr. Vargas left the meeting without further discussion or resolution. *Id.*

Mayor Bonfield placed Mr. Vargas on administrative leave as he requested. CP 34. After Mr. Vargas abruptly left the meeting, Mayor Bonfield drafted a second Personnel Action Form addressing Mr. Vargas's conduct during the meeting:

Danny [Vargas] admitted that he trash talks all the time "that is me" and he asked Bill [the Chief] if he planned to control what he said. Danny refused to sign anything – wanted to be placed on administrative leave.

There were several instances when I asked if there was a solution to the problem. Danny did not feel there was a solution except that he would communicate with the Chief through email. There is no communication.

CP 33-34, 41.

On April 3, 2013, Mayor Bonfield received a letter from a lawyer acting on behalf of Mr. Vargas. CP 34, 43. Mayor Bonfield responded by letter addressed to Danny Vargas and copied to his attorney dated April 8, 2013, stating:

At our meeting of March 29, 2013, you indicated you were not willing to discuss alternative resolutions to the problems Chief Derbonne and I presented to you. Therefore, we have no other course of action except termination of your employment.

CP 34, 45.

Termination of employment was not the course of action that either the Chief or the Mayor preferred; however, the Mayor had every reason to believe that Mr. Vargas would continue to engage in the undesirable insubordination and negative commentary (Mr. Vargas admitted that he trash talks all the time, “that is me”), and also understood that Mr. Vargas refused to communicate with his only fellow police officer other than via email. CP 33-34, 41. Under these circumstances, the Mayor concluded that in the interests of public safety and the efficiency of the police department, she had no alternative other than termination of Mr. Vargas’s employment.

CP 33-34.

Prior to Mayor Bonfield’s issuance of the termination letter on April 8, 2013, neither the Mayor nor Chief Derbonne had any knowledge

whatsoever that Mr. Vargas had reported alleged misconduct on the part of the Chief, as well as departmental deficiencies, to any outside law enforcement agency. CP 34, 48.

IV. ARGUMENT

A. The Trial Court Properly Granted Summary Judgment To Asotin Regarding Mr. Vargas's Wrongful Discharge Claim Because Mr. Vargas Failed To Produce Sufficient Admissible Evidence To Establish A Prima Facie Case.

1. Summary judgment standard

An order granting summary judgment is reviewed de novo, and the reviewing court engages in the same inquiry as the superior court. *Hiatt v. Walker Chevrolet Co.*, 120 Wn. 2d 57, 65, 837 P.2d 618 (1992). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 463, 98 P.3d 827 (2004). The Court of Appeals considers all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Kirby*, 124 Wn. App. at 463, 98 P.3d 827. If reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is proper. *Haubry v. Snow*, 106 Wn. App. 666, 670, 31 P.3d 1186 (2001). Appellate courts may affirm a superior court's ruling on

any grounds the record adequately supports. *LaMon v. Butler*, 112 Wn. 2d 193, 200–01, 770 P.2d 1027, cert. denied, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989).

A summary judgment movant is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law. *Ranger Ins. Co. v. Pierce Co.*, 164 Wn.2d 545, 192 P.3d 886 (2008). Affidavits made in support of, or in opposition to, a motion for summary judgment must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 183 P.3d 283 (2008).

An adverse party may not rest upon mere allegations or denials of a pleading, but a response must set forth specific facts showing that there is a genuine issue for trial. CR 56(e). If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. *Id.*

Further, a nonmoving party may not rely on speculation, argumentative assertions, or in having its affidavits considered at face value; rather, after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions. *Becker v. Wash. State Univ.*, 165 Wn. App.

235, 266 P.3d 893, review denied, 173 Wn.2d 1033, 277 P.3d 668 (2011); *State v. Kaiser*, 161 Wn. App. 705, 254 P.3d 850; *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 178 P.3d 1054, review denied, 165 Wn. 2d 1004, 198 P.3d 511 (2008); *Greenhalgh v. Dept. of Corrections*, 160 Wn. App. 706, 248 P.3d 150 (2011).

Ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to create a question of fact. *Snohomish Co. v. Rugg*, 115 Wn. App. 218, 61 P.3d 1184; *Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 227 P.3d 297 (2010).

A trial court may not consider inadmissible evidence when ruling on a motion for summary judgment. *Cano-Garcia v. King Co.*, 168 Wn. App. 223, 277 P.3d 34, review denied, 175 Wn. 2d 1010, 287 P.3d 594 (2012). If a non-moving party attempts to respond using “facts” prohibited by CR 56(e), summary judgment, if appropriate, shall be entered against the adverse party. CR 56.

2. Wrongful discharge standard

The Washington Supreme Court has allowed the common law tort of wrongful discharge in violation of public policy as an exception to the at-will employment doctrine. *Rickman v. Premera Blue Cross*, 184 Wn. 2d 300, 309, 358 P.3d 1153 (2015). This exception signifies that “the at-will doctrine can no longer be used to shield an employer’s action which

otherwise frustrates a clear manifestation of public policy.” *Thompson v. St. Regis Paper Co.*, 102 Wn. 2d 219, 231, 685 P.2d 1081 (1984).

Thompson characterized the public policy tort as “narrow,” meaning the employee has the burden of proving the dismissal violates a clear mandate of public policy. *Rickman*, 184 Wn. 2d at 309, *citing Thompson*, 102 Wn. 2d at 231. Washington has adopted a four-part test that a plaintiff must prove in order to impose liability on his/her employer: (1) the existence of a clear public policy (clarity element), (2) that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy (jeopardy element), (3) that the public policy linked conduct caused the dismissal (causation element), and (4) that the defendant has not offered an overriding justification for dismissal of the plaintiff (absence of justification element). *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1986).

Mr. Vargas cannot establish either the causation element or the absence of justification element as set forth in *Gardner*. As such, the City respectfully requests the Court dismiss Mr. Vargas’s claim in its entirety and with prejudice.

3. Mr. Vargas cannot establish the causation element of his wrongful discharge claim.

The Washington Supreme Court has found that a necessary element to establish a cause of action for retaliation is that the employer had *knowledge* of the employee's activity. *See e.g., Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn. 2d 46, 821 P.2d 18 (1991); *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 84 P.3d 1231 (2004); *Matson v. United Parcel Service, Inc.*, 872 F. Supp. 2d 1131 (W.D. Wash. 2012).

Mr. Vargas has alleged that he reported various instances of what he considers misconduct on the part of Chief Derbonne to three specific law enforcement agencies: the Washington State Patrol; the Bureau of Alcohol, Tobacco, Firearms, and Explosives; and to the Federal Bureau of Investigation. Mr. Vargas's central allegation is: "The City of Asotin fired Mr. Vargas in retaliation for his reporting Mr. Derbonne's conduct to various agencies." CP 4.

Mr. Vargas's wrongful discharge claim fails as a matter of law because he cannot set forth admissible evidence that Mayor Bonfield or Chief Derbonne had any knowledge of those complaints (the protected conduct) prior to Mr. Vargas's termination. To establish the causation element of his wrongful discharge claim, Mr. Vargas must show that his employer had *knowledge* of the so-called protected activity, and then acted

upon that knowledge in discharging the employee. *See Wilmot*, 118 Wn. 2d at 72 (emphasis added).

This requirement emphasizes a very simple policy: if an employer is unaware that a complaint has been made, the complaint cannot possibly serve as a motivation for an adverse employment action. *Id.* Failure to establish this personal knowledge fails to causally relate the “complaints” to Mr. Vargas’s discharge. There can be no “retaliation” for “protected conduct” if the employer does not know about the conduct.

The employee must establish specific and material facts to support each element of his/her prima facie case. *Hiatt v. Walker Chevrolet Co.*, 120 Wn. 2d 57, 66, 837 P.2d 618 (1992). If the plaintiff fails to establish each element of his/her prima facie case, the defendant is entitled to judgment as a matter of law. *Fulton v. Dept. of Social & Health Services*, 169 Wn. App. 137, 148, 279 P.3d 500 (2012).

At his deposition, Mr. Vargas was questioned about what evidence and facts he might be aware of with which he could prove that either Chief Derbonne or Mayor Bonfield was aware of the reports to “various agencies,” or any one of them, before Mr. Vargas was terminated from his employment. Mr. Vargas alleges he made complaints to the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Federal Bureau of Investigation, and the Washington State Patrol. CP 3-5. Mr. Vargas was

asked about each of these alleged complaints at his deposition wherein he ***admitted that he had no evidence that Mayor Bonfield or Chief Derbonne*** knew of these complaints:

Regarding the Washington State Patrol, Mr. Vargas was asked:

Q: Now, do you know if Mr. Derbonne became aware of your phone call to Deputy Snyder [regarding report to Washington State Patrol]?

A: Giving you proof? I have no idea.

CP 68.

Q: All right. As you sit here today, can you point me to any evidence that you believe establishes that Bill Derbonne was aware prior to April 5th, 2013, that you had made any phone calls to the Washington State Patrol regarding the City Hall incident?

A: No, sir.

CP 69-70.

Q: As you sit here today, can you point me to evidence that you believe establishes Mr. Derbonne was aware prior to April 5th, 2013, that you made a phone call to Deputy Snyder about the City Hall incident.

A: No, sir.

CP 69-70.

Q: All right. Anything else that you believe points to or indicates that you were terminated in retaliation for making these complaints?

A: No, sir.

CP 71.

Regarding the Bureau of Alcohol Tobacco Firearms and Explosives,

Mr. Vargas testified as follows:

Q: All right. So, Ms. Young [ATF] told you she would be contacting --.

A: Uh-huh.

Q: -- Mr. Derbonne?

A: Yes, sir.

Q: All right. In what conversation was that?

A: It was in conversation number two.

Q: Do you know if she ever contacted Mr. --

A: Evidence-wise? No, not evidence-wise.

CP 61.

Q: And did [Chief Derbonne] give you any indication at that time that he knew you had made contact with the ATF regarding his gun sales?

A: No, sir.

CP 64.

Q: As you sit here today, do you know whether Mayor Bonfield was aware -- was ever aware of your conversations with ATF regarding the firearms sales by Bill Derbonne?

A: I have no idea.

CP 67.

As to a report he says he made to the Federal Bureau of Investigation, Mr. Vargas again has no evidence of knowledge on the part of a City Official:

Q: As you sit here today, you can't point me to any evidence that establishes that Mr. Derbonne was aware prior to April

5th, 2013, that you had had these conversations with the FBI?

A: I have no evidence for you today, no.

CP 62.

Q: My question is, whether or not you can point me to any evidence that you believe suggests or establishes that Bill Derbonne was aware that you had these conversations with the FBI regarding the evidence room.

A: Other than future depositions, I have nothing for you today.

CP 65-66.

Q: As you sit here today, do you know if Mayor Bonfield was aware of your conversations with the FBI regarding either the evidence room or the firearms sales?

A: I have no idea.

CP 67.

Mr. Vargas has failed at each opportunity to produce any admissible evidence which supports his bare allegation that he was terminated because of his complaints to “various agencies,” and, further, has already admitted under oath that he has no such evidence to produce. Mayor Bonfield and Chief Derbonne denied any knowledge whatsoever of Mr. Vargas’s alleged complaints. CP 34, 48. Mr. Vargas has failed to produce admissible evidence which refutes Asotin’s simple and specific evidence in this case. Rather, he attempts to disparage Chief Derbonne as a person and a law enforcement officer in an attempt to deflect from the disparities in his case.

Mr. Vargas rests his appeal primarily upon the “City Hall” incident. *Appellant’s Brief*, at 12. This raises several issues regarding the viability of the appeal, and therefore his claim, but two principal issues are addressed here because this entire “incident” is a red herring.

First, Mr. Vargas did not witness *anything* in regard to the City Hall incident. He has absolutely no personal knowledge of anything that occurred. Without personal knowledge, he has no foundation for reporting anything. Mr. Vargas admits that he didn’t know anything about the City Hall incident until he was called later in the day. Mr. Vargas then claims that he reported this incident to the Washington State Patrol, Asotin County Sheriff’s Office and the Asotin County Prosecutor’s Office. Mr. Vargas does not, however, claim that Chief Derbonne or Mayor Bonfield had any indication that Mr. Vargas made these reports. There is no direct or circumstantial evidence upon which a fact finder could rely that either Chief Derbonne or Mayor Bonfield had knowledge of this report. Quite to the contrary, Chief Derbonne and Mayor Bonfield have unequivocally denied any knowledge of these phantom reports.

Secondly, even if Mr. Vargas made the “report,” this is not protected conduct here where no crime occurred. No criminal charges were filed. No investigation undertaken by any agency revealed that Chief Derbonne had done anything untoward during the meeting with Anthony Rogers and

Tiffany Rogers. Even giving Mr. Vargas the benefit of the doubt that he was not making these alleged reports to harass Chief Derbonne, the conduct here is not protected when all he is doing is tattling on Chief Derbonne because he does not like how he handled a situation. Mr. Vargas has failed to set forth admissible evidence that he has satisfied the sole threshold issue with regard to this City Hall incident – the conduct must be protected first before it is actionable.

It is noteworthy that despite his law enforcement background, Mr. Vargas has failed to provide the trial court or this Court with a single report number (much less the report itself), a declaration from a single witness that received any of these “reports,” a single cell phone record which shows his contact with one of these individuals, etc. Rather than provide the trial court with admissible testimony from, for example, Scott Coppess (Asotin County Sheriff’s Office), or Linda Young (ATF), or Sergeant Engelson (WSP) or Deputy Snyder (WSP), he instead chose to use declarations from his friends to disparage Chief Derbonne and attempt to bolster his own credibility. Further, rather than submitting admissible factual evidence supporting his claim, Mr. Vargas repeatedly offers conclusory statements such as: “I was terminated by the City of Asotin because I had reported the illegal behavior of William Derbonne.” CP 128.

If Mr. Vargas had made all of these complaints to these various agencies, and was certain that these agencies had alerted Chief Derbonne or some other Asotin employee to the conduct prior to his termination, surely Mr. Vargas could have drummed up even one declaration from one of those individuals (including his current supervisor – Scott Coppess) which provided the Court with admissible evidence to support the causation element of his prima facie case. Instead, he attempts to deflect the Court’s attention from that issue with irrelevant declarations vouching for his character and disparaging Chief Derbonne.

Pursuant to *Wilmot* and its progeny, Mr. Vargas is required to produce specific facts and evidence that Chief Derbonne and/or Mayor Bonfield had knowledge of his alleged complaints. He cannot do so here and thus cannot establish the causation element required to make a prima facie case of his common law claim of wrongful discharge. Mr. Vargas’s claim fails as a matter of law and the City is entitled to judgment as a matter of law.

4. The overriding justification for Mr. Vargas’ termination was his insubordination.

Insubordination is an ample basis for discharge. *See e.g., Appeal of Butner*, 39 Wn. App. 408, 415, 693 P.2d 733 (1985) (discharge of police officer for insubordination was lawful where officer refused to follow chief

of police's direction); *see also State ex rel. v. Matthiesen*, 24 Wn. 2d 590, 166 P.2d 839 (1946) (insubordination toward superior officers is sufficient grounds for dismissal of police officer); *see also Nunn v. Turner*, 133 Wn. 654, 659, 234 P. 443 (1925) (police officers that do not obey the commands given them by their superior, the chief police officer of the city are guilty of insubordination).

Mayor Bonfield and Chief Derbonne provided sworn testimony to the trial court that Mr. Vargas *refused* to cooperate with his immediate supervisor who was also the only other commissioned police officer of the City: Chief Derbonne. CP 33, 47. Mr. Vargas has never denied his refusal to cooperate with Chief Derbonne. Mr. Vargas placed Mayor Bonfield in an impossible position. His obstinate refusal to communicate with Chief Derbonne via any means except email undermined the interests of public safety and the efficiency of the police department. Mayor Bonfield had no alternative other than to terminate Mr. Vargas's employment once he refused to have any communication with his boss and sole coworker. Mr. Vargas's termination came immediately after he indicated that he was refusing to work with Chief Derbonne and immediately after leaving a meeting with his superiors prior to resolution of the insubordination issues.

Mr. Vargas argues in his opening brief that he had a "clean employment record" prior to his termination. This is obviously not true as

Chief Derbonne had verbally counseled Mr. Vargas for months prior to his termination. As with Mr. Vargas's other evidentiary issues at the trial court level, and now on appeal, he fails to provide any evidence which would satisfy CR 56(e). His "evidence" is 1) his self-serving declaration wherein he makes conclusory allegations about his employment history (CP 128) and 2) declaration testimony from Anthony Rogers who has never been employed by the City of Asotin Police Department and certainly is not Mr. Vargas's supervisor. This "evidence" is therefore not based upon Mr. Rogers' personal knowledge and is inadmissible, but is also irrelevant and a naked attempt to survive summary judgment. This fails the evidentiary standard as required by CR 56(e).

Chief Derbonne had counseled Mr. Vargas for months prior to the March 29, 2013 meeting regarding his insubordination. CP 47. This counseling fell on deaf ears and Mr. Vargas persisted in this spiteful behavior. *Id.* In Mr. Vargas's own words, "that is me." CP 41. Chief Derbonne's Personnel Action Form was nothing more than a written warning to attempt to correct Mr. Vargas's insubordinate behavior before it led to anything more serious. CP 39. Mr. Vargas's egregious actions at this meeting forced Mayor Bonfield's hand. Mr. Vargas refused to take responsibility for his actions and further refused to have any communication with his supervisor except through email. CP 33-34. Under these

circumstances, Mayor Bonfield concluded she had no alternative other than the termination of Mr. Vargas's employment. *Id.*

Mr. Vargas's employment was terminated because he was insubordinate. This insubordination coupled with his failure to correct his disruptive behavior despite months of counseling by Chief Derbonne to do so ultimately led to his termination. The termination was justified and Mr. Vargas's claim therefore fails as a matter of law.

V. CONCLUSION

For the reasons set forth herein, Asotin respectfully requests this Court affirm the trial court's dismissal of Mr. Vargas's lawsuit.

RESPECTFULLY SUBMITTED this 7 day of July, 2017.

EVANS, CRAVEN & LACKIE, P.S.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2017, a copy of Respondent's Brief was served on counsel at the following address via U.S.

Mail:

Lucy L. Dukes
Law Office of David A. Gittins
843 Seventh Street
Clarkston, WA 99403

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

DATED this 7th day of July, 2017, at Spokane, Washington.



Kimberley Mauss, Legal Assistant