

NO. 83882-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

King County Cause No. 08-2-02830-5 KNT

ROBERT PIEL & JACQUELINE PIEL, husband and wife,

Appellants

v.

THE CITY OF FEDERAL WAY, a Municipality organized pursuant
to the laws of the State of Washington,

Respondent.

OPENING BRIEF OF *Appellants*

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INTRODUCTION

The City of Federal Way's Police Department (FWPD) conducted a very lengthy witch hunt, wrongfully terminating Robert Piel – twice. Over a 14-month leave of absence, he successfully grieved his first wrongful termination through his union. But within days of returning to the force, FWPD again placed him on leave, and again wrongfully terminated him. This was consistent with a former FWPD employee's declarations that during Piel's first leave of absence, FWPD Chief Brian Wilson had sworn that Piel would never set foot in FWPD again.

On his second leave, however, Piel received few of the normal protections afforded to union members during a grievance process. The Piel's sued the City under numerous legal theories, most importantly here a claim for wrongful termination in violation of public policy ("WTVP"). Yet the trial court dismissed the Piel's case on the grounds that they had a sufficient alternative remedy under his CBA, essentially ruling that this Court had, *sub silentio*, overruled ***Smith v. Bates Technical Coll.***, 139 Wn.2d 793, 991 P.2d 1135 (2000) in ***Korlund v. DynCorp Tri-Cities Sevs., Inc.***, 156 Wn.2d 168, 125 P.3d 119 (2005).

This Court should reverse and remand for trial.

ASSIGNMENTS OF ERROR

The trial court erred in granting the City's motion for summary judgment, in dismissing the Piels' claims, and in entering summary judgment of dismissal. CP 767-78.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did this Court overrule *Smith sub silentio* in *Korslund*?
2. Whether the common law tort of wrongful discharge in violation of public policy still extends to employees who may be terminated only for cause and, if so, whether an employee still need not exhaust administrative or contractual remedies before pursuing such an action?
3. Did the Piels otherwise raise genuine issues of material fact requiring trial of their WTVP claims?

STATEMENT OF THE CASE

- A. All facts and reasonable inferences are taken in the light most favorable to the Piel in this *de novo* review from a summary judgment.**

The standard for reviewing summary judgments is well established:

An order granting summary judgment is reviewed *de novo*.

We view the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party.

Summary judgment is proper only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

The moving party has the burden of establishing the absence of an issue of material fact.

Alhadeff v. Meridian on Bainbridge Island, LLC, 167 Wn.2d 601, 610-11, 220 P.3d 1214 (2009) (paragraphing added; cites omitted).

- B. Lt. Piel was a 25-year veteran police officer who received consistently strong performance evaluations and commendations when the harassment began.**

At the time of the incidents at issue here, Lt. Robert Piel was a veteran police officer with roughly 25 years' experience. CP 481. He served with the Federal Way Police Department (FWPD) for over 11 years. CP 481-82. He began as a patrol officer at FWPD in 1996, promoting to Lieutenant in 1998. CP 102.

In January 2000, Deputy Chief Brian Wilson asked Lt. Piel to assume the "Support Services" position because no other Lieutenant had requested or bid for that assignment. CP 482. This was a broad supervisory role, most importantly recruiting new officers. *Id.* Lt. Piel accepted the assignment. *Id.* His direct supervisor was Commander Krista Osborne. *Id.*

Beginning in 2001, rumors circulated around FWPD that Commander Osborne and D.C. Wilson's brother, Commander Greg Wilson, were romantically involved. CP 486. They held themselves out as "close friends." *Id.*

Until the incidents giving rise to this suit (circa 2004) Lt. Piel consistently achieved "Meets Expectations," "Exceeds Expectations," or "Superior Performance" work appraisals at FWPD. CP 482, 502-541. He earned 145 "Exceeds Expectations" ratings, and nine "Superior/Distinguished" performance ratings. *Id.* His superiors repeatedly recognized that he attained 100% of his job-performance goals. *Id.* In January 2001, D.C. Wilson commended Lt. Piel for "Outstanding Performance and Ongoing Commitment to the Public Safety Department." CP 482.

C. In late 2002, Lt. Piel was chosen by his fellow Lieutenants to lead the formation of a union at FWPD.

Late in 2002, the 12 Lieutenants at FWPD began discussing unionizing. CP 483. The Lieutenants' motivations varied from pay issues, to legal support for disciplinary defense, to violations of the City's anti-nepotism policy involving D.C. Wilson and his brother, Commander Greg Wilson. *Id.* The Lieutenants voted 11-1 to form a union. *Id.* They asked Lt. Piel to manage the formation of their union. *Id.* He agreed on the condition that they would not elect him President of the Union. *Id.*

D. By mid-2003, FWPD's Chief of Police had turned against the Lieutenants and their Guild, and Lt. Piel began to suffer harsh discriminatory treatment.

Lt. Piel immediately asked Police Chief Ann Kirkpatrick whether she had any objections to a Lieutenants' union. CP 483. Initially, she was supportive. *Id.* But in mid-2003, she changed her mind. *Id.* Chief Kirkpatrick threatened that if the Lieutenants followed through with their unionizing, they would not be "considered as close members of the administration" as they once had been. *Id.* Her tone was decidedly negative. *Id.*

Shortly thereafter, D.C. Wilson exercised what he called his "management prerogative" to forbid Lt. Piel from bidding for a shift in 2004. CP 483. He then assigned Lt. Piel to the "F" squad: the

graveyard shift, including all weekends. *Id.* Lt. Piel sought reconsideration, in writing, explaining to D.C. Wilson that he was facing some serious family problems due to the recent deaths of both parents. CP 483-84. D.C. Wilson ordered Lt. Piel to take the “F” squad anyway. *Id.* D.C. Wilson noted that the Lieutenants’ Guild was not yet finalized, so he could do as he pleased. *Id.*

“F” was the largest squad in the department, with 13 officers, nearly twice the normal shift size. CP 484. Yet Lt. Piel quickly discovered that he would have no management assistance with the squad. *Id.* On paper, Commander Sumpter was assigned to the squad. *Id.* But he was relieved of his night-shift duties due to his supervision of the Valley SWAT team. *Id.* This left Lt. Piel – alone – to supervise the largest squad FWPD had ever fielded. *Id.*

Not only that, but Lt. Piel was also responsible for managing the K-9 units (two officers with dogs), and the Major Accident Investigation Team (M.A.I.T.). *Id.* He was also an active board member for the City’s retirement fund (MEBT). *Id.*

After overloading Lt. Piel with responsibilities, the real harassment began. In late February 2004, Commander Krista Osborne held her first monthly K-9 Unit meeting. CP 484. Minutes before the meeting, Commander Osborne told Lt. Piel that she

would be interviewing Officer John Clary regarding his dog biting an officer from the Des Moines Police Department. *Id.*

Lt. Piel did not have time to tell Commander Osborne that Officer Clary had reported this incident to Lt. Piel the night before. CP 484. Officer Clary had recently returned from a forced leave resulting from his wife's reporting that he assaulted her during a domestic dispute. *Id.* She recanted. *Id.* During his report to Lt. Piel, Officer Clary expressed concern, however, that Commander Osborne had been inserting herself into his private life and interfering with his marriage over this issue. *Id.* Even after he was cleared of any criminal wrongdoing, Commander Osborne continued to meet with Officer Clary's wife in their home. CP 484-85. He recently came home to find his Commander there. CP 485. Officer Clary was fearful that his Commander would "do or say something" to damage his career. *Id.*

At the K-9 meeting, Officer Clary gave Commander Osborne the same account of the dog-bite incident that he had given to Lt. Piel. *Id.* Three days later, Officer Clary reported that Commander Osborne had initiated a Standards Investigation against him, claiming that he was dishonest with her during their interview. CP 485. Her notice indicated that Officer Clary had denied any dog-

biting incident. *Id.* This was contrary to what Lt. Piel heard Officer Clary say to Commander Osborne. *Id.*

Aware that Officer Clary could lose his job for lying during an investigation, Lt. Piel went to Chief Kirkpatrick and explained the situation. CP 485. The Chief refused to acknowledge that Commander Osborne might be lying. *Id.* Lt. Piel offered the Chief a statement he wrote, but she refused to accept it. *Id.* She appeared angry that Lt. Piel had raised the matter with her. *Id.* She then took his statement and said that she would destroy it. *Id.* The Chief said that she would look into the situation and that Lt. Piel should not worry about Officer Clary's job. *Id.*

Commander Greg Wilson was in charge of Internal Affairs (IAD) and was assigned to investigate Commander Osborne's complaint against Officer Clary. CP 485. Around this time (beginning in February 2004) Lt. Piel noticed that IAD began routinely retuning "F" squad's use-of-force reports, pursuit reviews, and minor citizen complaints, for further investigation. CP 486. This unusual practice continued throughout the summer. *Id.* It concerned both Lt. Piel and his supervisor, Commander Sumpter, who had reviewed each of these reports with Lt. Piel and approved them before they went on to Commander Wilson at IAD. *Id.*

Commander Sumpter and Lt. Piel discussed this on several occasions, but the Commander instructed Lt. Piel to continue supervising his squad "as usual." *Id.*

Over the ensuing months, the returned reports began to overwhelm Lt. Piel with "additional follow-up" on virtually every alleged incident. CP 486. He was constantly re-interviewing officers and filling-out additional paperwork. *Id.* Nothing in the policy manual supported Commander Wilson's incessant demands, particularly in light of Commander Sumpter's prior approval of those reports. *Id.* Officer morale began to suffer due to this hyper-micromanagement from outside the squad. *Id.*

In light of the relationship that had developed between Commanders Wilson and Osborne, Lt. Piel could not help but wonder whether Commander Wilson was imposing excessive, unnecessary and unauthorized work on him in retaliation for his involvement in the Officer Clary incident and his report to Chief Kilpatrick regarding Commander Osborne. CP 486. This difficult situation was complicated by the fact that Commander Wilson was the Deputy Chief's brother, so reporting the problem to the Chief might simply result in further retaliation. CP 486-87.

On August 31, 2004, Commander Sumpter informed Lt. Piel that he was being reassigned. CP 487, 545. Commander Sumpter said that the Chief and Deputy Chief believed that "F" squad had "too many" use-of-force reports, pursuits, and citizen complaints. CP 487. In September 2004, Lt. Piel reviewed the annual reports reflecting statistics on these incidents, discovering that "F" squad did not show elevated numbers for such incidents, as Commander Wilson had reported to D.C. Wilson and Chief Kirkpatrick. *Id.* Lt. Piel asked to be assigned to a temporary position in the Criminal Investigation Section (CIS), property crimes division. CP 545.

E. After PERC certified the new Lieutenants' Guild, FWPD's wrongful conduct escalated.

In January 2005, PERC officially certified the FWPD's Lieutenants' Guild. CP 487. Also that month, Lt. Piel received his yearly evaluation, albeit late. *Id.* Several boxes were checked "below Expectations," and there were written areas suggesting poor performance. *Id.* But these negative reports were not written by his commanding officer, Commander Sumpter. *Id.*

Upon inquiry, Lt. Piel discovered that D.C. Wilson had authored the negative reports. CP 487. This highly unusual and

inaccurate procedure violated City policy. *Id.* Lt. Piel grieved this improper procedure and prevailed. CP 487, 544-46.

Despite Lt. Piel's victory, Chief Kirkpatrick and D.C. Wilson refused to remove the unsubstantiated negative comments from his file. CP 487. Lt. Piel complained to Human Resources, which agreed that the negative comments should be removed from his file, and assured him they would be. *Id.*

Also in January 2005, Lt. Piel completed his three-month temporary assignment in the detective division. *Id.* He received a good performance evaluation for supervising the Property Crimes Section from his supervisor, Commander McCall. *Id.* Since he had not worked in the detective division before, Lt. Piel asked to stay on for a standard rotation of 3 to 5 years. CP 487-88. But D.C. Wilson denied his request. CP 488. He instead gave the open position to Lt. John Everly, who had less-than-half Lt. Piel's experience, and was still on probation, which should have prevented him from receiving this assignment under the policy manual. CP 488.

In late April 2005, Chief Kirkpatrick told Lt. Piel that he was under investigation for violating departmental policies during the investigation of a robbery report. CP 488. Lt. Piel believed that he had violated no policies and that this was just further harassment

because he had prevailed on his grievance. *Id.* He filed a timely grievance, but was told that it was not timely. *Id.* The Union grieved that decision, but its grievance was ignored. *Id.*

On May 25, 2005, Lt. Piel was injured on the job, requiring corrective knee surgery. CP 488. He was off work on medical leave for nearly three months. *Id.* In late June 2005, while he was still on medical leave, D.C. Wilson summoned Lt. Piel to work. *Id.* He was told that the meeting would concern the ongoing Standards Investigation mentioned above. *Id.*

But when he arrived at D.C. Wilson's meeting, he discovered that it was about him "missing" staff meetings and one training during his medical leave. *Id.* Commander McCall and Lt. Everly were also present. *Id.* D.C. Wilson asked for Lt. Piel's "voluntary resignation." *Id.* When he refused, D.C. Wilson told him that he could expect to be "demoted" and placed on a "work plan" as punishment for the pending Standards violation when the Chief returned from vacation. CP 488.

Lt. Piel then advised D.C. Wilson that Commander McCall had instructed him, in writing, not to become involved in any work-related activity while on FMLA medical leave. *Id.* Commander McCall confirmed this to D.C. Wilson (*id.*) who became very angry

and used profanity. CP 488-89. Lt. Piel went home believing that he was going to be terminated or demoted for a minor policy violation that he did not believe he committed, and as to which he was denied his right to appeal. CP 489. He suffered great emotional distress for several weeks. *Id.*

F. After his medical leave – and even during it – Lt. Piel suffered further wrongful, discriminatory treatment.

On his first day back from medical leave, two Lieutenants told Lt. Piel that during a staff meeting, D.C. Wilson had called him and four other Lieutenants “problems to the administration.” *Id.* The other named Lieutenants had already complained to the Chief, who was meeting with them to apologize for this incident. *Id.* Chief Kirkpatrick later addressed the entire agency, stating that D.C. Wilson was wrong to make such a statement and that she was addressing the matter. *Id.* D.C. Wilson met with the other four Lieutenants, but he never met with Lt. Piel. CP 489-90.

On September 5, 2005, D.C. Wilson removed Lt. Piel from the “Accident Review Board.” CP 490. Commander McCall said that D.C. Wilson believed the Board was “mismanaged.” *Id.* Lt. Piel received no further explanations. *Id.*

On September 21, 2005, Lt. Piel received an intended letter of suspension. CP 489. Chief Kirkpatrick told him that if he would not appeal, she would reduce the suspension from 20 hours to 10 hours and that he could have the time deducted from his vacation bank, so that he would not have to miss any work. *Id.* Lt. Piel rejected this offer and asked to pursue his appeal. *Id.* Chief Kirkpatrick also told Lt. Piel that D.C. Wilson had breached policy by calling him to work during his medical leave. *Id.* She said that she would “discipline” D.C. Wilson for this violation. *Id.*

Approximately three hours later, Commander McCall telephoned Lt. Piel at home. *Id.* He said that Chief Kirkpatrick had instructed him to complete a time slip for Lt. Piel, deducting the 10-hour suspension. *Id.* The Commander wanted to know whether Lt. Piel wanted the time deducted from his comp-time or his vacation bank. *Id.* The Commander completed the form against Lt. Piel’s wishes, and without his signature, deducting 10 hours from his vacation bank. *Id.*

In October 2005, Lt. Piel and Lt. Norman were surprised to learn that they were being removed from the M.A.I.T. CP 490. When they had originally agreed to take on these additional responsibilities for no pay, Commander McCall had assured them

that if the volunteer positions ever became a paid position, they would be “grandfathered-in” and could stay on as long as they liked. CP 490. The position was subsequently contracted to a paid assignment, but D.C. Wilson ordered Lts. Piel and Norman to cycle out of the unit. *Id.* They both appealed this decision through their Union, and Lt. Norman eventually was allowed to return. *Id.* But Lt. Piel was not allowed to return. *Id.*

G. FWPD’s ongoing harassment culminated in Lt. Piel’s wrongful discharge in 2006.

By January 2006, Lt. Piel had been deprived of all of his collateral assignments. CP 490. He bid to work “E” squad again, with the same eight officers and days off as in 2005. *Id.*

On March 10, 2006, Lt. Piel was in the office late doing paperwork resulting from a series of collisions involving police officers and others. CP 490-91. At about 1 a.m., he received a call from Officer Jeffery Otto. CP 491. He was on traffic control, but had left the intersection to stop someone for not following his hand signals. *Id.* The driver turned out to be a King County Fireman whom Officer Otto suspected might be DUI. *Id.* Officer Otto had been on traffic control for three hours and it was raining, so he was seeking options other than arresting the firefighter. *Id.*

Lt. Piel told Officer Otto that under FWPD's policies there is discretion in arrest situations and that he would support the Officer in arresting the Fireman. CP 491. The other option would be to call the Battalion Chief to see if he would take charge of his employee and handle the matter internally. *Id.* Officer Otto said he liked the second option. *Id.* But he did not tell Lt. Piel (or Dispatch) that Officer Klingele (a certified DRE specializing in DUI) was with him. *Id.* He did say that the driver had not exited the vehicle and that he had not administered any Field Sobriety Tests. *Id.*

Lt. Piel called the Fire Chief, who said he would respond immediately. CP 491. Before Lt. Piel had explained the reason for the stop, the Chief said "thank you" and rang off. *Id.* Lt. Piel called Officer Otto and told him the Chief was on his way. *Id.* That was the end of Lt. Piel's involvement in the stop that evening. *Id.*

On March 17, 2006, D.C. Wilson told Lt. Piel that he was under a Standards Investigation for Officer Otto's traffic stop. *Id.* He claimed that Lt. Piel had violated two provisions in the Manual on Standards. CP 491-92. Lt. Piel responded that he had not violated any policies, and asked who reported the incident. CP 492. Although D.C. Wilson named Commander Sumpter, Lt. Piel later learned that Commander Wilson initiated the complaint. *Id.*

At the same time, the Lieutenants' Guild attorney was attempting to communicate with City management regarding Lt. Piel's appeal rights and the Wilson brothers' harassment and retaliation. CP 492. The City Attorney ignored these requests. *Id.*

On April 18, 2006, Lt. Piel received another notice of Standards Investigation. *Id.* This one alleged "serious Misconduct" and "Abuse of Authority." *Id.* Lt. Piel went on administrative leave pending the results of the investigation. *Id.*

In May 2006, Lt. Piel filed a Claim for Damages against the City based on the harassment and policy violations. *Id.*

On May 26, 2006, Officer Schwan told Lt. Piel that Commander Wilson had questioned him about "anything" Lt. Piel might have been doing wrong during briefings or at other times. *Id.* Schwan refused to be drawn into FWPD's "head hunting" games. *Id.* When Schwan told Wilson that Lt. Piel was already worried about his future, Wilson replied, "well he better be." *Id.* Lt. Piel filed a complaint regarding these statements and immediately informed the City Attorney about them. *Id.*; CP 557.

On July 7, 2006, Chief Kirkpatrick terminated Lt. Piel. CP 492. The same day, Chief Kirkpatrick sent an email to roughly 175 FWPD employees. CP 493. Her email reported Lt. Piel's

termination and her alleged reasons for it. *Id.*; CP 174. She mentioned an “investigation” into an unspecified “inappropriate use of discretion,” and “the [unspecified] very serious allegation of misconduct of abuse of authority” that was “sustained as a part of a separate investigation.” CP 174. “This sustained finding, along with a review of his overall performance with the [FWPD], led to my decision today.” *Id.*

It was not normal protocol for the Chief to describe such allegations to the entire FWPD. CP 493. Indeed, it had never happened before. *Id.* Yet she also subsequently released documents related to the case to a member of the public, before Lt. Piel had exhausted his grievance process. *Id.*

H. Lt. Piel successfully grieved his first wrongful termination, returning to work after 14 months, but immediately he was again placed on another administrative leave, was denied basic CBA protections, and was ultimately again wrongfully terminated.

Both Lt. Piel and the Union grieved his termination. CP 492. Lt. Piel’s grievance ultimately went to arbitration. *Id.* About 14 months after his termination, an arbitrator reinstated him. CP 493. The arbitrator’s award included all back pay and benefits. *Id.* After the City refused pay the lost wages, the arbitrator issued a second order to pay, which the City still stalled paying. *Id.*

On August 13, 2007, he returned to work at FWPD. CP 493. He had not been in the building for 14 months. *Id.* He was nervous. *Id.* He and had not slept in the last 24 hours. *Id.*

A new Deputy Chief, Andy Hwang, met him and escorted him to Commander McAllister's office. *Id.* D.C. Hwang told the Commander that he was going to escort Piel directly to now-Chief Brian Wilson's office. *Id.* This concerned Piel because no one had warned him about this meeting. *Id.* Commander McAllister, obviously noting Piel's distress, asked whether this meeting was voluntary or mandatory. *Id.* D.C. Hwang replied that the meeting was voluntary: "he does not have to go if he does not want to." CP 493-94. Piel replied that he would rather wait to meet with the Chief, giving him time to consult with the Guild and his attorney about the meeting. CP 494.

He had anticipated a full 10-hour day of reorientation and retraining. *Id.* He was anxious to begin. *Id.* Yet when he asked Commander McAllister about his orientation schedule, she replied something like, "not a whole lot." *Id.* She showed him her daily planner printout with only one or two sentences written on it. *Id.*; CP 573. He became discouraged. CP 494.

He was instructed to meet Officer Seth Hansen at the shooting range to qualify with a department-issued pistol. CP 494. He had not fired a weapon in 14 months. *Id.* He was issued a “practice range” (*i.e.*, poor-) quality weapon, even though Commander McCall had promised to hold onto his equipment, including his weapon, while he challenged his wrongful termination. *Id.* He nonetheless requalified at the range. *Id.*

Commander McAllister then sent him to the Quarter Master, a civilian employee named Jason Wilson, to obtain his equipment. *Id.* Wilson sat with his feet up on his desk and told him to “see what [he] could find” in piles of old equipment lying on the floor. *Id.* When he asked Wilson what had happened to his previously issued equipment, he said “I have no idea.” *Id.* Piel noted that his brand new bullet-proof vest with his name on it had specifically been fitted for his back. *Id.* Wilson then said that all of his equipment had been “reassigned.” *Id.*

About half-way through the day, he had nothing left to do and no assignments. CP 494-95. He had found neither uniforms nor a vest that fit. CP 495. He requested a new fitted safety-vest, which was denied. *Id.* He was told to go home. *Id.*

Again that night he could not sleep. CP 495. He lay awake thinking about how to be successful in law enforcement, starting at the bottom again after a 25-year career. *Id.* When he returned to work the next day, he had not slept in 48 hours. *Id.*

When he arrived on schedule in the morning, Commander McAllister told him that he was now scheduled to begin training with Officer Jason Ellis, who worked swing-shift. *Id.* No one told him this the day before. *Id.* She told him to go ahead and start the shift early and continue gathering equipment as needed. *Id.* He became more discouraged, returning to nothing to do. *Id.*

He went to be fitted for a jump suit at "Brat Wear Co," in Fife. *Id.* He returned to find that Commander McAllister had left on vacation. CP 495-96. Now he had nothing scheduled and no supervisor. CP 496. He and his family had unjustly suffered for a year and still had no back pay. *Id.* He was angry, tired, and frustrated. *Id.*

Since he had nothing to do and felt his blood pressure rising so much that he needed to see his doctor, he obtained permission to leave for the day. *Id.* As he was leaving, Commander Neal loudly yelled at him from 30 feet down a hall, "Welcome back Bud!

How you doing?" *Id.* He was startled and embarrassed, and moved away. *Id.*

On his way to the locker room, he noticed swing-shift officers in the briefing room. CP 496. Since he knew that he would be starting on swing-shift the next day, he entered the room to "break the ice" and to ask Officer Ellis what he needed to prepare before starting to work with him. *Id.* There were three or four officers in the room, two of whom he had worked with in the past. *Id.* Their conversation lasted two or three minutes, with Piel answering questions about what he had done during his time away and trying to be funny to relieve his intense feelings of discomfort and exhaustion. CP 496-97. Then he went home. CP 497.

That evening, he spoke to his wife about feeling terribly "unwanted" at FWPD. *Id.* She challenged him to get a good night's sleep, work the rest of the week, and then make decisions about their family's future with a "clear head." *Id.* He thought this was good advice, got 12 hours' sleep, and returned for work the next afternoon with a positive attitude. *Id.*

As he was dressing for work, Commander Sumpter entered the room and said he needed to check the serial numbers on Piel's weapon and to record them. Piel told the Commander that his gun

was loaded in its holster, and the Commander asked him to just hand over his gun belt and holster. CP 497. This was very unusual, catching the attention of the other officers in the room. *Id.* Commander Sumpter told him to pick up this equipment at his office on his way to the briefing. *Id.*

After he finished dressing and headed out the door, Commanders Sumpter and Arbuthnot, and Guild President John Clary, stopped him and told him to follow them to the Chief's office. *Id.* They instead took him to a conference room, where D.C. Hwang told him that he was again being placed on administrative leave, this time because he allegedly posed a "serious workplace safety concern." *Id.* He demanded clarification. *Id.* D.C. Hwang claimed that he had threatened members of the "Administration." *Id.* He denied this. *Id.* He asked for the names of his accusers and any written witness statements. *Id.* He instead received an unsigned letter reflecting the above, was stripped of his weapon, ID card, and badge, and was escorted out of the station. CP 498.

He received orders to meet with the Chief at 10 a.m. *Id.* When he did so, he received a revised letter accusing him of six possible policy violations. *Id.* He learned that Commander Arbuthnot would conduct the investigation, but he was going on

vacation, so the investigation would not begin immediately, and Piel would remain on leave. CP 498. The letter asserted that his “fitness for duty” was in question. *Id.*

On September 13, 2007, he met with Commander Arbuthnot and Guild representative Officer Keith Pon for a recorded investigatory interview. *Id.* Before turning on the recorder, they briefly discussed case status, the number of alleged charges, and how long the investigation might take. *Id.* The Commander said that he was pursuing only a single charge and that the others would be dismissed as “unfounded.” *Id.*

Piel again asked to examine witness statements and any transcripts to help him refresh his memory. CP 498. Officer Pon confirmed that this was authorized under the Collective Bargaining Agreement (CBA), art. 13, § H:

The Department shall tape record the interrogation of the subject of an investigation when a potential discipline could result in a suspension, demotion, or discharge. Upon request, a copy of the tape and transcript will be provided. For all Guild witnesses, in said investigation, other than the subject, the Department will either tape the interview or obtain signed, written statements, which will become part of the investigation **and will be provided upon request.**

CP 498-99, n. 1 (emphasis added). Yet Commander Arbuthnot said that he was told not to allow them to examine witness

statements. CP 499. Chief Wilson later asserted in a declaration that FWPD had “consistently” interpreted the above regulation to mean the statement would be given to the subject of a Standards Investigation after the investigation was over. CP 606.

The recorded interview began. CP 499. Piel had no recollection of making any statement in the briefing room, so he assumed the allegations must be about statements he made at the shooting range. *Id.* He answered the questions to the best of his ability, attempting to be truthful at all times. *Id.*

He asked for and received a copy of Commander Arbuthnot's written questions. *Id.* He took them to a polygraph expert, who tested him and found him truthful. *Id.* Piel supplied the results to Commander Arbuthnot. *Id.*

The FWPD then reassigned the investigation to an “Independent Investigator,” Amy Stephson. *Id.* The department claimed that Commander Arbuthnot was now “tainted” by the polygraph results. *Id.* Stephson interviewed Piel, albeit again without showing him any statements or transcripts. CP 218-27. He again flatly denied that he said anything “about shooting, murdering, killing, harming, injuring anybody.” CP 226.

Stephson issued a report on October 2, 2007, finding that Piel was lying. CP 230-33. She relied upon three witnesses who said that he talked about “shooting,” “killing” or “murdering” someone. CP 231-32. The first and most emphatic of these witnesses was Jason Wilson, the Quarter Master whose conduct toward Piel had been less than friendly. CP 231. Yet Stephson concluded without investigation that he “had no reason to lie.” *Id.*

But Jason Wilson had already given a statement on September 12, 2007, in which he said that Piel’s “sarcastic attitude” was just his “dry sense of humor,” and “he just likes to joke around.” CP 472. He further stated that despite his earlier report that Piel talked about “shooting” someone, “I just don’t remember exactly what he said.” *Id.* Indeed, he “wasn’t really considering the comment as a problem at the time,” and he did not “feel it was directed at anyone.” *Id.* Piel was not shown this statement before his interview.

The other two witnesses were Officers Bassage and Ellis. CP 231-32. Officer Bassage said that Piel said some unspecified thing about thinking about “‘murdering’ others in the department during his 15-month absence from the department.” CP 231. Yet Officer Bassage also reported that “Piel said this without anger in a

'typical Bud Piel' way that is 'facetious' and 'sarcastic.'" *Id.* He too had given an earlier statement, in which he said that he "was not offended or alarmed by the comments," that he was "not concerned" when the comments were made, that he was "not convinced the comment was serious," and that he knew Lt. Piel "to have a dry sense of humor and his comments and demeanor were consistent throughout" the incident. CP 476.

Officer Ellis reported that Lt. Piel said something about "shooting" someone, but did not remember hearing anything about "murdering" someone. CP 232. Mostly he felt that Piel had returned to his old sarcastic self surprisingly quickly upon his return. *Id.* Officer Ellis said he was not really paying attention, so he could not give any details. *Id.*

Based on the above inconclusive statements, Stephson concluded that Piel had lied when he denied saying anything about shooting or murdering anyone. CP 231. She nonetheless conducted a second interview. CP 235-53. As with the first interview, Piel again demanded to see witness statements and transcripts as required under the CBA. CP 235-36. And again, the City refused to produce them before his interview, and he was

again ordered to answer questions. *Id.*; *see also* CP 454 (Chief Wilson admits that Piel's requests were denied).

Piel again flatly denied that he ever said anything about shooting, killing or murdering anyone. CP 237, 239. He noted that after 25 years in law enforcement, he had never had so much as an excessive force complaint. CP 239. His lawyer also revealed to Stephson that FWPD employees would testify that before he returned work, Chief Wilson said, "Robert Piel will never work again . . . with the City of Federal Way. CP 244; *see also* CP 446 (former officer's declaration); 625-26 (same); 459 (Chief Wilson denies ever making these statements).

As for the alleged witnesses' credibility, Piel pointed out that he personally had been responsible for preventing Jason Wilson from promoting to officer "many times," so he might well hold a grudge. CP 239-40. As to the two weaker witnesses, he did not really recall who Officer Bassage was (CP 241), and did not remember Officer Ellis being present in the briefing room (CP 238, 244). He repeatedly insisted that he had no recollection of saying anything like what FWPD was accusing him of, as confirmed by the polygraph he took. CP 250-51. Upon insistent re-questioning, he

admitted that “anything is possible,” but he never agreed that he did or would say such a thing. CP 251.

Stephson issued a second report. CP 255-57. The issue this time was whether he was untruthful when he flatly denied making any comment about shooting or murdering anyone. CP 255. Stephson changed her prior view, now admitting that he could be telling the truth in light of all the circumstances:

In such circumstances, **Piel could credibly be unable to recall making one of many negative comments. This could be true even regarding the murder comment,** which he said in passing without particular emphasis.

CP 256 (emphasis added). Looking at all the things that had happened leading up to that day, as described above, Stephson acknowledged that, “given his mental state at the time, Piel may not have been quite aware of what he was saying at the briefing.” CP 256. She even acknowledged that “he could have failed in good faith to recall most of it.” *Id.*

Stephson thus concluded *not* that she thought he was lying, but that “*the City* could reasonably determine that his flat denial did constitute dishonesty and untruthfulness.” CP 257; *see also* CP 467 (Stephson admits leaving this decision to the City). She said this even though, “[i]n most investigations, one might view the

distinction between the former type of response ["I don't recall"] and a denial as insignificant." CP 257.

Predictably, Chief Wilson chose to terminate Piel for being "untruthful." CP 500. He invited Piel to give him any further information he wished, and he did so. CP 259-74. But that did not change the outcome.

The Piel's filed suit against Federal Way on numerous grounds in January 2008. CP 3- 21.

I. The parties brought cross-motions for summary judgment, which the trial court resolved on an issue not raised by the parties.

The City sought an early dismissal. CP 53-60. The trial court dismissed some claims, but left the Piel's wrongful termination in violation of public policy claims intact. CP 98-99.

The parties subsequently brought cross-motions for summary judgment on numerous grounds. CP 100-17 (Piel's MSJ); CP 323- 41 (City's MSJ). The gravamen of the City's motion was that Piel had "lied" during the investigation when he denied that he had threatened anyone because he subsequently had "admitted" that "anything is possible" (CP 251). *See, e.g.*, CP 326-30 (City's MSJ). The trial court asked the Piel's to "clarify" their

wrongful discharge claim in relation to RCW 49.78 (Washington's Family Leave provisions):

The Court requests clarification from the parties regarding the RCW 49.78 claim.

The Court would like [the Piel's attorney] Mr. Hansen to clarify whether he's relying on RCW 49.78.130 or 49.78.300 as a basis for his clients' claim that Mr. Piel was discharged in violation of public policy. Also, Mr. Hansen, please explain more fully the meaning of "Defendant's violation of Piel's medical leave rights properly form[s] the basis of one of the protected activities which he engaged in with respect to his cause of action for wrongful termination in violation of public policy." Plaintiffs' Reply to City's Opposition to Plaintiffs' Motion for Partial Summary Judgment, p.7 [CP 716].

The Court further requests that both counsel provide their view on the applicability, if any, of Korslund to a wrongful discharge in violation of public policy claim **based on RCW 49.78**.

CP 766 (emphasis added). Mr. Hansen clarified as follows:

Given the timing of Lt. Piel's use of medical leave in 2005, Plaintiffs must necessarily rely on RCW 49.78.130, which was in effect at the time. Plaintiffs concede that RCW 49.78 *et seq.* did not provide for a private cause of action in 2005. Lt. Piel admittedly did not pursue a Complaint with the Department of Labor & Industries per RCW 49.78.140. Because of this a discussion about the applicability of *Korslund* is not necessary.

Although Plaintiffs' cause of action based upon a violation of RCW 49.78.130 would be properly dismissed, it is Plaintiffs' position that the circumstances surrounding Lt. Piel[s] use of Medical Leave, his being summoned to the Department during his absence while on leave, and his subsequent complaint to Chief Kirkpatrick will be factually (as opposed to legally) probative of retaliatory intent on behalf of the

Defendant in connection with the wrongful termination in violation of public policy cause of action.

CP 764. Mr. Hansen later further clarified as follows (CP 762):

Having read the response of the City, I believe that the only reply necessary from the Plaintiffs is to reiterate that Plaintiffs are conceding only that the cause of action under RCW 49.78 would be properly dismissed for the reasons previously stated. This concession does not include dismissal of the Termination in Violation of Public Policy cause of action asserted in Plaintiffs' Complaint, for all of the reasons previously discussed and argued.

Notwithstanding these clarifications, the trial court ruled that the Piels' case should be dismissed. CP 767-74 (Opinion, attached as Appendix A); 775-78 (Order on Summary Judgment). As further discussed below, the trial court primarily relied on **Korslund** to dismiss the wrongful discharge claim, essentially ruling that **Korslund** overrules **Smith**:

In **Korslund**, the Washington Supreme Court held that the plaintiffs had failed to satisfy the jeopardy element because "there was an adequate alternative means of promoting the public policy on which they rely," namely, remedies available under the Energy Reorganization Act that protect whistleblowers in the nuclear industry. . . . The City argues that RCW 41.56 contains comprehensive remedies that protect employees alleging retaliation for engaging in protected concerted activities. Piel, on the other hand, argues that the analysis should be governed by **Smith** . . . , not **Korslund**. . . .

These arguments raise the question of whether **Smith** and **Korslund** can be harmonized, or whether **Korslund** implicitly limited **Smith**'s emphasis on making tort remedies available to all employees regardless of the remedies

already available to them. **Korslund** represents an entirely different approach to wrongful discharge tort claims than **Smith**. . . .

As the more recent Supreme Court case, **Korslund** is the controlling authority. Based on **Korslund**, the Court concludes that the remedies available to Piel through PERC are adequate to protect the public policy grounded in RCW 41.56. Since Piel cannot satisfy the “jeopardy” element, his wrongful discharge in violation of public policy claims grounded in RCW 41.56 are dismissed.

CP 768-72. This ruling forms the basis for this appeal.

ARGUMENT

A. This Court did not overrule **Smith** in **Korslund**, expressly or implicitly, and **Smith** is plainly on all fours and controlling here.

Korslund does not overrule **Smith** expressly or implicitly.

This Court has unequivocally held that where, as in **Smith**, it has “expressed a clear rule of law . . . we will not – and should not – overrule it *sub silentio*.” **Lunsford v. Saberhagen Holdings, Inc.**, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (citing **State v. Studd**, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999)). On the contrary, this Court continues “to require “a clear showing that an established rule is incorrect and harmful.”” **Lunsford**, 166 Wn.2d at 280 (quoting **Riehl v. Foodmaker, Inc.**, 152 Wn.2d 138, 147, 94 P.3d 930 (2004), (additional citation omitted). **Smith** is neither incorrect

nor harmful. This Court should reject the trial court's erroneous ruling, reverse, and remand for trial.

In **Smith**, this Court addressed precisely the question at issue here:

[W]hether the common law tort of wrongful discharge in violation of public policy extends to employees who may be terminated only for cause and, if so, whether an employee must first exhaust administrative or contractual remedies before pursuing such an action.

Smith, 139 Wn.2d at 796. Smith was an employee of Bates Technical College, so she was entitled to the civil service protections afforded to higher-education employees. *Id.* She was also a member of a professional/technical employees' union, subject to both RCW 41.56 and a CBA. *Id.* at 796-97. The CBA required only "for cause" firing (with the usual due process protections) and provided a grievance procedure. *Id.* at 797.

As with the legal issues, the facts in **Smith** and are also remarkably similar to ours: Like Piel, Smith had received favorable performance evaluations. *Id.* Like Piel, she filed a grievance. *Id.* And like Piel, she suddenly began to receive negative evaluations. *Id.* Unlike Piel, she withdrew her first grievance, but like Piel, she had to file additional grievances. *Id.* Also like Piel, she took a

medical leave, and like Piel, her employer took inappropriate actions due to that leave. *Id.* at 797-98.

Also like Piel, due to the great stress of all of her employer's improper actions, upon her return to work she said some things that were interpreted as "threatening" to fellow employees. 139 Wn.2d at 798. Like Piel, she denied that she ever threatened anyone. *Id.* She also filed further grievances. *Id.* And like Piel, she was wrongfully terminated, reinstated with back pay and benefits, and then wrongfully terminated again. *Id.*

Smith finally tired of all this wasteful procedure and backstabbing and, like Piel, simply sued her employer for WTVP. *Id.* at 799. As here, the trial court dismissed the WTVP claim on summary judgment, "for failure to exhaust her remedies with PERC." *Id.* Smith was, however, able to pursue some of her claims to trial, but ultimately lost on those other claims. *Id.* at 800.

The Court of Appeals affirmed, but this Court accepted review and reversed on this issue. The Court first agreed with a prior Division One Opinion that "for cause" employees may bring WTVP claims because "*the right is independent of any contractual agreement*" between employer and employee. 139 Wn.2d at 801-04 (quoting and following ***Wilson v. City of Monroe***, 88 Wn. App.

113, 117-18, 943 P.2d 1134 (1997), *rev. denied*, 134 Wn.2d 1028 (1998)). Thus, “when *any* employee is terminated in violation of a clear mandate of public policy, the employee should be permitted to recover for the violation of his or her legal rights.” 139 Wn.2d at 804 (emphasis original).

While Bates made much of the CBA’s remedies provisions, “these remedies do not protect an employee who,” like Smith or Piel, “is fired not only ‘for cause’ but also in violation of public policy.” *Id.* at 805. Moreover, “additional and distinct remedies would be available to Smith [or Piel] were she [or he] allowed to sue in tort.” *Id.* (citing ***Cagle v. Burns & Roe, Inc.***, 106 Wn.2d 911, 919, 726 P.2d 434 (1986) “(damages for emotional distress are recoverable in tort action based on” WTVP)). PERC simply has no authority to adjudicate WTVP actions or to award emotional-distress damages. *Id.* This Court thus held that Smith was not required to exhaust administrative remedies through PERC prior to suing for WTVP. *Id.* at 808-11.

Smith and this case are remarkably similar on the facts and the legal issues. ***Smith*** is thus controlling here, not ***Korslund***. As in ***Smith***, Piel was an exemplary employee who invoked his rights and then suffered serial retaliations, all the way up to and including

two wrongful terminations. PERC still has no authority to try WTVP claims or to fully compensate Piel. As in **Smith**, Piel was not required to exhaust inadequate administrative remedies.

By contrast, **Korslund** involved three employees who sued for WTVP based on alleged retaliation for reporting safety violations, mismanagement, and fraud at the Hanford Nuclear Reservation. **Korslund**, 156 Wn.2d at 172. This Court began its analysis by reiterating the now-well-established policies supporting a WTVP claim (*id.* at 178):

A claim for wrongful discharge in violation of public policy may arise when an employer discharges an employee for reasons that contravene a clear mandate of public policy. **Gardner v. Loomis Armored, Inc.**, 128 Wn.2d 931, 936, 913 P.2d 377 (1996). The cases addressing the claim generally involve situations where employees are fired for refusing to commit an illegal act, for performing a public duty or obligation, for exercising a legal right or privilege, or for engaging in whistleblowing activity. *Id.* at 938; **Dicomes v. State**, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989). The cause of action was first recognized in this state as an exception to the rule that employment contracts that are indefinite in duration may be terminated at will by either the employer or the employee. **Thompson v. St. Regis Paper Co.**, 102 Wn.2d 219, 231-33, 685 P.2d 1081 (1984); see **Hubbard v. Spokane County**, 146 Wn.2d [699,] at 707[, 50 P.3d 602 (2002)].

Korslund then specifically noted that under **Smith**, union employees may still bring such actions (*id.*):

The cause of action is also available to employees who are dischargeable only for cause (and who may be covered by a collective bargaining agreement). **Smith** . . .; see **Wilson**, [*supra*].

The Court also set forth the familiar elements of the WDVP claim:

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**, [*supra*]. To satisfy the elements of the cause of action, the “plaintiff must prove

- (1) the existence of a clear public policy (*clarity* element);
- (2) that discouraging the conduct in which [he or she] engaged would jeopardize the public policy (*jeopardy* element); and
- (3) that the public-policy-linked conduct caused the dismissal (*causation* element).”

Hubbard, 146 Wn.2d at 707 (citing **Gardner**, 128 Wn.2d at 941). Then,

- (4) “‘the defendant must not be able to offer an overriding justification for the dismissal’ (*absence of justification* element).” **Hubbard**, 146 Wn.2d at 707 (quoting **Gardner**, 128 Wn.2d at 941).

156 Wn.2d at 178 (emphasis original, paragraphing added).

Korslund first held that the employees had satisfied the “clarity” element. The *Energy Reorganization Act of 1974* (ERA) “provides that ‘[n]o employer may discharge any employee or otherwise discriminate against any employee . . . because the employee . . . notified his employer of an alleged violation of this

chapter or the Atomic Energy Act of 1954” *Id.* at 181 (quoting 42 U.S.C. § 5851(a)(1)(A)). Since the ERA made such retaliation illegal, “there is a clear public policy encouraging and protecting their right to report without fear of retaliation or reprisal.” *Id.*

But unlike in ***Smith***, ***Korslund*** concluded that the employees had not satisfied the “jeopardy” element. To establish jeopardy, “a plaintiff must show that he or 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.’” *Id.* at 181 (quoting ***Hubbard***, 146 Wn.2d at 713 (quoting ***Gardner***, 128 Wn.2d at 945)). In addition, the plaintiff must “prove that discouraging the conduct that he or she engaged in would jeopardize the public policy.” *Id.* (citing ***Ellis v. City of Seattle***, 142 Wn.2d 450, 460, 13 P.3d 1065 (2000)). Finally – and dispositively in ***Korslund*** – “the plaintiff also must show that other means of promoting the public policy are inadequate.” *Id.* at 181-82 (citing ***Hubbard***, 146 Wn.2d at 713; ***Gardner***, 128 Wn.2d at 945).

Although noting that “the question whether the jeopardy element is satisfied generally involves a question of fact,” ***Korslund*** also notes that, “the question whether adequate alternative means for promoting the public policy exist may present a question of law,

i.e., where the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy.” **Korslund**, 156 Wn.2d at 182 (citing **Hubbard**, 146 Wn.2d at 716-17). The Court concluded that the ERA provides alternative means, including – as is particularly important here, and unlike in **Smith** – compensatory damages:

The ERA provides an administrative process for adjudicating whistleblower complaints and provides 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, conditions of employment; back pay; **compensatory damages**; and attorney and expert witness fees. 42 U.S.C. § 5851(b)(2)(B). The ERA thus provides comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs.

Id. at 182 (emphasis added). Thus, the **Korslund** plaintiffs failed to meet the jeopardy element. *Id.* at 182-83.

Contrary to the trial court’s ruling, this Court can (and probably did) harmonize **Smith** and **Korslund**. As here, **Smith** involved a state employee, in a union and under a CBA, where the employer repeatedly violated her rights and wrongfully terminated her twice. The question there was exhaustion and, as here, none of the procedural protections could fully compensate the employee for WTVP. On the contrary, they would simply subject her, like the Piels, to further rounds of abuse and delay.

By contrast, **Korslund** involved federal employees who were fully protected under a federal whistleblower statute. That statute even permits an award of “compensatory damages.” 156 Wn.2d at 182. This was a key distinction, among several, permitting the different result in **Korslund**, without overruling – expressly or otherwise – the correct and helpful **Smith** decision. *Stare decisis* demands that this Court reverse and remand for trial.

B. The Piels otherwise have (at the very least) raised genuine issues of material fact precluding summary judgment on their WTVP claims.

On the elements of WTVP, as in **Smith**, and similarly to **Korslund**, the Piels may rely on the public policy reflected in RCW 41.56 to meet the “clarity” element. **Smith** holds that this statute provides a clear mandate of public policy: “As RCW 41.56 and Washington precedent establish a public employee’s pursuit of a grievance is a protected legal right, Smith has identified a relevant public policy.” 139 Wn.2d at 807. Nothing in **Korslund** even addresses, much less overturns, this correct holding.

Again on the jeopardy element, as in **Smith**, discouraging employees from pursuing their legal rights jeopardizes this public policy: “A cause of action for [WTVP] exists where an employee is fired for exercising a legal right or privilege.” 139 Wn.2d at 807

(citing **Gardner**, 128 Wn.2d at 936 (citing **Dicomes**, 113 Wn.2d at 618)). This element is generally a question of fact. **Korslund**, 156 Wn.2d at 182. At the very least, the facts stated above raise genuine issues of material fact on whether Lt. Piel was wrongfully discharged (twice) for exercising his legal rights.

The same is true for the causation element. Causation is generally a question of fact for the jury. See, e.g., **Joyce v. State**, 155 Wn.2d 306, 321, 119 P.3d 825 (2005). As set forth above, the long pattern of abuse the Piel's suffered, including proven improperly low evaluations, proven violations of medical leave, and a proven wrongful termination, together with Chief Wilson's avowal that Lt. Piel would never work at FWPD again, provide ample evidence for a jury to find that FWPD committed WTVP. This Court should reverse and remand for trial.

Finally, FWPD may attempt to argue that it has presented "an overriding justification for the dismissal" (*absence of justification element*) based on its allegation of "lying" during its investigation. **Korslund**, 156 Wn.2d at 178. As the facts set forth above – taken in the light most favorable to the Piel's – make quite clear, however, a jury could well reject FWPD's assertions in this regard. Even its own investigator admitted that one could

reasonably conclude – in light of all the facts – that Piel was telling the truth. CP 256. The Court should reverse and remand for trial.

C. The Piels do not claim WTVP based on “violations” of RCW 49.78 or RCW 4.96, but rather note that FWPD’s wrongful actions in relation to those protected activities are evidence of its general course of conduct, tending to support their WTVP claims based on RCW 41.56.

On a collateral matter, the trial court also purported to “dismiss” the Piels’ WTVP “claim” based on “violations” of RCW 49.78, pertaining to Medical Leave. CP 771-72. Similarly, the trial court purported to “dismiss” the Piels’ “claim” under RCW 4.96 that they had a right to file a Notice of Claim and that, therefore, the City committed WTVP by retaliating against them for doing so. CP 772 n. 4. That is not what the Piels were claiming.

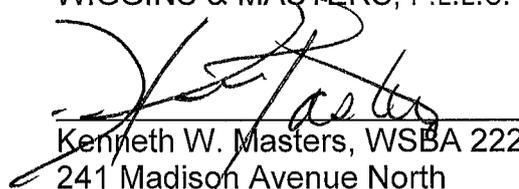
Rather, the Piels simply wished to make it clear to the trial court that FWPD’s misbehavior in relationship to Lt. Piel’s Medical Leave, and to their Notice of Claim filing, provides evidence of its general course of misconduct and retaliation toward them. See, e.g., CP 764. The Piels agree that RCW 49.78 provides no private cause of action, and they assert no generalized “access to justice” claim here. But that does not mean that this evidence is irrelevant to their WTVP claims.

CONCLUSION

For the reasons stated above, this Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 15th day of March, 2010.

WIGGINS & MASTERS, P.L.L.C.



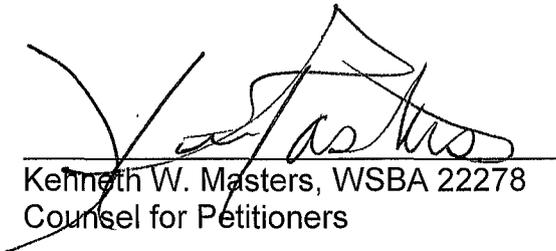
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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF PETITIONER** postage prepaid, via U.S. mail on the 1st day of March, 2009, to the following counsel of record at the following addresses:

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FILED

KING COUNTY, WASHINGTON

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DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ROBERT PIEL & JACQUELINE PIEL,
Husband and wife,

No. 08-2-02830-5 KNT

Plaintiffs,

OPINION

v.

THE CITY OF FEDERAL WAY, a
Municipality organized pursuant to the laws
of the State of Washington,

Defendant.

I. INTRODUCTION

This case is before the Court on defendant City of Federal Way's ("City") motion for summary judgment, plaintiffs Piel's ("Piel") motion for partial summary judgment, and the City's motion to dismiss pursuant to CR 12(c). The motions present the following issues:

(1) whether *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168 (2005), requires the dismissal of Piel's wrongful discharge in violation of public policy claims based on RCW 41.56;

(2) whether Piel's allegation that the City retaliated against him because he took medical leave pursuant to 49.78 should be dismissed; and

OPINION - Page 1

Judge Bruce E. Heller
King County Superior Court
Regional Justice Center
401 Fourth Avenue North, 2D
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CP 767

App. A

1 (3) whether Piel's invasion of privacy allegation should be dismissed.¹

2 **II. DISCUSSION**

3 **A. RCW 41.56 Claims**

4 Piel alleges that he was wrongfully terminated in 2006 and 2007 because he engaged in
5 the following activities protected by RCW 41.56.040:

- 6 • participation in the formation of the Federal Way Lieutenant's Association
7 through the Washington Public Employee Relations Commission ("PERC");
- 8 • filing a Complaint with the City's Department of Human Resources in January
9 2005, as authorized by the Employee Guidelines for Employees of the City of Federal Way,
10 concerning his annual Performance Appraisal;
- 11 • filing a second Complaint with the City's Human Resources Department in
12 January 2005, as authorized by the Employee Guidelines for Employees of the City of Federal
13 Way, when he learned that the performance evaluation he had contested would be placed in his
14 permanent personnel file;
- 15 • appealing to the City Manager, as authorized by the Employee Guidelines for
16 Employees of the City of Federal Way, concerning proposed discipline resulting from the
17 April 2005 Standards Investigation;
- 18 • filing a protest, through the Federal Way Lieutenant's Association and its
19 counsel, of his removal from the MAIT (Major Accident Investigation Team);

22 ¹ Piel has withdrawn his public policy claim based on RCW 51.48.

1 In *Korlund*, the Washington Supreme Court held that the plaintiffs had failed to
2 satisfy the jeopardy element because “there was an adequate alternative means of promoting
3 the public policy on which they rely,” namely, remedies available under the Energy
4 Reorganization Act that protect whistleblowers in the nuclear industry. *Id.*, 156 Wn.2d at 181-
5 182. The City argues that RCW 41.56 contains comprehensive remedies that protect
6 employees alleging retaliation for engaging in protected concerted activities. Piel, on the other
7 hand, argues that the analysis should be governed by *Smith v. Bates Technical College*, 139
8 Wn.2d 793 (2000), not *Korlund*. In *Smith*, the Supreme Court held that a unionized public
9 employee alleging retaliatory discharge could bring a wrongful discharge against public policy
10 claim without having to exhaust the grievance procedure provided by her collective bargaining
11 agreement: “We see no justified reason to deny Smith the opportunity to recover damages for
12 emotional distress – thereby immunizing the alleged tortious conduct of her employer – simply
13 because her administrative and contractual remedies may partially compensate her wrongful
14 discharge.” *Id.*, 139 Wn.2d at 806. Piel points out that, as in *Smith*, none of the remedies
15 available to him through PERC, the Civil Service Commission or the grievance procedure
16 include emotional distress damages.

17 These arguments raise the question of whether *Smith* and *Korlund* can be harmonized,
18 or whether *Korlund* implicitly limited *Smith*'s emphasis on making tort remedies available to
19 all employees regardless of the remedies already available to them. *Korlund* represents an
20 entirely different approach to wrongful discharge tort claims than *Smith*. While *Smith* cites
21 *Gardner* for the proposition that a wrongful discharge tort is available outside the
22 employment-at-will context, *Id.*, 139 Wn.2d at 807, the court did not analyze whether *Smith*
23 satisfied the four elements of the tort set forth in *Gardner*. *Korlund* clearly did. Instead of

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1 focusing on placing unionized employees on the same footing as at-will employees, *Korlund*
2 asked whether the remedies available to the employee were adequate to protect the public
3 policy on which the plaintiffs relied. The court concluded that the remedies available under
4 the ERA were adequate, even though they did not provide emotional distress damages. *Id.*,
5 156 Wn.2d at 182.

6 As the more recent Supreme Court case, *Korlund* is the controlling authority. Based
7 on *Korlund*, the Court concludes that the remedies available to Piel through PERC are
8 adequate to protect the public policy grounded in RCW 41.56. Since Piel cannot satisfy the
9 "jeopardy" element, his wrongful discharge in violation of public policy claims grounded in
10 RCW 41.56 are dismissed.²

11 **B. RCW 49.78 Claim**

12 Piel alleges that in May 2005, the City violated RCW 49.78.130 by inappropriately
13 ordering him to return to work while on medical leave and then criticizing him for
14 performance issues and absences that occurred during his leave.³ As Piel acknowledges, RCW
15 49.78.130 did not provide for a private cause of action. Therefore the claim must be
16 dismissed.

17 Piel has also argued that the alleged violations of RCW 49.48.130 support his wrongful
18 termination in violation public policy claims. As noted above, to state a wrongful discharge

19 ² It is therefore not necessary for the Court to reach other issues presented, including
20 the appropriate statute of limitations applicable to wrongful discharge claims based on RCW
21 41.56, whether the filing of grievances pursuant to Employee Guidelines, as opposed to a
collective bargaining agreement, is protected by RCW 41.56, and whether *White v. State*, 131
22 Wn.2d 1(1997)(wrongful discharge tort is limited to discharges) applies to Piel's 2006
23 termination that was subsequently converted to a demotion by an arbitrator.

24 ³ While Piel's briefing cited RCW 49.78.330 for this argument, he has since conceded
that RCW 49.78.330 was not in effect in May 2005 and does not apply retroactively.

1 claim, a plaintiff must establish the existence of a clear public policy, i.e., the “clarity
2 element.” *Danny v. Laidlaw Transit Services*, 165 Wn.2d 200, 207 (2008). Since RCW
3 49.78.130 was repealed prior to Piel’s 2006 and 2007 terminations, no public policy based on
4 that statute “existed” at the time of these adverse employment actions.

5 Piel cannot satisfy the “clarity” element for an additional reason. Even if the statute
6 were in effect at the time of his termination, it did not protect an employee’s right to take
7 medical leave, but rather family leave. RCW 49.78.130.020(5). While Piel’s medical leave
8 may have been protected by the federal Family Medical Leave Act, Piel has not relied on that
9 statute. Therefore, Piel’s wrongful discharge claim based on RCW 49.78.130 is dismissed.⁴

10 C. Invasion of Privacy

11 Piel alleges invasion of privacy based on the following: On July 7, 2006, Chief
12 Kirkpatrick sent an e-mail to approximately 175 department employees explaining the reasons
13 for Piel’s termination. Subsequently, the Chief answered questions about the termination at a
14 shift briefing. On August 1, 2006, in response to a Public Records Act request, the City

15
16 ⁴ In his motion for partial summary judgment, Piel has asked the Court to rule as a
17 matter of law that he had a protected right under RCW 4.96.020 to file a notice of claim
18 against the City in May 2007. It is unclear why he is seeking this ruling since his partial
19 summary judgment motion does not articulate a wrongful discharge against public policy
20 claim based on RCW 4.96.020. Yet at oral argument, Piel pointed out the close temporal
21 proximity between the May 2007 notice of claim and his July 7, 2006 termination. Arguably,
22 a dismissal based on the threat of a lawsuit could violate public policy. For example, in
Bennett v. Hardy, 113 Wn.2d 912 (1990), the Supreme Court recognized a wrongful discharge
cause of action alleging that an employer terminated an employee after receiving a letter from
the employee’s attorney warning the employer not to commit age discrimination. The court
identified the policy at issue as the right to oppose discriminatory practices under RCW
49.60.210. Here, there is no evidence that Piel’s notice of claim raised issues of discrimination
under RCW 49.60. Furthermore, Piel has not argued for, let alone established, the existence
of a generalized access to justice policy that would protect him under the circumstances of this
case. He therefore fails to establish the “clarity element” of a wrongful discharge claim.
Gardner, supra. Again, the Court does not reach the question of whether *White* bars Piel’s
wrongful discharge claim based on the 2006 termination/demotion.

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1 released its Internal Affairs Investigation regarding the circumstances that lead to Piel's
2 termination.

3 The tort of invasion of privacy requires that the disclosure (1) would be highly
4 offensive to a reasonable person, and (2) is not of legitimate concern to the public.
5 Restatement (Second) of Torts, § 652D. *Reid v. Pierce County*, 136 Wn.2d 195, 205 (1998).
6 In *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 727 (1988), the Supreme Court
7 concluded that "a law enforcement officer's actions while performing his public duties . . .
8 do not fall within the activities to be protected under the Comment to § 652D of the
9 Restatement (Second) of Torts as a matter of 'personal privacy'." Piel has presented no
10 evidence that any of the information disclosed about him in the e-mail, during the shift
11 briefing or in the internal affairs investigation report extended into his private life, as opposed
12 to the actions he took as a police officer. The disclosures therefore cannot be characterized as
13 "highly offensive to a reasonable person."

14 The Court is not persuaded by Piel's contention that the disclosure of the investigation
15 report was not of legitimate concern to the public because the allegations had not yet been
16 heard by an arbitrator and were therefore unsubstantiated. At the time of the disclosure, the
17 department had investigated the allegations, found them to be true and therefore terminated
18 Piel. These circumstances are distinguishable from *Tacoma v. Tacoma News Tribune*, 65
19 Wn.App. 140 (1992), wherein the City declined to release information concerning allegations
20 of abuse of a minor after finding them to be unsubstantiated. The mere possibility that Piel
21 might be successful in challenging the City's termination does not render the City's pre-
22 termination investigation unsubstantiated. The Supreme Court recently rejected a similar
23 argument in *Morgan v. City of Federal Way*, __Wn.2d__, 213 P.3d 596, 601 (August 20,

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1 2009)(incidents in investigation report are not unsubstantiated simply because they are
2 disputed). Further, if Piel's argument were accepted, no information regarding the conduct of
3 public officials could ever be disclosed until all litigation regarding such conduct was
4 concluded. Such a result would run counter to the legislative policy of assuring "full access to
5 information concerning the conduct of government on every level . . ." RCW 42.17.010(11).

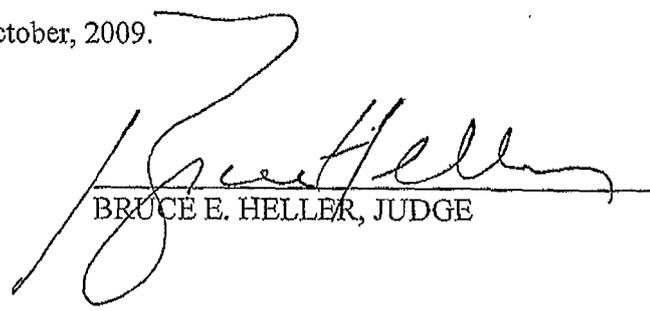
6 Piel's privacy claims are therefore dismissed.

7 **III. CONCLUSION**

8 Accordingly, the Court **GRANTS** the City's motion to dismiss pursuant to CR 12(c)
9 and its motion for summary judgment and **DENIES** Piel's motion for partial summary
10 judgment.

11 IT IS SO ORDERED.

12 ENTERED this 7th day of October, 2009.

13 
14 BRUCE E. HELLER, JUDGE