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SUPREME COURT
STATE OF WASHINGTON

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BY RONALD R. CARPENTER

CLERK

SUPREME COURT 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.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
HON. BRUCE HELLER, JUDGE

ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW

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FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. DISCUSSION	1
A. There is No Inconsistency Between <i>Korlund</i> and <i>Smith</i>	1
1. The Tort of Wrongful Discharge in Violation of Public Policy.....	2
2. <i>Korlund</i> and its Application Here.	2
3. <i>Smith</i> Addresses Issues Entirely Different From Those Addressed in <i>Korlund</i>	5
B. This Case Does Not Involve a Fundamental and Urgent Issue of Broad Public Import, Requiring Prompt and Ultimate Determination.	7
C. As Petitioners have not Identified All the Issues on Appeal, it is Unclear Whether it Would be Appropriate for the Court to Accept Review of the Remaining Issues.	7
III. CONCLUSION.....	8

I. INTRODUCTION

Respondent, the City of Federal Way (the “City”), respectfully submits that direct review should be denied.

First, there is no inconsistency between the *Korlund* and *Smith* cases, as they address entirely different issues. *Korlund*, a case from 2005, addresses whether one can satisfy the Jeopardy Element of a claim for wrongful discharge in violation of public policy where there are adequate alternative means of promoting the public policy at issue. In contrast, *Smith*, a case from 2000, addresses whether one must exhaust administrative remedies before bringing a wrongful discharge suit under RCW Chapter 41.56, and whether the tort of wrongful termination in violation of public policy extends to employees who are terminable only for cause. The *Smith* Court was not presented with the issue raised in *Korlund*.

Second, this case does not involve a fundamental and urgent issue of broad public import. The superior court’s decision is consistent with existing Washington law. And in any event, it lacks precedential value and does not affect the governing law.

For these reasons, the Court should deny direct review.

II. DISCUSSION

A. **There is No Inconsistency Between *Korlund* and *Smith*.**

RAP 4.2(a)(3) provides that a party may seek direct review in the Court of a superior court decision in a case involving an “inconsistency in

decisions of the Supreme Court.” But no such inconsistency exists between *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168 (2005), and *Smith v. Bates Technical College*, 139 Wn.2d 793 (2000). *Korlund* and *Smith* address entirely different issues. Direct review should thus be denied.

1. The Tort of Wrongful Discharge in Violation of Public Policy.

The claim at issue involves the common law tort of wrongful discharge in violation of public policy. This tort is an exception to the terminable-at-will doctrine. *Hollenback v. Shriners Hosp. for Children*, 149 Wn. App. 810, 825 (2009). Washington courts require that the tort of wrongful discharge be narrowly construed. *Id.*

One element of a claim for wrongful discharge in violation of public policy is that discouraging the conduct in which plaintiff engaged—i.e., the alleged protected conduct—would jeopardize public policy (the “Jeopardy Element”). See *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941 (1996).

2. *Korlund* and its Application Here.

In 2005, the Court discussed the Jeopardy Element in *Korlund*, which element was not at issue in *Smith*. In *Korlund*, the plaintiffs asserted a public policy claim under the federal Energy Reorganization Act (“ERA”). 156 Wn.2d at 181. The Court held that the plaintiffs failed to satisfy the Jeopardy Element of the claim “because there is an adequate

alternative means of promoting the public policy on which they rely.” *Id.*

It reasoned as follows:

In order 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 public policy.’” . . . The plaintiff has to prove that discouraging the conduct that he or she engaged in would jeopardize the public policy. . . . And, of particular importance here, the plaintiff also must show that other means of promoting the public policy are inadequate

While the question whether the jeopardy element is satisfied generally involves a question of fact, . . . the question whether adequate alternative means for promoting 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.

Id. at 181-82. The Court went on recognize that the ERA includes comprehensive remedies, including an administrative process to protect the public policy therein. *Id.* at 182. It thus concluded that the remedies available under the ERA were adequate to protect the public policy at issue and thus that, as a matter of law, plaintiffs’ public policy tort claim failed.

Likewise, here, Petitioners do not have a public policy tort claim under RCW Chapter 41.56, because that set of statutes includes comprehensive remedies to protect the public policy at issue. RCW 41.56.140 enumerates unfair labor practices for a public employer, i.e., the public policy at issue here. And RCW 41.56.160 empowers the Public Employment Relations Commission (“PERC”) to address and prevent unfair labor practices, including through remedial orders, cease and desist

orders, reinstatement orders, and damage awards. PERC may also petition a superior court for enforcement of its orders. RCW 41.56.160(3). Also, legal expenses may be recovered. *See Pasco Housing Authority v. State, PERC*, 98 Wn. App. 801 (2000); *Lewis County v. PERC*, 31 Wn. App. 853 (1982). *See also* WAC 391-45 (unfair labor practice case rules for PERC); WAC 391-45-410 (backpay). Furthermore, Petitioners had the additional protections of the grievance procedures of Mr. Piel's union's collective bargaining agreement and the right to commence civil service commission proceedings. *See* RCW 41.56.122(2); City of Federal Way Civil Service Rule 18.1.1. The existence of these additional means further weakens any argument that the remedies available to Petitioners inadequately protected the public policy of RCW Chapter 41.56.

Korlund does not require that the available remedies be coextensive with those that may be sought in a tort action. Rather, it requires that the remedies "provide adequate alternative means of promoting the public policy." *Id.* at 182. The tort of wrongful discharge in violation of public policy is not designed to protect an employee's private interest; rather, it operates to protect the public interest by prohibiting employers from acting in a manner contrary to fundamental public policy. The question here, as it was in *Korlund*, is whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy. To be sure, the extensive alternative remedies here are adequate and, thus, Petitioners cannot satisfy the Jeopardy Element.

3. *Smith* Addresses Issues Entirely Different From Those Addressed in *Korlund*.

The Court's opinion in *Smith*, issued in 2000, does not conflict with *Korlund*. The *Smith* Court did not address the Jeopardy Element. Rather, the *Smith* Court was presented with the following issues: "whether 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 and contractual remedies before pursuing such an action." 139 Wn.2d at 795. These issues involved a public policy claim under RCW Chapter 41.56. The Court answered both these questions in the affirmative. *Id.* at 808, 811. But the *Smith* Court did not address the question here presented, i.e., whether the remedial scheme set forth in RCW Chapter 41.56 makes it impossible, as a matter of law, for Petitioners to satisfy the Jeopardy Element of their public policy claim based on that statute. Simply put, the *Smith* Court—which rendered its opinion five years prior to *Korlund*—was not presented with the issue raised here.

In an attempt to argue inconsistency between *Korlund* and *Smith*, Petitioners indicate that *Korlund* addresses the issue of exhaustion of administrative remedies. Statement of Grounds for Direct Review ("Statement") at 1. This is incorrect. *Korlund* does no such thing.

Petitioners claim that Judge Heller determined that *Korlund* overruled—*sub silentio*—*Smith*. *Id.* This is incorrect. Judge Heller determined properly that the two cases address different issues. *See*

Opinion at 4-5 (attached to Statement; also attached to Notice of Appeal, which is appended hereto). Petitioners purport to quote portions of the Opinion supporting their request for direct review. Statement at 3. However, they omit—via ellipsis—the very passage that illuminates the core of Judge Heller’s reasoning:

While *Smith* cites *Gardner* [*v. Loomis Armored, Inc.*, 128 Wn. 2d 931 (1996)] for the proposition that a wrongful discharge tort is available outside the employment-at-will context, . . . the court did not analyze whether *Smith* satisfied the four elements of the tort set forth in *Gardner*. *Korslund* clearly did. Instead of focusing on placing unionized employees on the same footing as at-will employees, *Korslund* asked whether the remedies available to the employee were adequate to protect the public policy on which the plaintiffs relied. The court concluded that the remedies available under the ERA were adequate, even though they did not provide emotional distress damages.

Opinion at 4-5. Judge Heller thus recognized that the two cases presented different issues and that *Korslund* did not overrule *Smith*.

Also, Petitioners’ argument appears to suffer an internal inconsistency. On the one hand, Petitioners contend that “*Korslund* did not—and should not—overrule *Smith*.” Statement at 1. Their argument appears to be that Judge Heller misapplied *Korslund*, not that the case is inconsistent with *Smith*. Yet such an argument does not justify direct review. On the other hand, seeking to satisfy RAP 4.2(a)(3), Petitioners claim there is a “purported conflict between” the cases. *Id.* at 2. As discussed above, no such conflict exists, purported or otherwise.

At first (and brief) glance, *Smith* might appear pertinent here, as the case involves a public policy claim under RCW Chapter 41.56. But a

closer look reveals that it is wholly inapposite to the Jeopardy Element analysis presented in *Korslund* and the case at bar. The *Smith* Court was not presented with the Jeopardy Element issue raised in *Korslund*.

B. This Case Does Not Involve a Fundamental and Urgent Issue of Broad Public Import, Requiring Prompt and Ultimate Determination.

RAP 4.2(a)(4) provides that a party may seek direct review in the Court of a superior court decision in a “case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” This is hardly such a case.

First, as discussed above, Judge Heller’s decision is consistent with existing Washington law, including *Korslund* and *Smith*, which opinions are four and nine years old, respectively.

Second, Judge Heller’s ruling and Opinion, which is unpublished, lacks precedential value and does not affect the governing law. *See* RAP 10.4(h); GR 14.1; *Tunstall v. Bergeson*, 141 Wn.2d 201, 224 n. 19 (2000); *Bauman v. Turpen*, 139 Wn. App. 78, 87 (2007). Thus, Washington law on the issues here is the same now as it was prior to the Opinion’s issuance; the ruling gives rise to no urgency or any need for a prompt determination.

C. As Petitioners have not Identified All the Issues on Appeal, it is Unclear Whether it Would be Appropriate for the Court to Accept Review of the Remaining Issues.

As set forth above, the City does not believe the Court should accept direct review of this matter. In the event it does so, in the interest of judicial economy, it might be appropriate for the Court to accept review

of the issues in addition to those raised in the Statement. The problem, however, is that Petitioners have not yet made clear which issues will be presented on appeal. Their Notice of Appeal (appended hereto) merely indicates that they seek review of the Opinion and the Order Re: The City's Motion for Summary Judgment; Plaintiffs' Motion for Partial Summary Judgment; and the City's Motion to Dismiss dated October 6, 2009 and filed October 7, 2009 (which order is attached to the Notice of Appeal). Accordingly, there are a large number of potential additional issues on appeal.¹ It is difficult to answer in the abstract whether it would be appropriate to accept review of any additional issues.

III. CONCLUSION

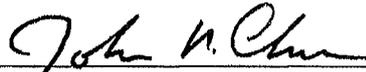
For the foregoing reasons, the City respectfully requests that the Court deny direct review of the Superior Court decision.

¹ Essentially, this case arises out of the following facts: While a police officer at the City, Mr. Piel, who was upset at the police department, indicated to fellow officers that he had thought about murdering members of the department. The City's Motion for Summary Judgment at 1, Superior Court Dkt. # 52. During the ensuing investigation regarding the incident, notwithstanding the multiple witnesses thereto, Mr. Piel was dishonest and flatly and repeatedly denied making any such statement. *Id.* Due to Mr. Piel's untruthfulness and his workplace violence statement, after an independent investigation, the City terminated his employment. *Id.* at 3. In response, Mr. Piel claimed that a combination of multiple unlawful motivations led to the City's decisions with respect to his employment. *Id.* (Mr. Piel admits that his own union refused to pursue this matter to grievance arbitration. *Id.*) Mr. Piel brought numerous claims against the City. A number of these claims were dismissed pursuant to an early CR 12(c) motion to dismiss. Superior Court Dkt. # 24. The remaining claims were dismissed on October 7, 2009, by Judge Heller. These claims, and the issues surrounding them, are potentially at issue in this matter.

DATED this 30th day of November, 2009.

Respectfully submitted,

SUMMIT LAW GROUP PLLC

By  _____

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STATE OF WASHINGTON

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BY RONALD R. COERTIN ~~CLERK~~ CLERK OF SERVICE

~~I~~ certify that on the 30th day of November, 2009, I caused a true
and correct copy of this Answer to Statement of Grounds for Direct
Review to be served on the following in the manner indicated below:

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DATED this 30th day of November, 2009.



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

ROBERT PIEL & JACQUELINE PIEL,
husband and wife,

Plaintiffs,

v.

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

Defendant.

No. 08-2-02830-5 KNT

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE STATE
OF WASHINGTON

Robert and Jacqueline Piel seek review by the Supreme Court of the State of
Washington of the following:

1. The Opinion granting the City Summary Judgment and granting the City's
Motion to Dismiss dated October 7, 2007, entered by Judge Bruce E. Heller;
2. Order Granting Summary Judgment entered October 7, 2007, by Judge
Bruce E. Heller.

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Copies of the above documents are attached to this notice.

Dated this 30th day of October, 2009.

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



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NOTICE OF APPEAL - 2

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CERTIFICATE OF SERVICE

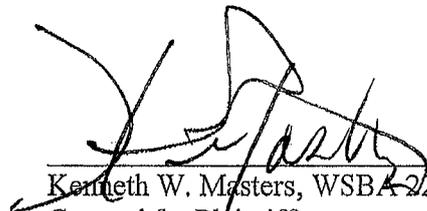
I certify that I sent out for service by messenger a copy of the foregoing Notice of Appeal postage prepaid, via U.S. mail on the 30th day of October, 2009, to the following counsel of record at the following addresses:

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The Honorable Bruce E. Heller

FILED

KING COUNTY, WASHINGTON

OCT 07 2009

SUPERIOR COURT CLERK
BY GLENNA J. JONES
DEPUTY

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

ROBERT PIEL & JACQUELINE PIEL,
Husband and Wife,

Plaintiffs,

v.

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

Defendant.

Case No. 08-2-02830-5 KNT

ORDER RE: THE CITY'S MOTION
FOR SUMMARY JUDGMENT;
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT;
AND THE CITY'S MOTION TO
DISMISS

THESE MATTERS came before the Court on defendant City of Federal Way's (the
"City") Motion for Summary Judgment, Plaintiffs' Motion for Partial Summary Judgment; and
The City's Motion to Dismiss. The Court considered the following:

1. The City's Motion for Summary Judgment;
2. Declaration of Mary McDougal and exhibits attached thereto;
3. Declaration of John H. Chun and exhibits attached thereto;
4. Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment;
5. Declaration of Miguel Monico in Opposition to Defendant's Motion for Summary Judgment;

ORDER RE: THE CITY'S MOTION FOR SUMMARY
JUDGMENT; PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT; AND THE CITY'S MOTION TO
DISMISS - 1

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- 6. Declaration of Robert Piel in Opposition to Defendant's for Summary Judgment and exhibits attached thereto;
- 7. Declaration of Stephen M. Hansen in Response to Defendant's for Summary Judgment and exhibits attached thereto;
- 8. The City's Revised Reply in Support of its Motion for Summary Judgment;
- 9. Supplemental Declaration of John H. Chun and exhibits attached thereto;
- 10. Supplemental Declaration of Jean Stanley and exhibits attached thereto; and
- 11. Supplemental Declaration of Brian Wilson.
- 12. Plaintiffs' Motion for Partial Summary Judgment;
- 13. Declaration of Robert Piel in Support of Plaintiffs' Motion for Partial Summary Judgment and exhibits attached thereto;
- 14. Declaration of Stephen M. Hansen in Support of Plaintiffs' Motion for Partial Summary Judgment and exhibit attached thereto;
- 15. The City's Opposition to Plaintiffs' Motion for Partial Summary Judgment & The City's Motion to Dismiss;
- 16. Declaration of Brian Wilson;
- 17. Declaration of Jean Stanley;
- 18. Plaintiffs' Reply to City's Opposition to Plaintiffs' Motion for Partial Summary Judgment;
- 19. Reply Declaration of Robert Piel and exhibits attached thereto;
- 20. The City's Reply in Support of Motion to Dismiss;
- 21. The City's Supplemental Memorandum; and
- 22. The argument of counsel during oral argument on September 11, 2009;

ORDER RE: THE CITY'S MOTION FOR SUMMARY JUDGMENT; PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; AND THE CITY'S MOTION TO DISMISS - 2

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1 23. Plaintiffs' email in further consideration of the motions, dated
2 September 11, 2009;

3 24. Defendant's email response to Plaintiffs' email in further
4 consideration, dated September 11, 2009;

5 25. The Court's email request for clarification, dated September 29,
6 2009;

7 26. Plaintiffs' email regarding the request for clarification by the
8 Court, dated September 29, 2009;

9 27. Defendant's supplemental memorandum via email in response to
10 Plaintiffs' email regarding the request for clarification by the Court, dated
11 September 30, 2009; and

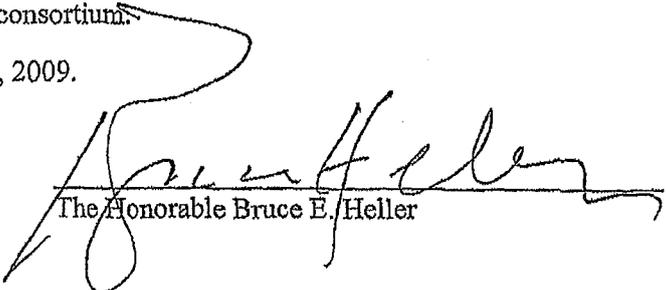
12 28. Plaintiffs' email in reply to Defendant's supplemental
13 memorandum, dated October 1, 2009.

14 Based on the argument of counsel and the pleadings submitted in connection herewith,
15 and for the reasons set forth in the Court's Opinion, IT IS HEREBY ORDERED:

- 16 1. The City's Motion for Summary Judgment is GRANTED.
- 17 2. Plaintiffs' Motion for Partial Summary Judgment is DENIED.
- 18 3. The City's Motion to Dismiss is GRANTED.
- 19 4. Plaintiffs' remaining claims in this matter are dismissed with prejudice. These
20 claims are as follows:
 - 21 a. Public policy claim based on RCW Chapter 41.56;
 - 22 b. Public policy claim based on RCW Chapter 51.48;
 - 23 c. Public policy claim based on the City's employee guidelines;
 - 24 d. Public policy claim based on the City's public safety department's manual
25 of standards;

- 1 e. Public policy claim based on RCW Chapter 4.96 and Federal Way City
2 Code, 2-156;
3 f. Public policy claim based on RCW Chapter 49.78;
4 g. Claim for invasion of common law privacy rights; and
5 h. Claim for loss of consortium.

6 DATED this 6th day of October, 2009.

7
8 
9 The Honorable Bruce E. Heller

10 Presented by:

11 SUMMIT LAW GROUP, PLLC

12
13 By _____
14 John H. Chun, WSBA #24767
15 Otto G. Klein, III, WSBA #7061
16 Attorneys for Defendant City of Federal Way
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ORDER RE: THE CITY'S MOTION FOR SUMMARY
JUDGMENT; PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT; AND THE CITY'S MOTION TO
DISMISS - 4

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HONORABLE BRUCE E. HELLER

FILED

KING COUNTY, WASHINGTON

OCT 07 2009

SUPERIOR COURT CLERK
BY GLENNA J. JONES
DEPUTY

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

ROBERT PIEL & JACQUELINE PIEL,
Husband and wife,

Plaintiffs,

v.

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

Defendant.

No. 08-2-02830-5 KNT

OPINION

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 *Koroslund 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
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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 • filing a Complaint in May 2006, as authorized by the Employee Guidelines for
2 Employees of the City of Federal Way, concerning statements made about Piel by Commander
3 Greg Wilson to a Patrol Officer;

4 • filing a grievance pursuant to a Collective Bargaining Agreement concerning
5 his termination of employment in 2006.

6 RCW 41.56.160 requires that unfair labor practice (ULP) charges alleging violations of
7 RCW 41.56.040 be filed with PERC within six months of the alleged ULP. Washington
8 courts have not addressed whether PERC has exclusive jurisdiction over ULP charges. Based
9 on the language of RCW 41.56.160 ("The Commission [PERC] is empowered and directed to
10 prevent any unfair labor practice and to issue appropriate remedial orders . . ."), the Court
11 concludes that it does not have concurrent jurisdiction with PERC over ULP charges.
12 However, both parties agree that the Court does have jurisdiction to consider claims of
13 wrongful discharge in violation of public policy based on RCW 41.56.040.

14 The elements of a wrongful discharge in violation of public policy claim are:

- 15 (1) the existence of a clear public policy (clarity element);
16 (2) that discouraging the conduct in which the plaintiff engaged would jeopardize
17 the public policy (jeopardy element);
18 (3) that the public policy linked conduct caused the dismissal (causation element);
19 and
20 (4) the defendant must then not be able to offer an overriding justification for the
21 dismissal (absence of justification element).

22 *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941(1996).

1 In *Korslund*, 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 *Korslund*. 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
include emotional distress damages.

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

1 focusing on placing unionized employees on the same footing as at-will employees, *Korslund*
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, *Korslund* is the controlling authority. Based
7 on *Korslund*, 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
22 collective bargaining agreement, is protected by RCW 41.56, and whether *White v. State*, 131
23 Wn.2d 1(1997)(wrongful discharge tort is limited to discharges) applies to Piel's 2006
24 termination that was subsequently converted to a demotion by an arbitrator.

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
23 *Bennett v. Hardy*, 113 Wn.2d 912 (1990), the Supreme Court recognized a wrongful discharge
24 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.

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,

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).

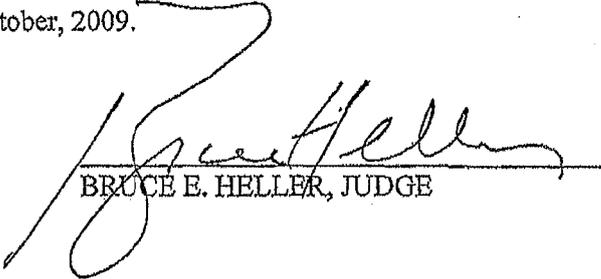
6 Piel's privacy claims are therefore dismissed.

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
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83882-8

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Case Number: 83882-8
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