

No. 72344-8-I

DIVISION I OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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AARON SWANSON,

*Appellant/Cross-Respondent,*

vs.

CITY OF SEATTLE, SEATTLE CITY LIGHT,

*Respondent/Cross-Appellant.*

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**REPLY BRIEF OF CROSS-APPELLANT**

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## I. INTRODUCTION

City Light is being held liable for a comment on the publicly-accessible *Seattle Times* website, yet there is a lack of substantial evidence that City Light was responsible. Without evidence about who posted the comment, only speculation can fill the void.

Swanson does not dispute, or even attempt to challenge the fact that Ron Allen was not Swanson's supervisor when the *Seattle Times* comment occurred. The ALJ's finding that Allen was in a "secondary supervisory position with the City" over Swanson because of his participation on the JATC is not supported by substantial evidence. Likewise, there is no evidence in the record – let alone substantial evidence – to establish that any City Light employee posted the *Seattle Times* comment. Without either one of these two essential pieces of evidence in the record, the ALJ's finding that "Mr. Allen's encouragement and/or commission of the impersonation of Mr. Swanson publicly to the *Seattle Times* is actionable retaliation under Chapter 42.41 RCW" is unsupported by substantial evidence, is clearly erroneous, and should be set aside.

Furthermore, as explained below, the ALJ's ambivalent finding—that Allen either posted the comment himself or encouraged someone else to post it—demonstrates the lack of substantial evidence to support a legal conclusion that City Light engaged in retaliation. City Light therefore

respectfully requests this Court to reverse the ALJ's findings that Allen was in a secondary supervisory position over Swanson, that the *Seattle Times* website comment was posted by a City Light employee who was encouraged by Allen, and affirm the trial court's conclusion that City Light did not engage in retaliation under Chapter 42.41 RCW.

## II. REPLY ARGUMENT

### A. **City Light's Challenge to the ALJ's Finding in Paragraph 5.10 That Allen was in a "Secondary Supervisory Position With the City" Over Swanson is Properly Before the Court**

#### 1. **City Light Properly Preserved for Appeal its Challenge to the ALJ's Finding That Allen "was in a Secondary Supervisory Position With the City" Over Swanson**

Whether an issue was properly preserved for appeal is a matter within the discretion of the appellate court. *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) ("The application of RAP 2.5(a) is ultimately a matter of the review court's discretion.") Where an "argument is pertinent to the substantive issues raised below and necessary to the [Court's] rendering a proper decision" it may be considered. This is especially true where "respondents had ample opportunity to address the argument [in their briefing]." *Spokane v. Rothwell*, 166 Wn.2d 872, 880 n. 9, 215 P.3d 162 (2009).

At all stages of this proceeding, City Light made clear that it was challenging the ALJ's finding of actionable retaliation regarding the *Seattle Times* website comment in paragraph 5.10 of her order because of a lack of substantial evidence. CP 2872 (Judicial Review brief, at 10) (identifying the first issue as whether there was substantial evidence to support actionable retaliation under Chapter 42.41 RCW); CP 2868 (Brief of Respondent / Cross-Appellant, at 5) (assigning error to paragraph 5.10 of the ALJ's order). City Light's Petition for Judicial Review correctly noted the portions of the ALJ's decision it wanted reviewed: "The portions of Judge Dublin's order regarding the *Seattle Times* comment [and] the finding that there was actionable retaliation." CP 2873 (City Light Petition for Review). City Light specifically identified paragraph 5.10 of the ALJ's decision as incorrect and not supported by the evidence. *Id.*

Paragraph 5.10 of the ALJ's order states:

the impersonation of Mr. Swanson to the Seattle Times [was] undoubtedly hostile action[] taken by SCL employees toward Mr. Swanson that Mr. Allen either vocally or tacitly encouraged, if not performed himself. . . . However, at the time the impersonation of Mr. Swanson to the Seattle Times took place, Mr. Allen was in a secondary supervisory position with the City over Mr. Allen because of his participation with the JATC, a City committee with authority to negatively impact Mr. Allen's apprenticeship. Consequently, Mr. Allen's encouragement and/or commission of the impersonation of Mr. Swanson publicly to the Seattle Times is actionable retaliation under Chapter 42.41 RCW.

CP 525 (Order, at ¶ 5.10). Paragraph 5.10 is the only paragraph in the 19-page order that concludes Mr. Allen either posted the *Seattle Times* comment himself or encouraged someone else to do it, and that Mr. Allen was in a “secondary supervisory” position over Mr. Swanson due to his participation on the JATC when the comment was posted. It is also the only paragraph in the body of the order containing the legal conclusion that actionable retaliation occurred under Chapter 42.41 RCW as a consequence of Mr. Allen’s alleged acts regarding the *Seattle Times* comment and his secondary supervisor status over Mr. Swanson.<sup>1</sup> By assigning error to Paragraph 5.10 and challenging the ALJ’s finding of actionable retaliation regarding the *Seattle Times* website comment, City Light properly challenged all factual and legal conclusions in Paragraph 5.10.

City Light provided further notice of its challenge to the “secondary supervisory position” finding by citing relevant facts in its briefing. City Light cited facts relating to the JATC, how Allen came to

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<sup>1</sup> Swanson feigns lack of notice on the grounds that City Light failed to cite paragraph 2.1 from the “Order Summary” section of the ALJ’s decision. But paragraph 2.1 simply summarizes the ALJ’s findings that are fully articulated and explained later in paragraph 5.10 under the heading, “Conclusions of Law.” Because paragraph 2.1 is a mere summary of what is stated in the ALJ’s order, it was unnecessary for City Light to specifically call out paragraph 2.1 in its briefing. City Light made clear it was challenging the ALJ’s finding of actionable retaliation and its findings regarding the *Seattle Times* website comment.

participate on the JATC, his lack of voting on the JATC, and City Light's efforts to reduce his influence. CP 193 (Prehearing brief at 2); CP 660 (Reply brief, at 7 n.5). City Light firmly stated, "Mr. Allen has never been Mr. Swanson's crew chief and has never had supervisory authority over him." CP 660 (Reply at 7, citing RP 160:22-161:1 (Allen)). These facts directly relate to the ALJ's finding that Allen was in a "secondary supervisory position" over Swanson due to his participation on the JATC. While City Light could have framed its argument more clearly, City Light sufficiently preserved its challenge to the ALJ's actionable retaliation finding regarding the *Seattle Times* website in paragraph 5.10 on the grounds that there is not substantial evidence to support the finding that Allen was in a secondary supervisory position with the City over Swanson. *See, e.g., Bennett*, 113 Wn.2d at 917 ("Plaintiffs may have framed their argument more clearly at this stage, but so long as they advanced the issue below, thus giving the trial court an opportunity to consider and rule on the relevant authority, the purpose of RAP 2.5(a) is served and the issue is properly before this court.")

**2. In any Event, the Court can Consider the Supervisor Issue for the First Time on Appeal**

Even if City Light raised for the first time on appeal a specific challenge to the ALJ's conclusion that Allen was in a "secondary

supervisory position” over Swanson, the court is not precluded from considering City Light’s argument. “If an issue raised for the first time on appeal is ‘arguably related’ to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal.” *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007) (internal citations omitted).

As noted above, City Light challenged Paragraph 5.10 and the ALJ’s finding of actionable retaliation based on the *Seattle Times* comment. The ALJ found only one retaliatory action: Allen’s alleged encouragement or posting of the *Seattle Times* comment. (CP 504). The ALJ based her legal conclusion on the “hostile actions” prong of RCW 42.41.020(3), which necessarily requires encouragement “*by a supervisor.*” RCW 42.41.020(3)(b) (emphasis added). As City Light stated in its briefing to Superior Court, encouragement of an employee by a supervisor is a key requirement. CP 658 (KCSC reply brief, at 5). But even assuming City Light did not properly raise this issue below, it can still be considered on appeal because ALJ’s conclusion that there was actionable retaliation depends on the finding that Allen is a supervisor. *Bennett*, 113 Wn.2d at 918-919 (appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision) (internal citations omitted).

Moreover, under RAP 2.5(a), “a party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.” RAP 2.5(a). In his judicial review brief filed with Superior Court, Allen argued, “Conclusion of Law 5.10 should be set aside because it is not supported by substantial evidence, and it is arbitrary and capricious.” CP 649. Paragraph 5.10 is the only place in the entire decision where the ALJ makes the factual finding that “Mr. Allen was in a secondary supervisory position with the City” over Mr. Swanson “because of his participation with the JATC....” Allen’s challenge to paragraph 5.10 was sufficient to preserve City Light’s challenge to the supervisor finding.

In addition, RAP 2.5(a)(2) provides that an appellant may raise for the first time on appeal the “failure to establish facts upon which relief can be granted.” This exception applies where the proof of particular facts at trial is required to sustain a claim. *Mukilteo Ret. Apts., LLC v. Mukilteo Investors, LP*, 176 Wn. App. 244, 246, 310 P.3d 814 (2013), review denied, 179 Wn.2d 1025, 320 P.3d 719 (2014). Proof that Allen was a supervisor is necessary to sustain the claim that the *Seattle Times* posting was retaliatory. This is because under RCW 42.41.020(3)(b), hostile actions are retaliatory only where they are encouraged by “a supervisor or senior manager or official.” The ALJ’s finding that Allen’s

encouragement of another employee to post the *Seattle Times* comment was actionable retaliation is error because the record does not establish the fact that Allen was a supervisor or senior manager or official. This argument by City Light involves a “failure to establish facts upon which relief can be granted,” which can be raised for the first time on appeal under RAP 2.5(a)(2).

**B. The Substantial Evidence Standard is not met With Regard to the ALJ’s Findings and Conclusions in Paragraph 5.10**

**1. The Finding That Allen was in a “Secondary Supervisory Position With the City” Over Mr. Swanson “Because of his Participation on the JATC” is not Supported by Substantial Evidence**

Swanson provides no substantive response to the City’s argument that Allen could not have engaged in actionable retaliation under RCW 42.41.020(3)(b) because he was not a City “supervisor or senior manager or official.” RCW 42.41.020(3)(b). Swanson’s silence indicates the lack of substantial evidence to support the ALJ’s finding.

The ALJ’s finding that Allen was in a “secondary supervisory position” over Swanson is erroneous for three reasons. First, the ALJ appears to have invented an entirely new and ambiguous employment status called “secondary supervisor.” Chapter 42.41 RCW neither defines nor mentions the term “secondary supervisor.” No witness used the term

“secondary supervisor” to describe Allen or any position at the City. Nor is there any case law under Chapter 42.41 RCW articulating or applying a secondary supervisor standard. It was error for the ALJ to invent her own “secondary supervisor” standard where there is no indication the legislature intended such a standard.

Second, there is insufficient factual support for the notion that Allen’s participation on the JATC constituted a supervisory position with the City over Swanson. When questioned whether he ever had any supervisory authority over Swanson, Allen answered “No.” CP 2570-71 (160:24-161:1 Allen). Swanson offered no testimony to dispute this fact. The uncontroverted evidence shows that being on the JATC does not constitute a supervisory position with the City. The JATC is not established or governed by the City. Rather, it is established and governed by the Washington State Apprenticeship Training Council. It is the Washington State Apprenticeship Training Council, not the City, who sets and administers the standards for the apprenticeship programs. CP 2073 (1470:2-14 Hill); CP 2182 (1579:7-25 Johnson). It is the Washington State Apprenticeship Training Council, not the City, who has the ultimate authority to review JATC decisions. AR 1002-55 (apprenticeship standards); CP 2190 (1587:13-24 Johnson); CP 2254-55 (1651:22-1652:7,

Johnson); CP 2591-91 (181:21-182:2, Allen); AR 446, 478-9. As such, the JATC is not an arm of the City.

Furthermore, the City played no role in placing Allen on the JATC. Chapter 42.41 RCW does not define supervisor, but the definition of supervisor under federal employment statutes is a source of guidance. Under Title VII, the rationale for holding an employer vicariously liable for a supervisor's misconduct is because the employer aids the misconduct by delegating authority to supervisors. *See, e.g., Faragher v. Boca Raton*, 118 S. Ct. 2275, 2290 (1998); *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2269 (1998); *see also Vance v. Ball State University*, 133 S.Ct. 2434, 2448 (2013) ("the authority to take tangible employment actions is the defining characteristic of a supervisor"). Under this widely accepted definition, in order for the City to be held liable for Allen's actions, the City must have delegated or conferred authority on him.

But when Allen was on the JATC, it was *not* because the City delegated the position to him or conferred authority on him. Rather, it was Local 77, *not City Light*, who nominated Allen to be on the JATC. CP 2254 (1651:19-21 Johnson); CP 2541 (131:3-10 Allen). He was the Union's JATC representative, *not City Light's*, and City Light took no steps to confirm or approve his appointment. *Id.* As a result, Allen was never a properly appointed member of the JATC, and he did not vote on

any matter pertaining to Swanson during the time period at issue. CP 2541-2542 (131:3-132:1 Allen); CP 2591-2592 (181:21-182:1 Allen); CP 2190 (1587:16-24 Johnson). And, during the relevant time period, City Light took unprecedented steps to reduce Allen's influence on the JATC by having the Human Resources Officer attend a JATC meeting to notify the committee of the investigative finding that Allen had lobbied others to reduce Swanson's performance ratings. CP 2541-2542 (131:3-132:1 Allen); CP 2591-2592 (181:21-182:1 Allen); CP 2190 (1587:16-24 Johnson); CP 2184-2195 (1581:18-1592:21 Johnson); *see also* CP 660.

In sum, there is not substantial evidence to support the ALJ's finding in paragraph 5.10 that "Mr. Allen was in a secondary supervisory position with the City" over Swanson "because of his participation with the JATC" because (1) there is no "secondary supervisory" position; (2) the JATC is not a City committee because it is not governed or administered by the City; (3) Allen was not an agent or representative of the City on the JATC because the City did not confer or delegate authority to him regarding the JATC. RCW 42.41.020(3)(b) defines retaliatory action as "hostile actions by another employee towards a local government employee that were encouraged *by a supervisor or senior manager or official.*" (emphasis added). Because there is not substantial evidence that

Allen was a supervisor, the ALJ's finding of retaliatory action must be reversed.

**2. There is no Evidence That Allen or any Other City Light Employee Posted the Seattle Times Comment**

**a) Swanson Does not Dispute the Lack of Direct Evidence**

Swanson's response is striking for the lack of argument regarding any direct evidence that Ron Allen either posted the comment on the *Seattle Times* website or encouraged a City Light employee to post the comment. This is because there is none. As set out in City Light's briefs, Mr. Allen did not testify at all about this, and the undisputed testimony was that any member of the public could have posted to the website. It is therefore not disputed that there is no direct evidence (let alone substantial direct evidence) regarding any involvement by Mr. Allen in the *Seattle Times* website comment.

**b) There is Insufficient Circumstantial Evidence to Support a Reasonable Inference That Allen Either Posted or Successfully Encouraged Another City Light Employee to Post the Seattle Times Comment**

Swanson's argument that there is substantial circumstantial evidence to support the finding regarding the *Seattle Times* website comment is unpersuasive. Circumstantial evidence is proven by facts

which are of such a nature and so related to each other that only one conclusion can fairly or reasonably be drawn from them. *Boguch v. Landover Corp.*, 153 Wn.App. 595, 610-611, 224 P.3d 795 (2009). Speculation is not sufficient, and where there are two or more equally reasonable inferences that can be drawn from the facts, only one of which would result in liability, then the fact finder will not be allowed to resort to conjecture about which inference should be applied. *Schmidt v. Pioneer United Daries*, 60 Wn.2d 271, 276, 373 P.2d 764 (1962).

*Schmidt* involved an action for injuries resulting from a slip and fall, in which plaintiff attributed his injuries to mud on the floor, speculating that the mud must have been attributable to acts of an employee of the defendant. But the Court held that where there was no evidence that an employee of defendant created the dangerous condition of mud on the floor, there was not substantial evidence to support plaintiff's claim. *Schmidt*, 60 Wn. at 276 ("there is no more reason to believe that the mud was placed there by employees of respondent than that it was placed there by appellant or a third party.").

Similarly, in the Swanson case there is no evidence linking a City Light employee, as opposed to a non-employee who had relevant knowledge, to the *Seattle Times* website comment. The Superior Court's ruling on this point does not seem to differentiate between "a City Light

insider who was encouraged to act by the behavior and conduct of Ron Allen” and a City Light employee. CP 2820 (Ramsell order ¶ 5). An “insider” is not necessarily an employee – the evidence shows that individuals who are not employees had the information necessary to post the comment. For example, the evidence shows that Joe Simpson, who is the union business representative and not a City Light employee, not only had access to the information necessary to post the comment but was aligned with Mr. Allen against Mr. Swanson. The factual findings of the Administrative Law Judge regarding Mr. Simpson include the following:

- Mr. Simpson is Mr. Allen’s uncle. CP 8 (¶ 4.3).
- Mr. Simpson appointed Mr. Allen to the ECAC (Electrical Crafts Advisory Committee) which oversees and makes recommendations regarding the lineworker apprenticeship program that Mr. Swanson was in. CP 11 (¶ 4.14).
- Mr. Simpson appointed Mr. Allen to the JATC (Joint Apprenticeship Training Committee) in June 2012, shortly after Mr. Allen had been suspended for taking alcohol from apprentices, which was the incident that had been reported to City Light’s Human Resources group by Mr. Swanson. CP 15 (¶ 4.33); *see also* CP 13 (¶ 4.23).
- Mr. Simpson hindered an investigation by City Light into a confrontation between Mr. Allen and Mr. Swanson at the union hall, writing to City Light stating “I am not willing to spend the members money on silly investigations every time the apprenticeship office talks an apprentice into ‘crying wolf.’” CP 15 (¶ 4.34, in n.2). The apprentice he was referencing in this case was Mr. Swanson.

- Mr. Simpson sent City Light's Human Resources group copies of text messages that discussed Mr. Swanson's retaliation claims and that were taken without Mr. Swanson's knowledge or authorization. CP 19 (¶ 4.48).

The inference from the record that Mr. Simpson posted the *Seattle Times* comment, either with or without the encouragement of Mr. Allen, is at least an equally likely inference to the inference that Mr. Allen posted the comment or encouraged a City Light employee to do so.<sup>2</sup> If Mr. Simpson posted the comment, then there is no actionable retaliation under the statute, because he is not a City Light employee.<sup>3</sup> A record such as this which supports contrary and equally likely inferences cannot meet the substantial evidence standard. *Schmidt*, 60 Wn. at 276.

*Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn. 2d 46, 821 P.2d 18 (1991) is distinguishable and does not help Swanson fill the evidentiary void. The *Wilmot* case was appealed following a summary judgment motion, and the court was considering the proof required for a prima facie showing by plaintiffs that they had been discharged in retaliation for claiming workers' compensation benefits. In this context, the focus was on the third element of the required prima facie showing,

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<sup>2</sup> Mr. Swanson did not identify any specific City Light employees that he believes Mr. Allen encouraged to post the comment.

<sup>3</sup> Another possibility is that Allen posted the comment himself. But there can be no employer liability under RCW 42.41 if he posted the comment himself, regardless of whether or not Allen was Swanson's supervisor. See Section B.3 below.

namely the causation between the protected activity (claiming benefits) and the adverse action (discharge), and the court noted that causation, or the employer's motivation for the discharge, often must be shown by circumstantial evidence, such as a pattern of retaliatory conduct. The *Wilmot* reasoning is not particularly helpful to Swanson because in the situation contemplated in *Wilmot* there was no question that the employer had discharged the employee. In Swanson's case, however, the evidentiary problem is different because there is a failure of evidence tying the alleged retaliatory act to the employer. Even if it is assumed that the person who posted the *Seattle Times* website comment was motivated by some kind of animus towards Swanson, this alone is insufficient to establish liability.<sup>4</sup> The problem for Swanson is not a failure of evidence regarding motive, but rather a failure of evidence regarding the person who posted the comment, and whether that person's act could result in liability for the employer. This is particularly important where, as here,

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<sup>4</sup> Evidence of past retaliation is not admissible to prove that a person is generally a retaliator and has therefore retaliated in the instance in question. ER 404(b) ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). Prior bad acts can be admitted to prove motive. *Id.* Here, the evidence regarding events before the 30-day limitations period applicable to Swanson's claim was admitted for background purposes, not to prove the retaliation claim. CP 2778 (May 24, 2013 status conference). However, even assuming Mr. Allen's retaliatory motive can be established by his past conduct, motivation alone is insufficient to establish liability on the part of City Light, absent some further evidence linking Mr. Allen to the *Seattle Times* website comment. There is no such evidence.

the allegedly retaliatory action could have been performed by someone who is not an employee, such as Mr. Simpson, and for whom City Light bears no responsibility.<sup>5</sup>

In sum, there is a void of evidence – including any circumstantial evidence – that affirmatively ties the posting of the *Seattle Times* website comment to Ron Allen or someone he encouraged.<sup>6</sup>

**3. The ALJ's Failure to Determine Whether Ron Allen Posted the Comment or Encouraged Someone Else to do so is Fatal to Her Finding of Actionable Retaliation**

The ALJ's order itself demonstrates the lack of substantial evidence to support her legal conclusion of retaliation. The Administrative Law Judge was apparently unable to determine, based on the evidence, whether Ron Allen posted the *Seattle Times* comment himself or, as a supervisor, encouraged another employee to do so. CP 23 (Order, ¶5.10). The judge did not articulate which of these two scenarios was more likely:

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<sup>5</sup> Swanson argues that the PAL sticker incident can be used as evidence to support the finding regarding the *Seattle Times* comment. However, the ALJ made clear in her order that she did not consider the PAL sticker incident in determining whether City Light violated Chapter 42.41 RCW. CP 525 (Order, ¶ 5.10).

<sup>6</sup> The ALJ's finding was not based on any credibility determination because no witnesses testified about the circumstances under which the comment was created or posted. Therefore Swanson's argument that City Light seeks to invade the province of the factfinder is misplaced.

the impersonation of Mr. Swanson to the Seattle Times [was] undoubtedly hostile action[] taken by SCL employees toward Mr. Swanson that Mr. Allen either vocally or tacitly encouraged, if not performed himself. . . Consequently, Mr. Allen's encouragement and/or commission of the impersonation of Mr. Swanson publicly to the Seattle Times is actionable retaliation under Chapter 42.41 RCW.

CP 23 (Order, ¶5.10) (emphasis added). The problem with the ALJ's conclusion is that only one of the two possible scenarios—Allen's encouragement of another employee— can potentially lead to a finding of actionable retaliation under RCW 42.41.020. This is because under the applicable definition of retaliation, hostile actions are retaliatory and attributable to the employer only where the actions “were encouraged by a supervisor or senior manager or official.” RCW 42.41.020(3)(b). Therefore, if Allen did not encourage another employee, but instead posted the comment himself, there would be no actionable retaliation.

The Administrative Law Judge's failure to articulate whether Allen posted the comment himself or encouraged another employee to post it demonstrates that the factual record is ambiguous. Her either/or finding shows there is not substantial evidence in the record to establish the requisite fact that Allen encouraged another employee to post the comment.

In order to reach a finding of actionable retaliation based on the ALJ's either/or factual finding, one would have to speculate that Allen encouraged another employee to anonymously post a website comment that he, by himself, could post anonymously. (The evidence is clear that any member of the public could post anonymously on the website). One would also have to speculate that Allen's encouragement was successful. Such speculation strains logic and common sense. Speculation that Allen did not anonymously post the comment himself, and instead encouraged another employee to anonymously post the comment, doesn't make sense and is contrary to Swanson's testimony that Allen was openly hostile towards him. And importantly, there is no evidence at all – either direct or circumstantial – to support the idea that a City Light employee succumbed to Allen's encouragement. To the contrary, if anything the evidence shows that Allen's attempts to encourage others to treat Swanson poorly were ineffective. Despite the finding that Ron Allen lobbied line workers and crew chiefs to downgrade Mr. Swanson's performance evaluations, the Administrative Law Judge nevertheless found that Swanson's performance evaluation within the limitations period was not retaliatory. CP 500 (ALJ's Order, ¶ 5.8). Mr. Allen's efforts to negatively impact Mr. Swanson's performance evaluations were demonstrably unsuccessful. In short, the only possible way to find actionable retaliation under

RCW 42.41.020 – based on the *Seattle Times* website comment which did not adversely impact Swanson’s employment and which therefore must be a result of encouragement of another employee by Ron Allen – is not supported by substantial evidence. The Administrative Law Judge’s failure to make a definitive factual finding that Allen encouraged another employee to post the comment demonstrates that the evidence is inconclusive.

**4. The Errors in Paragraph 5.10 of the ALJ’s Order Were not Harmless**

Swanson’s argument that the errors in the ALJ’s order were harmless does not pass cursory review. *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992), relied upon by Swanson, is inapplicable. In *Caldera*, the court noted an erroneous factual finding that 10 ounces of cocaine were delivered, when in fact only 9 ounces were delivered, was harmless to the defendant’s ultimate drug conviction. In contrast, here the ALJ’s conclusion that there was actionable retaliation directly flowed from the challenged findings regarding the *Seattle Times* article in paragraph 5.10 of her order. Without those findings, the conclusion that there was actionable retaliation cannot stand.<sup>7</sup> Swanson’s attempt to rely

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<sup>7</sup> The ALJ’s order is confusing because although paragraph 5.10 is in the section of the order entitled “conclusions of law” it appears to contain factual findings regarding Ron Allen’s connection to the *Seattle Times* article. In the part of the order entitled “findings

on the summary section of the order to claim City Light did not challenge the ALJ's conclusion there was actionable retaliation puts form over substance and is unpersuasive. City Light was prejudiced by the erroneous finding of actionable retaliation regarding the *Seattle Times* website comment – the factual findings regarding prior events that Swanson references are events outside the limitations period and as such cannot form the basis for actionable retaliation.

### **III. CONCLUSION**

For the forgoing reasons, Swanson's arguments responding to City Light's cross appeal are unpersuasive. There was not substantial evidence to support the ALJ's finding that the *Seattle Times* website comment constituted actionable retaliation.

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of fact" the ALJ states only that "Neither Mr. Swanson nor Ms. Proudfoot could determine specifically who posted this article." CP 496 (Order, ¶ 4.47). There is no mention of Ron Allen and no statement at all in the "findings of fact" linking Ron Allen to the *Seattle Times* website comment.

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