

FILED
MAY 17 2010

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 83882-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT PIEL & JACQUELINE PIEL, husband and wife,

Petitioners,

v.

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

Respondent.

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

If any “theme” can be gleaned from the City’s responsive brief, it must surely be, “liar, liar, pants on fire.” The problem for the City with its disturbing approach is that the central question thus becomes, who is telling the truth? Since this is a summary judgment, remand is required: only a jury can decide that question.

Otherwise, the City simply concedes the key issue on appeal: did *Korslund v. DynCorp Tri-Cities Sevs., Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005) overrule *sub silentio* *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 991 P.2d 1135 (2000). In a footnote, the City says no. BR 19 n.5.

Yet the City’s arguments – and the trial court’s ruling based on them – would render *Smith* dead letter: they inexorably lead to the conclusion that even though *Smith* holds that civil service employees need not exhaust any remedies under RCW 41.56 and their CBAs (and probably should not to avoid a potential trap for the unwary) that statute and those contracts nonetheless provide “adequate protection” against wrongful termination in violation of public policy in violation of RCW 41.56. That is obviously wrong. The City’s remaining arguments raise genuine issues of material fact requiring a trial. A jury must decide who is telling the truth.

REPLY RE STATEMENT OF THE CASE

The offensive, caustic tone of the City's Statement of the Case is as troubling as it is telling. The City repeatedly accuses the Piels of lying, "mischaracterizing" the record, or making "false contentions." Yet the City ignores crucial facts, and dwells on irrelevancies that serve only to slander the Piels. The City plainly despises Robert Piel. Whether the Piels could ever have deserved the City's spiteful mistreatment is a question for a jury.

This is an appeal from the City's summary judgment motion. The Piels have made nothing but well supported factual assertions and reasonable inferences from the record. By contrast, the City sets forth an ugly rendition of the facts that is highly skewed in its own favor, contrary to extremely well established summary judgment standards that the City simply ignores. This Court can read the record for itself, and will properly take the facts and reasonable inferences in the light most favorable to the Piels. The following are just a few examples of the City's failures to do so, which – notwithstanding the City's malicious tone – simply raise genuinely disputed issues of material fact.

The Court should not be misled by the City's venom: It simply echoes the City's wrongful conduct toward the Piels.

A. The City ignores crucial facts showing its pattern of mistreatment that continues into the City's brief.

The City begins by asserting that the "events central to this case regard Piel's dismissal from the City in 2008." BR 3. The City thus ignores Lt. Piel's history of service to the people of Federal Way, his outstanding performance record, and the utter absence of any legitimate reason for the negative treatment he began to receive only after he helped to initiate the Lieutenants' Union. See BA 3-13. All of this is highly probative to the Piel's wrongful termination in violation of public policy ("WTVP") claim. The City fails to address it here, but a jury must decide the truth.

B. Robert Piel absolutely denies ever making the alleged "murder" statement, vague as that allegation is.

Beginning in its "Introduction," and throughout its brief, the City repeatedly asserts that "Piel does not dispute he made the murder comment." *E.g.*, BR 1, 9 ("they do not dispute that Piel made the murder comment"). These falsehoods are incredible. The City itself quotes some of the places where Robert Piel denied making this statement (BR 5-6), including his post-termination letter to Chief Wilson stating, "I stand by my statement as to not having any recollection of making some of the statements, including the allegation of 'murdering' someone." BR 8 (citing CP 259).

Lest there be any remaining doubt, Robert Piel has always denied, and he continues to flatly deny, having any recollection whatsoever of ever making a statement involving “murdering” anyone, or whatever other vague and conflicting statements the various “witnesses” made, which he was never given prior to his “interviews” with the City or its investigator. He must reluctantly admit, however – as he did during the City’s investigation – that it is not impossible that he is misremembering this incident due to the incredible stress and pressure he was under at the time. See BA 18-30. This honest admission is a far cry from the picture the City tries to paint. A jury must decide the truth.

The City relies extensively on Ms. Stephenson’s first report – the one whose conclusions she later backed away from. See BR 4-7 (repeatedly citing 10/2/07 Stephenson Report, CP 230-33); compare CP 255-57 (“Piel could credibly be unable to recall making one of many [alleged] negative comments”; 11/4/07 Stephenson Report, attached as Appendix A). The City primarily relies on “Jail Coordinator Jason Wilson,” whom Stephenson claimed (in her first report) “had no reason to lie.” BR 6; CP 231. The City continues to simply ignore the contrary evidence, showing that Lt. Piel personally had blocked Wilson’s attempts to become a police

officer “many times.” BA 28 (CP 239-40). Stephenson plainly was in error about Jason Wilson.¹

The City mentions in passing Officers Ellis’ and Bassage’s statements, claiming they are not “inconclusive.” BR 7. Yet all three witnesses gave differing, vague accounts, using different words, describing a different affect, and variously saying that they were not sure what Robert Piel said, were not “alarmed” or concerned about it, or were surprised by his “old sarcastic self.” BA 26-27. If the City applied the same loose standards to Piel’s statements that it seems to apply in crediting these Officer’s statements, it could never have persecuted Lt. Piel as it did.

A jury could easily find that all of the City’s excuses are a mere pretext for carrying out Chief Wilson’s vow that Lt. Piel would never work at FWPD again after the arbitrator reversed his first wrongful termination. But the trial court denied the Piel’s their day in court based on a misreading of this Court’s decisions. The Court should reverse and remand for a jury to find the truth.

¹ The City correctly points out that the opening brief erroneously cites to Jason Ellis’s testimony that Piel was joking, not Jason Wilson’s. BR 6. Counsel apologizes for his unintended mix-up of the two Jasons. Mistakes do happen.

C. The City wrongfully discharged Lt. Piel in 2006, it never “demoted” him, and the arbitrator arbitrarily “enforced” a demotion that never really happened.

The City also argues in its facts that it “demoted” Lt. Piel “in 2007.” BR 11-12. Yet as the City itself states, “Chief Kirkpatrick issued a letter of discharge on July 7, 2006.” BR 12. Indeed, the “City Manager upheld the decision to terminate on August 23, 2006.” *Id.* The City wrongfully terminated Lt. Piel in 2006.

Thus, in 2007, an arbitrator ruled that the City had failed to establish “just cause” for Lt. Piel’s first wrongful termination. CP 205. And Chief Kirkpatrick admitted under oath that she would have demoted – not terminated – Lt. Piel for the lesser concerns alleged by the City. CP 204. Based on this testimony – not on any actual order of demotion – the arbitrator *sua sponte* reduced the discipline to a demotion. CP 205. But this simply confirms the fact that the City wrongfully terminated Lt. Piel in 2006; it in no way counters his point that he was again wrongfully terminated in 2008.

Finally, the City may leave a misimpression when it says “the arbitrator gave no weight to Piel’s assertion that the City was motivated by any alleged protected conduct under RCW 41.56.” BR 12. There is no evidence in this record that Lt. Piel raised these concerns before the arbitrator in 2007.

REPLY ARGUMENT

A. *Smith* – which the City concedes is still good law – is on all fours and controlling.

The Piels' primary points were that this Court did not overrule *Smith* in *Korslund* and that *Smith* is controlling here. BA 33-41. In a footnote, the City concedes that “there was no such overruling.” BR 19 n.5. The City even suggests – contrary to the trial court's view – that no conflict exists. *Compare id. with* CP 770 (“*Korslund* represents an entirely different approach to wrongful discharge tort claims than *Smith*”).

If the City's premises were sound, then the only remaining issue would be whether *Smith* or *Korslund* controls here. As here, *Smith* involves a civil service employee protected under RCW 41.56, but allows her WTVP claim to go forward without any exhaustion requirements, notwithstanding the limited “for cause” remedies available under her CBA. By contrast, *Korslund* involves the vast federal nuclear regulatory scheme that itself requires exhaustion and provides comprehensive remedies fully adequate to protect federal nuclear-plant employees who blow the whistle on safety violations. *Smith* is thus plainly on all fours and controlling here, while *Korslund* is plainly inapposite. The Court should thus reverse and remand for trial. That certainly is a simple answer.

B. The City's arguments would create a trap to ensnare all of Washington's civil service employees.

Unfortunately, the City's premises are unsound, so more analysis is necessary. The trial court plainly felt that **Smith** and **Korslund** present different approaches to WTVP and that the more recent case should control. This is simply wrong for several reasons, including that **Smith** acknowledges **Gardner v. Loomis Armored, Inc.**, 128 Wn.2d 931, 913 P.2d 377 (1996), the case that first firmly established the "jeopardy" element.

What the City fails to acknowledge and the trial court failed to see is that under **Smith**, one need not reach the "jeopardy" element in cases involving Washington State civil service employees: if no one must exhaust the limited remedies available under a CBA governed by RCW 41.56 because the WTVP claim is independent of the CBA and the agency has no WTVP jurisdiction, then asking whether those limited remedies are "adequate" to protect the public interest is beside the point. After all, **Smith** itself says that "our decision is consistent with **Gardner**" – the case in which this Court first formally adopted the "jeopardy" element. **Smith**, 139 Wn.2d at 806; **Gardner**, 128 Wn.2d at 941. **Smith** thus did not address the "jeopardy" element because it was irrelevant.

Yet the City argues (and the trial court accepted) that **Korslund** asks a “different” question: whether the public policy at issue is adequately protected (*i.e.*, whether the Piels failed to satisfy the “jeopardy” element because the public policy against wrongful termination in violation of the public policy reflected in RCW 41.56 is adequately protected by the very CBA processes that **Smith** says no union member must exhaust). Obviously, if the City were correct, then **Smith** would be dead letter: union employees would have to exhaust the inadequate CBA remedies, or have no remedy at all. **Smith**, 139 Wn.2 at 811 (“if [civil service] employees are required to exhaust all available administrative remedies in order to bring a civil suit for wrongful termination, the administrative remedy could be the *only* available remedy”).

Perhaps worse, **Smith** would be a trap for the unwary because it requires no exhaustion, whereas (according to the City) under **Korslund** those RCW 41.56 procedures that do not have to be exhausted under **Smith** somehow adequately protect the public policy against WTVP of union employees. As **Smith** expressly notes, however, exhausting administrative remedies is simply a trap because – even though the agency has no jurisdiction over WTVP claims – administrative findings nonetheless could have collateral

estoppel effect on a WTVP claim. 139 Wn.2d at 811 (citing and discussing the effect of *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 445, 951 P.2d 782 (1998), under which “an employee who loses in an administrative proceeding will be collaterally estopped from attempting to prove the distinct tort of wrongful discharge in violation of public policy”). This Court should again reject this bald attempt to ensnare all Washington civil service employees.

Indeed, contrary to the City’s claims, *Smith* itself says that it is “consistent with” *Gardner*, which makes sense only if the absence of an exhaustion requirement makes the “jeopardy” analysis irrelevant, where *Smith* itself did not apply that analysis. And that makes complete sense because an essential question under the “jeopardy” element is whether other alleged means of protecting the public policy are inadequate. See, e.g., *Gardner*, 128 Wn.2d at 945. Just as in *Smith*, the Piels’ CBA remedies are inadequate for various reasons, including that the WTVP claim is not cognizable in the first instance by the agency and that the agency cannot provide full relief, including compensatory damages. *Smith*, 139 Wn.2d at 808-09. Just as *Smith* holds, there is no question here that the CBA remedies are inadequate.

This answers the City's claim that the question in **Korslund** was "differen[t]," as its own arguments make clear. See BR 15-17. The City acknowledges the close relationship between the "jeopardy" element and the available remedies in arguing that the mere procedural requirements of RCW 41.56 are "adequate" to protect the public policy against wrongfully terminating a civil servant for exercising his rights under that statute. *Id.* But this Court already rejected that argument in **Smith**, which the City concedes is still good law. **Korslund** simply involved a much more comprehensive federal statutory scheme specifically designed to protect whistleblowers. **Smith** is controlling here.

C. The Piels have (at the very least) raised genuine issues of material fact precluding summary judgment on their WTVP claims, an issue this Court need not reach.

The Piels' second point was that they raised genuine issues of material fact requiring a trial on each of the WTVP elements. BA 41-43. The trial court did not consider this issue, so this Court need not reach it either. See RAP 9.12. ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only . . . issues called to the attention of the trial court"). Only a jury may decide who is telling the truth here.

The City solely challenges the third, “causation” element – again, an argument not considered below. The City thus tacitly concedes that the Piels met the first two elements, a clear mandate of public policy and jeopardy. See BA 41-42. Yet the City utterly fails to acknowledge that normally, causation is a question of fact for a jury. See BA 42. The City’s claims lack merit because the Piels present ample evidence. See BA 3-33.

The City first argues that the Piels “fail to specify the alleged protected conduct under RCW 41.56.” BR 21 (title case omitted). Again, the trial court did not reach this question, so it is not proper here. Nonetheless, the City’s assertion is false: the Piels plainly relied upon the City’s retaliation, both for forming the Lieutenants’ Union, and for filing grievances. See, e.g., BA 3-33. This retaliation took the form of “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.” BA 42. If the jury accepts the facts detailed at BA 3-33 and concludes that the City terminated Lt. Piel in retaliation for his protected activities, then the Piels will prevail on their WTVP claims. The truth is for a jury to decide.

The City next asserts that the Piels failed to “establish a causal link between the alleged protected conduct and the termination in 2008.” BR 22-27 (title case omitted). Again, this issue was not considered by the trial court, so this Court should not reach it. In any event, the City launches into a long, misleading story taken in the light most favorable to itself, which is wholly improper on summary judgment. The City’s claims are meritless.

Simply put, a jury could easily recognize the obvious connections between Lt. Piel’s protected conduct – forming the union and filing numerous successful grievances based on the City’s subsequent retaliatory mistreatment – and the City’s long course of retaliatory and improper actions culminating in a second wrongful termination immediately upon his return from successfully grieving his first wrongful termination. The independent evidence from an unbiased witness that Chief Wilson – who the Piels allege engaged in many of the earlier retaliatory acts due to his personal and familial relationships at FWPD – swore that Lt. Piel would never work at FWPD again, is extremely strong confirmation that the alleged basis for final wrongful termination was mere pretext. There is very ample evidence of causation in this record.

While the City's "nine" arguments about the facts simply raise credibility and other factual disputes not susceptible to summary judgment (BR 22-27), some of them are just false.² First, the City's "temporality" argument is false: the City retaliated against Lt. Piel in an unbroken and escalating series of wrongful acts culminating in his 2008 wrongful termination. The causal chain is clear, and a jury could easily find causation here.

Second, Lt. Piel's strong evaluations pre-dating his participation in forming the union are not "irrelevant," but are highly probative for the stark contrast they provide regarding the City's treatment of Lt. Piel before and after his protected activities. BR 23-24. Here again, the City baldly asserts that the Piel's "cannot dispute the factual basis for the discipline at issue," but on the contrary, the Piel's have steadfastly asserted that the asserted reasons are pretextual. *Id.*; *see also*, BR 28-29. The rest of the City's assertions are simply improperly construing the facts most favorably to itself.

² The City raises a number of claims challenging the evidence presented on summary judgment, but it has not cross-petitioned, and did not obtain any evidentiary rulings – favorable or unfavorable – from the trial court, so none of this is properly before this Court. *See, e.g.*, BR 23, 27.

Third, the City incredibly argues that the Piels show no “connection” between their protected activities and Chief Wilson’s wrongful discharge decision. BR 25. When Chief Wilson was D.C. Wilson, he orchestrated a long series of retaliatory acts, first overloading Lt. Piel with unnecessary and improper work, then systematically depriving him of all perks and privileges, attempting to force him to resign based on a wholly improper claim that he failed to show up for work during his FMLA leave, and raising the allegations that led to Lt. Piel’s first wrongful termination. What he could not successfully achieve as D.C. Wilson he immediately achieved as Chief Wilson. The “connection” is obvious.

These three examples hardly exhaust the possible responses to the City’s highly improper re-imagining of the facts in the light most favorable to itself. But more examples are unnecessary. Neither these issues nor the City’s imaginative renditions are relevant here. The Court should reverse and remand for trial so that a jury can decide who is telling the truth.

D. The first wrongful termination is part and parcel of the City’s long pattern of retaliation against the Piels.

Finally, the City argues that its first wrongful termination cannot “serve as the basis for a WTVP claim.” BR 29-32 (title case

omitted). Again, the trial court did not reach this issue, and the City did not cross-petition on it, so this Court should ignore it. But as fully explained above, the City wrongfully terminated Lt. Piel in 2006. The fact that an arbitrator reversed the wrongful termination and arbitrarily reduced it to a demotion does not alleviate the severe emotional distress and other personal injuries the Piel suffered from the City's proven wrongful termination. As *Smith* so clearly holds, the WTVP claim is wholly independent of any CBA or RCW 41.56 administrative remedies. The Piel are entitled to pursue damages based on both the 2006 and 2008 wrongful terminations.

The City also claims that the independent WTVP tort claim is somehow subject to the six-month limitations period for filing a grievance under RCW 41.56. That is absurd. In any event, the City cites no authority, so the Court again should ignore this claim.

Finally, the City reiterates its imaginative "causation" arguments. BR 31-32. The facts are in dispute. The City subjected the Piel to a long nightmare of retaliation and wrongful termination. A jury must decide who is telling the truth.

CONCLUSION

For the reasons stated above, this Court should reverse and remand for trial. Only a jury can decide the truth here.

RESPECTFULLY SUBMITTED this 14th day of May, 2010.

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



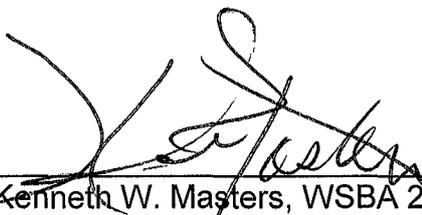
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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF OF PETITIONERS** postage prepaid, via U.S. mail on the 14th day of May 2010, to the following counsel of record at the following addresses:

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INVESTIGATIVE REPORT

Date: November 4, 2007

To: Brian Wilson, Chief of Police
City of Federal Way

From: Amy J. Stephson
Attorney at Law

Re: Investigation of Officer Robert Piel: Truthfulness Issue

I. Introduction and Investigative Process

The City of Federal Way retained this investigator in September 2007 to conduct an independent investigation of an allegation that during or right after a swing shift briefing on August 14, 2007, Officer Robert "Bud" Piel made a comment to the effect that he had thought about murdering others in the police department at some point during the 15-month period following his termination from City employment in mid-2006. At the time of the comment, Piel had just returned to work after being reinstated by an arbitrator and demoted from lieutenant to officer.

Based on the evidence gathered in my first investigation, I concluded in a report dated October 2, 2007, that despite stating that he "didn't talk about shooting, murdering, killing, harming, injuring anybody," Piel did make the alleged comment. I reached this conclusion on the grounds that (1) three witnesses, all of whom were credible, stated they had heard Piel make a comment along these lines; and (2) Piel's denial was not credible because his mere denial did not overcome the credible and consistent witness statements and he did not recall other comments he had also made.

The issue in this second investigation is whether Officer Piel's denial that he made the comment violated Federal Way Police Department Manual of Standards, Code of Conduct 1.3, which requires members of the department to be "truthful" at all times, or constituted "dishonesty" under Federal Way Employee Guidelines, Code of Conduct 9.1(4). To conduct the investigation, I again interviewed Piel, who was accompanied by his attorney Steve Hanson and his Guild representative Officer Keith Pon.

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I also reviewed transcripts of August 2007 interviews by Commander Steve Arbuthnot of other officers who had attended the briefing in question, specifically, Sierra Baker (Scheyer), Matt Leitgeb, Scott Parker, Mike Sant, and Annette Scholl. None of these officers had heard Piel's "murder" remark, but they had heard other comments by him that they found inappropriate. I also reviewed the transcript of Arbuthnot's September 13, 2007, interview of Piel regarding the murder comment, among other documents.

II. Findings and Conclusions

Based on the information gathered in this and my previous investigation, I conclude that the City of Federal Way could reasonably conclude that Piel's denial of the murder comment constituted dishonesty and/or untruthfulness. Piel is an experienced police officer and if the City, based on its knowledge of what that entails, believes that Piel knows the difference between a denial and saying he can't remember, then his denial was not truthful and honest. My reasoning is as follows:

(1) Based on the information provided by all of the officers present at the briefing, including those I interviewed and those only interviewed by Commander Arbuthnot, it appears that Piel made a variety of inappropriate, offensive and negative comments that day. 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. Piel, in fact, denied making *most* of the alleged comments and said he recalled only being in the room a few minutes and keeping to himself. He said he didn't even recall sitting next to Officer Ellis, who is his friend and was to be his FTO. This is contrary to the well-established facts.

(2) At his second interview with me, Piel expanded upon his state of mind on the day of the August briefing. He stated that he was nervous about returning to the department as an officer after his "ordeal" and distressed and agitated by the seeming lack of preparation for his return. He said he also was agitated by some uncomfortable encounters he had: on his first day, the Deputy Chief wanted him to meet with the Chief, which he declined to do; and on his second day, just before the briefing, Commander Steve Neal shouted across the room in a "derogatory manner," "Welcome back Bud." Piel added, "it was like a whirlwind. I was only there eleven hours ... split between two days ... and I just don't have a recollection of everything I said" He also stated, with regard to the murder comment, "I just can't recall saying anything about hurting anyone that's just not me alright I'm not a violent person."

(3) All of this suggests that given his mental state at the time, Piel may not have been quite aware of what he was saying at the briefing. Therefore, he could have failed in good faith to recall most of it. However, he flatly denied making the comment or anything like it -- both when initially questioned by Commander Arbuthnot on September 13, 2007, and when questioned by me later that month. Therefore, the issue is whether a flat denial, instead of, "I

don't remember" or "I don't know" constitutes dishonesty and untruthfulness given Piel's status as a police officer.

Conclusion. It clearly would have been more accurate for Piel to say he couldn't recall making the comment, didn't know if he said it, it was not the type of thing he would say, or something along those lines. Instead he denied it. In most investigations, one might view the distinction between the former type of response and a denial as insignificant. However, given that Piel is an experienced police officer, who presumably understands the difference between the two, the City could reasonably determine that his flat denial did constitute dishonesty and untruthfulness.