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No. 50570-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of

BRETT HAMILTON

BRETT HAMILTON,

Plaintiff - Appellant,

v.

KITSAP COUNTY,

Respondent.

PETITION FOR REVIEW

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Statutes and Regulations

A. Identity of Petitioner

COMES NOW the Petitioner, Brett Hamilton, by and through his attorney, Rodney R Moody, and hereby requests this Court accept review of the Court of Appeals, Div. II decision affirming summary judgment and denying the Motion for Reconsideration on February 6, 2019.

B. Court of Appeals Decision

The Petitioner seeks review of the Court of Appeals ruling upholding the Trial Courts granting of summary judgment and denying the Motion For Reconsideration on February 6, 2019.

C. Issues Presented for Review

1. Division One has implicitly with this ruling empowered employers in the State of Washington who have negotiated a Collective Bargaining Agreement with their union employees to unilaterally disregard the CBA without citing to any authority to support this decision.
2. Division One has committed legal error by failing to consider the substantial evidence presented demonstrating the decision to terminate Hamilton's employment was both retaliatory and mere pretext for the actual, but unlawful, purpose of ridding itself of an Officer whose safety related activities were creating embarrassment for the Administration.

D. Statement of the Case

In 2012 the Plaintiff, Brett Hamilton, had been employed by the Kitsap County Sheriff's Department in the Corrections Division for over 10 years. CP 349. In 2011 Officer Hamilton was selected as Officer of the Year. CP 349. All of his performance reviews were fully successful. In 2008 and 2009 Officer Hamilton was specifically complemented on his investigative skills in his performance reviews. CP 271.

As an officer with the Kitsap County Sheriff's Department Hamilton was a member of the Kitsap County Corrections Officers Guild. A Corrections Officer Bill of Rights (COBR) was in effect between January 1, 2010 and December 31, 2012. CP 328-32.

Appendix D, paragraph 2 states that in criminal matters an employee shall be afforded those constitutional rights available to any citizen. CP 328. It further states in administrative matters in which an employee will be interviewed concerning an act, which, if proven, could reasonably result in disciplinary action involving a loss of pay against him or her, she/he will be afforded the safeguards set forth in this Appendix.

Appendix D, paragraph 3, states whenever the employer decides to initiate an investigation that may lead to disciplinary action involving the loss of pay, the employer shall promptly provide the employee notice of the investigation. Paragraph 3 further requires such notice to include a description of the general nature of the complaint unless such notice would endanger the investigation. CP 328. No notice of any investigation or description of the general nature of a complaint was provided to Hamilton.

Appendix D, paragraph 4 requires the employee to be informed in writing not less than forty-eight (48) hours prior to conducting an investigatory interview that the employee is a subject of an inquiry that

may lead to disciplinary action that involves a potential loss of pay. CP 328. Paragraph 4 requires the employee to be informed of the nature of the investigation and provided a summary of the factual allegation(s) sufficient to reasonably apprise the employee the nature of the charge. Paragraph 4 also requires that upon request the employee shall be afforded the opportunity to consult with a Guild representative. Again, no notice was provided to Hamilton and he had no opportunity to consult with a Guild representative prior to being interviewed with potential employment consequences.

Appendix D, paragraph 5 requires the employee under investigation to be informed of the name of the person in charge of the investigation and the name of the questioners, and all other persons to be present during the questioning. CP 329. No such information was provided to Hamilton.

Appendix D, paragraph 6 requires that when possible the questioning shall be conducted at a reasonable hour, preferably at time when the employee is on duty or during the normal waking hours for the employee, unless the seriousness of the investigation requires otherwise. CP 329.

There is no language or agreement in the COBR which would permit the Administration to disregard these notice requirements

because a member of the Guild was suspected of engaging in criminal activity.

In 2012 the administration and officers of the Kitsap County Corrections Department became aware of potential abuse of the Telmate communication system by inmates. On April 6, 2012, a Jail Incident Report was prepared by Officer Hamilton regarding the abuse of the Telmate system and approved by his supervisor, Sgt. Dick. CP 257.

On April 12, 2012, a Jail Incident Report was prepared by Officer Sapp regarding her monitoring of the video visitation system because "there have been several prisoners who had been defrauding the institution and Telmate by not paying for visits." CP 259. On April 26, 2012, a Jail Incident Report was prepared by Sgt. Dick regarding his reporting of the potential abuse of the Telmate system and manipulation to obtain free visits. CP 262. On March 13, 2012, Sgt. Hall sent an email to the representative of Telmate, Kelly O'Neil, which included an attached handwritten note from an inmate describing how the manipulation was taking place. CP 264. On April 27, 2012, Sgt. Hall sent an email to Chief Newlin in which he informed him regarding Telmate issues and described how inmates had been manipulating the remote visit scheduling system and obtaining free remote visits. CP 267. These problems continued and on July 11, 2012, Sgt. Hall

prepared a Jail Incident Report which was reviewed by Lt. Elton. CP 269. This report detailed how after the implementation of the video visiting system in early May 2012, several inmates had been manipulating the scheduling system in order to receive free remote visits.

In early 2002 Hamilton began an investigation into the Telmate system and abuse by inmates that was occurring. As a reserve officer on the Bremerton Police Department Hamilton had learned an investigative technique from one of the Department's detectives regarding sending text messages to the known phone number of a suspect pretending to be someone else hoping to solicit a response. CP 240-41. He chose to use this technique with the wife of the inmate that was suspected of abusing the Telmate system, Ashley Caseria. Hamilton sent a text message to Ms. Caseria purportedly from her Mother who had recently passed away. CP 162.

Hamilton made no effort to hide his investigative activities from his fellow corrections officers. After openly discussing his attempts to solicit information from Ms. Caseria this information was brought to the attention of Sgt. Dick on June 12, 2012. Sgt. Dick brought this to the attention of his supervisor, Lt. Genie Elton, that same day. CP 283.

Lt. Elton drafted a memorandum on June 14, 2013, to Chief Newlin describing her actions in response. CP 283-91. She met with Chief Newlin on June 12, 2012 at approximately 8:40 AM. They discussed the "potential criminal nature of this allegation and concerns of the potential for various policy violations having taken place by Hamilton". CP 288. On June 12th Lt. Elton also had telephone contact with Detective Martin of the Port Orchard Police Department. They met later that morning and she briefed Detective Martin in full. CP 290.

Lt. Elton spoke with Detective Martin on June 13, 2012 regarding emails that he sent to her on the case. CP 290. Detective Martin sent an email to Lt. Elton on June 13, 2012 at 8:23 AM. CP 279. In this email Detective Martin described staffing this matter with his Chief and Commander and stated, "The Chief and Commander met with me yesterday afternoon and asked if I thought there was any criminal act involved." "I told them it might be telephone harassment, but that was pretty slim." "They said before I go any further, to get the Prosecutors take on this and see if they would pursue charging before I went any further, that this looked like a violation of your department policy, not criminal." "So–I will wait to see if the Prosecutors Office will charge." CP 279. There is no evidence of any response from the Prosecutor's Office.

Lt. Elton called Detective Martin at approximately 14:15 on June 13, 2012, "and told him that I had reviewed the report and that regarding contacting Hamilton, if necessary, that it not be done while he is at work." "Martin agreed." CP 290. This conversation occurred after she had received the email from Det. Martin stating this looked like a policy violation, not a criminal matter. Chief Newlin acknowledged that he probably did direct Lt. Elton to inform Detective Martin that they were not to contact Officer Hamilton at his place of employment which was in direct violation of Appendix D, paragraph 6. CP 208.

Hamilton was contacted at his personal residence by Det. Martion shortly after the conclusion of his shift after he was awoken from sleep and interviewed regarding this issue in Det. Martin's unmarked vehicle. CP 163. Neither the Guild nor Hamilton was provided prior notice of this pending interview.

Sgt. McDonough who was in charge of the Office of Professional Services was asked if he had suggested to Chief Newlin, Lt. Elton, or the Undersheriff that Officer Hamilton should be afforded the opportunity to have a Guild representative present before he was interviewed by Detective Martin. His reply was "No." CP 248. He was asked if there was anything so significant or serious about the allegations as he understood them that would justify questioning

Hamilton outside of a reasonable hour or at his place of duty during normal waking hours for the employee. Sgt. McDonough testified, "For the administrative investigation, no." He was then asked about the criminal matter and his testimony was, "Not my decision." CP 249.

Hamilton was involved in bringing awareness to safety-related issues within the jail. In 2011, a concern arose regarding the safety of officers in the Central Pod. Hamilton prepared an Emergency Injunction which was signed by 60 individual officers. CP 274-78. Chief Newlin, Sgt. Glover, and Sgt. Dick all denied having seen this Emergency Injunction during their depositions. CP 214, 239, 233. Chief Newlin acknowledged that he was aware that safety-related issues were being raised by the Guild. CP 214. Terry Cousins, a former twenty-year employee of Kitsap County Jail and President of the Guild in 2012-13 stated in her Declaration she has personal knowledge that Chief Newlin was aware of this Emergency Injunction, contrary to his sworn testimony during his deposition. CP 344. She personally gave a copy of the Emergency Injunction to Administration and discussed the same with him directly. CP 344. She further stated "This Emergency Injunction was a source of irritation and embarrassment to the Administration." CP 344.

Chief Newlin was asked during his deposition if he recognized that there were possible administrative policy implications to the alleged

actions of Officer Hamilton. Chief Newlin testified, "There were policy implications, yes." "If there's a criminal investigation, there's potential policy violations by the fact of it being a criminal investigation, but I didn't know which policies or those kinds of things." CP 215. Chief Newlin testified that he considered all the information presented to him in making the decision to engage in the criminal investigation process. CP 220. He further testified, "the totality of the information led me to believe that this could possibly be a criminal violation." CP 220-21. He also admitted to making the decision not to engage in the administrative process outlined in the COBR when he testified, "once I make a determination that it is potentially criminal, then, no, we don't go down the administrative route prior to that." CP 221.

E. ARGUMENT

Negligent Supervision

This Court should accept review pursuant to RAP 13.4 (b)(4).

Without providing any authority the Respondent, Trial Court, and Division One have all argued or ruled that the Corrections Division Administration for Kitsap County was acting within the scope of their authority when they purposely disregarded every notice provision of the COBR. To support this holding will imperil every Collective Bargaining Agreement in the State of Washington, particularly in the law enforcement

employment context, by permitting the employer to disregard all contractually bargained for provisions of a CBA by simply deciding to unilaterally determine that an employee's actions may constitute a criminal act. There is no authority to support this conclusion and Division One's ruling would jeopardize every contract between an employer and their employee in this State.

For Hamilton to establish a negligent supervision claim against Kitsap County he must establish: (1) the relevant supervisor's acted outside the scope of their employment; (2) they presented a risk of harm to him; (3) the County knew, or in the exercise of reasonable care should have known, that the supervisors posed a risk of harm to Hamilton; and (4) the County's failure to supervise its supervisor adequately was the proximate cause of Hamilton's injury. *Niece v. Bellevue Group Home*, 131 Wn.2d 39, 48-51, 929 P.2d 420 (1997).

When an employee causes injury by acts beyond the scope of their employment an employer may be liable for negligently supervising the employee. *Gilliam v. Department of Social and Health Services*, 89 Wn.App. 569, 584-85, 950 P.2d 20 (1998). Whether an employee acts within the scope of employment depends on whether they were "fulfilling their job functions at the time the engage in the injurious conduct." *Robel v. Roundup Corp.*, 148 Wn.2d 35,53, 59 P.3d 611 (2002). Employees are

not "fulfilling their job functions when their 'conduct is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.'" *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343. 361-62, 423 P.3d 197 (2018).

Division One focused on the first element finding that Chief Newlin and Lt. Elton acted within the scope of their authority because they claimed they believed Hamilton's actions to be criminal in nature.

Ordinary rules of contract law govern collective bargaining agreements unless they conflict with, and therefore are superseded by, federal labor law. *Barclay v. Spokane*, 83 Wn.2d 698, 700, 521 P.2d 987 (1974). There is no suggestion that this COBR was superseded by federal labor law. Simply put, Administration for the Corrections Department purposely chose to disregard virtually all notice requirements of the COBR and justified this action by Chief Newlin deciding to call this a "criminal" investigation.

The Respondent at the Trial Court level was asked to provide authority in support of this proposition that Chief Newlin could unilaterally make the decision to disregard all notice requirements of the COBR, the Respondent failed to provide any authority. This issue was specifically argued to Division One who appears to have accepted this

argument by the Respondent while also failing to cite to any authority to support this contention. Division One stated:

> Here, the County's employees acted within the scope of their employment when they asked Martin to interview Hamilton while he was off duty and before he had notice of the criminal investigation. Corrections Division procedures required that its employees report suspected criminal conduct occurring in the Kitsap County Jail to POPD for an independent criminal investigation. While on duty, Hamilton sent harassing texts to Ashley. Because Elton and Newlin suspected criminal activity by Hamilton, they acted in the scope of their employment when they reported his conduct.

Of course there is virtually no citation to any authority made in this paragraph or in support of this ruling.

Acceptance of review by this Court is appropriate pursuant to RAP 13.4(b)(4). There are of course many law enforcement related agencies in this State with similar CBA's. These employers cannot be permitted to unilaterally disregard the terms of a contract by simply deciding, wrongfully or not, that a potential criminal act was committed by an employee.

There is no authority to support the absurd proposition that a law enforcement employer can simply disregard a negotiated and agreed upon CBA by making a claim that an employee's act was potentially criminal.

Division One's decision directly contradicts the substantial body of authority regarding the enforcement of contracts.

Division One also disregards the standards on summary judgment. It is not the function of the trial court or Division One to weigh the evidence to be considered and summary judgment must be denied if a right of recovery is indicated under any provable set of facts. *Smith v. Acme Paving Co.*, 16 Wn.App. 389, 92-93, 558 P.2d 811 (1976). By stating "While on duty, Hamilton sent harassing text to Ashley" Division One makes a factual determination which is not within their authority. Division One follows up this incorrect statement by stating, "Because Elton and Newlin suspected criminal conduct by Hamilton, they acted in the scope of their employment when they reported his conduct." While reporting his conduct may be within the scope of their authority, directing that all notice requirements of this COBR be disregarded because of their suspension a criminal act may have occurred is not.

Retaliation

To establish the prima facie elements of a retaliatory discharge a plaintiff must demonstrate (1) that he engaged in a statutorily protected activity, (2) the employer took adverse employment action against him, and (3) demonstrate a causal link between the activity and the adverse

action. *Short v. Battle Ground*, 169 Wn.App. 188, 205, 279 P.3d 902 (2012); RCW 49.17.160 A retaliatory motive need not be the employer's soul or principal reason for discharge so long as the employee establishes that retaliation was a substantial factor. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991); *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 621, 60 P.3d 106 (2002); WAC 296-360-09(2). A factor supporting the decision is "substantial if it so much as "tips the scales one way or the other.'" *Wilmot,* supra at 72, *Renz*, supra at 621.

In *Renz* the Court stated:

> Employers, of course, rarely openly reveal that retaliation was a motive for adverse employment actions. Employees must then necessarily resort to circumstantial evidence to demonstrate the retaliatory purpose. *Kahn,* 90 Wn.App. at 130 (citing *Wilmot*, 118 Wn.2d at 69). An employee can meet this prong by establishing that he or she participated in an opposition activity, the employer knew of the opposition activity, and the employer discharged him or her. *Id.* at 131 (citing *Wilmot*, 118 Wn.2d at 69.

Renz, supra at 621-22.

The actions engaged in by Mr. Hamilton when creating the Emergency Injunction in November 2011 are statutorily protected by WAC 296-360-100 and RCW 49.17.060. His actions are protected

activities under WAC 296-360-100 and RCW 49.17.160. This is not disputed by the Respondent.

Division One states, "Hamilton argues that a genuine dispute exists because he produced evidence of his positive performance reviews, his recognition as officer of the year in 2011, and evidence of the circumstances and surrounding Martin's interview." Hamilton produced far more evidence than this which Division One commits legal error by simply choosing to disregard in violation of the holding in *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 421 P.2d 811, (1997), which of course requires that the Court consider *all evidence* and draw *all reasonable inferences therefrom* most favorable to the nonmoving party. Id. at 951.

Lt. Elton and Chief Newlin knew that Hamilton on April 6, 2012, had prepared a Jail Incident Report regarding the abuse of the Telmate system which was approved by his supervisor. CP 257. They were aware that multiple Jail Incident Reports had also been prepared by Officer Sapp and Sgt. Dick. Administration also knew that Sgt. Hall had communicated with the Telmate representative regarding the abuse taking place.

Hamilton also produced evidence that he had engaged in safety related activities by producing the two Emergency Injunctions which were signed by the vast majority of non-supervisory members of the Guild. CP

274-78. Chief Newlin testified he did not have knowledge of Hamilton's safety related activities, but the Guild President testified that she personally discussed this with him. This is a material issue of fact that is in dispute and as a result a jury question. The Guild President also stated in her Declaration that the emergency injunctions were a "source of irritation and embarrassment to the Administration" which Chief Newlin "personally disliked having to address." CP 499. This is evidence that the claimed basis for ter will mination was a mere pretext for the true reason, Hamilton's actions were embarrassing the Administration.

Despite this clearly conflicting testimony on a material fact Division One suggests that Hamilton failed to produce evidence of pretext. The uncontested fact that Chief Newlin and Lt. Elton knowingly and purposely disregarded *virtually all* notice provisions of the COBR and then tried to justify their actions by claiming authorization to do this because they decided to call it a criminal investigation; authority which does not exist within the COBR itself is evidence that the claimed legitimate basis for Hamilton's termination is evidence of pretext.

Division One makes the comment, "Here, the County's legitimate nondiscriminatory reason for firing Hamilton was his loss of faith in a corrections officer who harassed an inmate's wife and lied to public servants." When a trial court rules on a motion for summary judgment it

must accept the plaintiff's evidence as true and then determine whether or not the plaintiff has made a prima facie case. *Roy v. Goerz*, 26 Wn. App. 807, 810, 614 P.2d 1308 (1980). In ruling as a matter of law, the court "does not make factual determinations or evaluate the credibility of plaintiff's evidence, except as may be incidentally necessary to favorably resolve conflicts appearing therein." *Spring v. Dep't of Labor & Indus. Of State,* 96 Wn.2d 914, 918, 640 P.2d 1 (1982). Division One commits legal error by making the factual determination that the County had a legitimate nondiscriminatory reason for firing Hamilton, that it lost faith in a corrections officer, that he harassed an inmate's wife, or lied to a public servant. These are factual questions to be determined by a jury.

Chief Newlin seized the opportunity of Hamilton's investigatory activities to rid himself of an officer engaging in safety related conduct that Chief Newlin found to be embarrassing and distasteful to deal with. In doing so Chief Newlin retaliated against Hamilton in violation of the WISHA thereby acting outside the scope of his employment.

F. CONCLUSION

At the Trial Court level Judge Houser granted Summary Judgment twice while refusing to provide any explanation for his ruling on both occasions. In the motion to reconsider as it relates to the retaliation claim he was specifically asked to explain his reasoning. He refused to do so.

Division One has factually determined that when Hamilton sent a text message to Ms. Caseria his action constituted "harassment." He then "lied" about it to a public official which caused Chief Newlin to lose confidence in his officer therefore creating a "legitimate" basis for his termination. Of course all of these factual statements are beyond the authority of the Appellate Court.

In order to justify its decision supporting the granting of summary judgment on the retaliation claim Division One resorts to the baseless claim that no evidence of pretext has been presented by Hamilton. Hamilton has shown that before any of these issues with Ms. Caseria occurred he engaged in safety related activities which the Administration found to be embarrassing and distasteful to deal with. Then, while knowing that multiple officers and supervisors had all investigated the Telmate abuse by resident inmates including Hamilton himself the Administration purposely and with full knowledge of the effect of their actions direct an investigation occur which they personally direct occur in such a manner so as to disregarded virtually every notice provision of the COBR. When Hamilton acts as one might well expected of an individual who is confronted without any opportunity to prepare the Administration uses his response to justify his termination.

The Administration sought to justify their action by making the claim their actions were justified because this was a "criminal" investigation. Authority for that position does not exist in any statute, administrative regulation, County policy, or the COBR itself. When pressed for an explanation of the source of such authority the Respondent fails to provide any authority, the Trial Court refuses to provide any explanation for the decision to grant summary judgment and Division One agrees with the argument while also failing to cite to supporting authority.

The Respondent, Trial Court, and Division One have all failed to cite any authority to support this legal argument because there is no such authority.

This is a situation where Division One factually decided that Hamilton's actions constitute "harassment" and chose to support the granting of summary judgment despite all evidence and legal authority to the contrary. This decision should cause every citizen of the State of Washington to pause and question the legitimacy of the judicial process.

Respectfully, this decision by Division One cannot be permitted to stand if the integrity of the judicial system is to be maintained.

RESPECTFULLY SUBMITTED this 8th day of March, 2019.

/s/ Rodney R. Moody
WSBA #17416, Attorney for Appellant

CERTIFICATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on March 8, 2019, I caused to be filed and delivered via US Mail and Email Service the foregoing to:

Counsel for Defendant

Jacqueline Aufderheide
Kitsap County Civil Division
614 Division St., Stop 35A
Port Orchard, WA 98366

DATED this 8th day of March, 2019.

s/ Rodney R. Moody
Rodney R. Moody, WSBA #17416
Attorney for Appellant

Filed
Washington State
Court of Appeals
Division Two

February 6, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRETT HAMILTON, a single individual, Appellant, v. KITSAP COUNTY, Respondent.	No. 50570-3-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Brett Hamilton filed a motion for reconsideration of this court's January 3, 2019 unpublished opinion. After review, we deny the motion.

IT IS SO ORDERED.

PANEL: Jj. Worswick, Johanson, Melnick.

FOR THE COURT:

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

January 3, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRETT HAMILTON, a single individual, Appellant, v. KITSAP COUNTY, Respondent.	No. 50570-3-II UNPUBLISHED OPINION

MELNICK, J. — Brett Hamilton appeals from summary judgment in favor of Kitsap County on his claims of negligent supervision, negligent infliction of emotional distress (NIED), and retaliatory discharge. Hamilton argues the trial court erred in concluding no genuine dispute of any material fact existed on the negligent supervision claim or the retaliatory discharge claim. He also argues the trial court erred because it did not consider emotional damages when ruling on the NIED claim. We affirm.

FACTS

I. BACKGROUND

Hamilton worked as a corrections officer for the Kitsap County Sheriff's Office (KCSO) Corrections Division from 2002 to 2013. He received positive employee-performance reviews, and his employer recognized him as the corrections officer of the year in 2011. Hamilton had no disciplinary history prior to June 2012.

Corrections officers were members of the Kitsap County Correctional Officers Guild (Guild). A Collective Bargaining Agreement (CBA) governed the terms of employment for corrections officers. The CBA included appendix D, the Corrections Officer Bill of Rights (COBR), which provided, among other matters, rights afforded to corrections officers for administrative investigations that potentially involved disciplinary action. The COBR provided, in relevant part, that:

> In criminal matters, an employee shall be afforded those constitutional rights available to any citizen. In administrative matters . . . , [an employee] will be afforded the safeguards set forth in [the COBR].

Clerk's Papers (CP) at 327. As relevant here, the COBR provided that in certain administrative matters an employee must be provided the opportunity to consult with a Guild representative upon request and be questioned while "on duty or during the normal waking hours . . . unless the seriousness of the investigation require[d] otherwise." CP at 327-28.

Corrections Division procedures included the following. When detailing major infractions of the jail's rules, corrections officers had to submit a written incident report before their shift ended. When corrections officers suspected criminal conduct, they would write a report, and a shift supervisor would notify the Port Orchard Police Department (POPD) to conduct an independent criminal investigation. When the corrections officers reported non-criminal infractions, the shift supervisors would write on the report if they assigned a corrections officer to a follow-up investigation.

A. Petitions

In the fall of 2011, Hamilton created two petitions entitled "Emergency Injunction." The petitions stated that the KCSO officers who signed the petitions had safety concerns about staffing levels during a particular shift.

Hamilton gave the petitions to Terry Cousins, the Guild president. Hamilton did not know what happened with the petitions, and he did not receive any feedback. Cousins gave the documents to an administrator in the Corrections Division. Cousins discussed the petitions with Ned Newlin, the Chief of the Corrections Division, on December 30, 2011.

B. Jail Investigation

The Corrections Division used a company, Telmate, to manage inmate's phone calls and video visits. Inmates paid Telmate directly for the service. In March 2012, Corrections Sergeant Keith Hall e-mailed Telmate that inmates were receiving free remote-video visits because of a suspected software glitch. In the e-mail, Hall noted that Aaron Caseria, an inmate, had one of the highest number of free visits. Telmate replied that it did not want to seek payment for the free visits.

A few weeks later, Hamilton filed an incident report about Caseria exploiting the software glitch to get free video visits. The report contained Caseria's statement that he could not be blamed because the system could be manipulated. Sergeant Craig Dick, the shift supervisor, reviewed this incident report. Dick wrote on the report that Telmate was reviewing the issue. The Corrections Division did not ask Hamilton to follow up on the report.

Hamilton later spoke with Hall and Sergeant Anthony Glover about his incident report. Glover told Hamilton that he could continue to review Caseria's video visits on Telmate and write reports on his findings. Hamilton did not file any other incident reports related to Caseria's Telmate use.

C. Text Messages

On one occasion, Hamilton saw Caseria's wife, Ashley,[1] using a Telmate account registered to Caseria's mother. Hamilton took down the phone number associated with the Telmate account and texted personal messages to Ashley saying, in part, how much he loved her. Hamilton used his son's phone for the texts because he believed it would not show a name on caller ID.

On June 9, 2012, Caseria's mother-in-law died, and Officer Kearney told Hamilton that Caseria found out about the death. Hamilton believed Caseria was lying about the death so he could be furloughed claiming he needed to attend the funeral. Hamilton could not find an obituary for Caseria's mother-in-law. He again texted Ashley, stating how much he loved her. He also called her number. Despite repeated requests, Hamilton never identified himself.

Ashley subsequently called 911 and reported Hamilton's calls and texts. The same day, Hamilton looked up Ashley in the Corrections Division records and saw a new criminal case number. He believed that Ashley had filed a police report about his texts and calls.

Hamilton told Officer Kearney and two other officers about the texts. The other officers expressed their concerns to Hamilton. Hamilton did not have concerns about getting caught because he used somebody else's phone. He did not tell anybody he was conducting an investigation.

Before Kearney's shift ended, Kearney told Dick that Hamilton admitted he texted Ashley. Dick then reported this information to Lieutenant Genie Elton. Neither Dick nor Elton authorized the text messages. Hamilton never discussed his plan to text Ashley with any supervisor. He also did not write an incident report about his actions.

[1] For purposes of clarity we use Ashley's first name. We intend no disrespect.

Elton met with Newlin and told him about Hamilton's texts. Newlin told Elton to report Hamilton's conduct to POPD so it could conduct an independent criminal investigation. Newlin also told Elton to have Sergeant Jim McDonough, of KCSO's Office of Professional Standards, check the Corrections Division's records to see if Hamilton had accessed Caseria's or Ashley's records. McDonough reported that Hamilton accessed Ashley's records on two occasions. Hamilton changed the address on file for Ashley on January 22, 2012, and had queried her name on June 10.

D. Criminal Investigation

POPD had discretion to investigate whether Hamilton acted criminally. The Corrections Division did not have control over POPD's criminal investigation. POPD assigned Detective E.J. Martin to investigate the criminal complaint against Hamilton relating to the text messages.

Elton told Martin that she preferred he interview Hamilton about the text messages away from the Kitsap County Jail. She wanted to avoid workplace disruptions and ensure that Hamilton did not feel that the Corrections Division was pressuring him to incriminate himself. Martin agreed and decided to interview Hamilton at Hamilton's home.

On June 16, Martin went to Hamilton's home. Martin displayed his badge, and Hamilton agreed to speak with Martin. Hamilton repeatedly denied texting Ashley. Two days later, Payne reassigned Hamilton to administrative work because of the criminal investigation.

On June 19, Hamilton contacted Cousins for advice from the Guild. Hamilton admitted to Cousins that he had lied to Martin about the text messages. Cousins told Hamilton to write a truthful statement and give it to Martin.

Hamilton met with Martin and gave him a sworn written statement admitting he sent the texts. In the statement, Hamilton claimed that the texts were part of a follow-up investigation into Caseria's Telmate use. Hamilton told Martin that he lied because he was afraid and did not know if he should talk to Martin.

Shortly thereafter, Newlin told Elton to notify the Bremerton Police Department (BPD) about Hamilton's conduct. Hamilton served as a volunteer reserve officer for BPD. BPD told Hamilton that he could not serve as a reserve officer while he was under investigation.

Ashley filed for a protection order against Hamilton. At a hearing on the order, Hamilton testified that he was conducting an investigation when he texted Ashley but admitted that he did not notify his supervisors. The presiding judge found that Hamilton's texts were harassing and sent without legal authority. The court granted Ashley a permanent protection order against Hamilton.

On August 28, the City of Port Orchard filed a criminal complaint based on POPD's investigation. The complaint charged Hamilton with telephone harassment and making a false statement to a public servant, Martin. Hamilton signed a pretrial diversion agreement in that case.

E. Terminations

On March 26, 2013, KCSO terminated Hamilton for misconduct. In the termination letter, Newlin cited violations of KCSO policies, Civil Service Rules, the Corrections Division mission and core values, and Hamilton's oath of office as a corrections officer. Newlin stated that he had no faith in Hamilton's judgment, honesty, or ethics. He believed Hamilton could not effectively conform to standard operating procedures, testify on behalf of the Corrections Division, or represent the Corrections Division positively. The Guild did not seek arbitration even though the

CBA allowed for it. BPD subsequently terminated Hamilton from service as a volunteer reserve officer.

II. PROCEDURAL FACTS

On March 24, 2016, Hamilton filed a complaint against the County alleging negligent supervision, NIED, and retaliation.[2]

He specified, in part, that the County "engaged in a course of conduct deliberately intended to cause injury to [his] reputation" which caused him physical harm and emotional distress. CP at 565. He also claimed the County retaliated against him because of his Guild-related activities relating to the petitions he submitted.

The County moved for summary judgment on the NIED and negligent supervision claims. Newlin filed a declaration in support of the motion, stating that Hamilton's untruthful statements to Martin and to the court about conducting an investigation when he sent Ashley the texts had the "most significant" impact on his decision to terminate Hamilton. CP at 43. Newlin stated he knew of the safety issues raised in Hamilton's petitions but did not know Hamilton prepared them.

Hamilton opposed summary judgment and filed a declaration from Cousins that she believed there was a "direct connection" between the petitions Hamilton submitted and his termination. CP at 346. In support, Cousins stated that she discussed the petitions with Newlin at a meeting on December 30, 2011, and that the petitions were "a source of irritation and embarrassment to the Administration," which Newlin "personally disliked having to address." CP at 499.

[2] On September 14, 2016, a federal court granted summary judgment to the County after Hamilton filed a complaint for a violation of 42 U.S.C. § 1983 and for breach of contract. Hamilton based both claims on allegations that the County violated his rights under the COBR.

The court granted summary judgment in favor of the County on the NIED and negligent supervision claims. It subsequently denied Hamilton's motion to reconsider the order.

The County later moved for summary judgment on the retaliation claim. The trial court granted it and then denied Hamilton's motion to reconsider the order. Hamilton appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review a grant of summary judgment de novo. *Bank of Am. NT & SA v. Hubert*, 153 Wn.2d 102, 111, 101 P.3d 409 (2004).

Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." CR 56(c). "'A material fact is one that affects the outcome of the litigation.'" *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164-65, 273 P.3d 965 (2012) (quoting *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005)). We view facts, and reasonable inferences therefrom, in the light most favorable to the nonmoving party. *Briggs v. Nova Servs.*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009).

"The moving party bears the burden of showing the absence of a material issue of fact." *Steinbock v. Ferry County. Pub. Util. Dist. No. 1*, 165 Wn. App. 479, 484-85, 269 P.3d 275 (2011). "[A]fter the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The nonmoving party "may not rely on speculation, argumentative assertions that

unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables Corp.*, 106 Wn.2d at 13. "Broad generalizations and vague conclusions are insufficient to resist a motion for summary judgment." *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993).

"A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Repin v. State*, 198 Wn. App. 243, 262, 392 P.3d 1174, *review denied*, 188 Wn.2d 1023 (2017); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

III. NEGLIGENT SUPERVISION

Hamilton argues that the County negligently supervised Elton, Newlin, and McDonough. He contends a genuine dispute exists as to material facts regarding whether Elton, Newlin, and McDonough acted outside the scope of their employment by asking Martin to interview him while he was off duty, before he had notice of POPD's criminal investigation.[3] We disagree.

An allegation of negligent supervision can take the form of a stand-alone claim or as a means of establishing vicarious liability. *See Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48, 51, 929 P.2d 420 (1997). Here, Hamilton asserts it as a stand-alone claim.

A plaintiff alleging a stand-alone negligent supervision claim must prove that: (1) the defendant's employee acted outside the scope of his or her employment; (2) "the employee presented a risk of danger to others"; (3) the employer knew, or should have known, about the

[3] There is nothing in the CBA that mandates Hamilton receive advance notice of a criminal investigation.

tortious employee's dangerous tendencies; and (4) that the employer's failure to supervise was the proximate cause of the injuries suffered. *Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 47, 380 P.3d 553 (2016); *see Niece*, 131 Wn.2d at 48-49, 52; *Briggs v. Nova Servs.*, 135 Wn. App. 955, 966-67, 147 P.3d 616 (2006).

Whether employees were acting within the scope of employment depends on whether they were "fulfilling [their] job functions at the time [they] engaged in the injurious conduct." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 53, 59 P.3d 611 (2002). Employees are not "fulfilling [their] job functions when [their] 'conduct is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.'" *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 361-62, 423 P.3d 197 (2018) (internal quotation marks omitted) (quoting *Robel*, 148 Wn.2d at 53).

Here, the County's employees acted within the scope of their employment when they asked Martin to interview Hamilton while he was off-duty and before he had notice of the criminal investigation. Corrections Division procedures required that its employees report suspected criminal conduct occurring in the Kitsap County Jail to POPD for an independent criminal investigation. While on duty, Hamilton sent harassing texts to Ashley. Because Elton and Newlin suspected criminal conduct by Hamilton, they acted in the scope of their employment when they reported his conduct.

Furthermore, as relevant here, the COBR only provided that corrections officers receive the procedural safeguards, or rights, contained therein when they were the subject of certain administrative investigations. In criminal investigations, the COBR did not provide procedural safeguards beyond "those constitutional rights available to any citizen." CP at 327. We note that even in administrative investigations, the COBR only provided that investigators should question

corrections officers while the officers were "on duty or during the normal waking hours . . . unless the seriousness of the investigation require[d] otherwise." CP at 328. As such, the COBR did not mandate that all administrative interviews occur while a corrections officer was on-duty.

Viewing the undisputed facts in the light most favorable to Hamilton, the County's employees acted within the scope of their employment. Alleged COBR violations formed the sole basis for Hamilton's argument that the County's employees acted outside the scope of their authority. Hamilton failed to produce evidence sufficient to create a genuine dispute over whether the County's employees exceeded the scope of their employment, an essential element of his negligent supervision claim.[4] Accordingly, the superior court properly granted the County's summary judgment motion dismissing the negligent supervision claim.

IV. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (NIED)

Hamilton argues that his NIED claim extended beyond employment-related emotional damages. Hamilton contends that the damages he alleged under the NIED claim are unrelated to his wrongful employment termination, including financial stress caused because he could not meet financial obligations made by his wife and reliance on his mother to meet living expenses. Therefore, according to Hamilton, the trial court erred by dismissing his NIED claim. We disagree.

"The tort of negligent infliction of emotional distress is a limited, judicially created cause of action." *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 49, 176 P.3d 497 (2008). A plaintiff may recover for negligent infliction of emotional distress by proving "duty, breach, proximate cause, damage, and 'objective symptomatology.'" *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 505, 325 P.3d 193 (2014) (quoting *Strong v. Terrell*, 147 Wn. App. 376, 387, 195 P.3d 977 (2008)).

[4] Because we conclude the County's employees acted within the scope of their employment, an essential element of Hamilton's negligent supervision claim, we need not address the remaining elements.

In other words, the plaintiff must have been a foreseeable plaintiff, who reasonably suffered emotional distress, caused by the negligent conduct of the defendant, and confirmed by objective symptomatology. *Kumar*, 180 Wn.2d at 505; *Bylsma v. Burger King Corp*., 176 Wn.2d 555, 560, 293 P.3d 1168 (2013); *Colbert*, 163 Wn.2d at 49; *Repin*, 198 Wn. App. at 263-64.

A negligent infliction of emotional distress claim cannot rest on allegations that the defendant intended to inflict emotional distress on the plaintiff. *St. Michelle v. Robinson*, 52 Wn. App. 309, 315-16, 759 P.2d 467 (1988); *cf. Rodriguez v. Williams*, 107 Wn.2d 381, 384, 387, 729 P.2d 627 (1986). A defendant must have negligently or recklessly caused the plaintiff emotional distress to be liable for NIED. *St. Michelle*, 52 Wn. App. at 316.

Because there is no negligence associated with the NIED claim, and only an intentional act, the superior court properly granted the County's summary judgment motion on the NIED claim.

V. RETALIATORY DISCHARGE

Hamilton argues that a genuine dispute exists as to material facts regarding whether the petitions he created in 2011 were a substantial factor in Newlin's decision to terminate him. He contends that RCW 49.17.160 and WAC 296-360-100 protect him from retaliation based on the petitions because they reported workplace safety concerns. Hamilton argues that a genuine dispute exists because he produced evidence of his positive performance reviews, his recognition as officer of the year in 2011, and evidence of the circumstances surrounding Martin's interview. Thus, Hamilton argues that because factual disputes remain, the trial court erroneously granted the County's summary judgment motion. We disagree.

"To establish a prima facie case of retaliation . . . , a plaintiff must show that (1) he or she engaged in statutorily protected activity, (2) he or she suffered an adverse employment action, and (3) there was a causal link between his or her activity and the other person's adverse action." *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 742, 332 P.3d 1006 (2014).[5] After an employee establishes his or her participation in a statutorily protected activity and an adverse employment action occurs, evidence that the employer knew of the protected activity before the adverse employment action is sufficient to show causation, and "a rebuttable presumption of retaliation arises that precludes summary dismissal of the case." *Currier*, 182 Wn. App. at 747.

"[T]he defendant may rebut the claim by presenting evidence of a legitimate nondiscriminatory reason for the adverse action." *Currier*, 182 Wn. App. at 743. If the defendant produces evidence of a legitimate nondiscriminatory reason for the termination, summary judgment is proper unless the plaintiff comes forth with evidence that the defendant's reason is mere pretext for a retaliatory motive. *Currier*, 182 Wn. App. at 743. "An employee may prove the employer's reasons were pretextual 'either directly by persuading the court that a

[5] We are not convinced that the parties utilized the correct test. The cases that apply this three-part test all involve claims of retaliatory discharge under Washington's Law Against Discrimination (WLAD), RCW 49.60.210(1). Because Hamilton alleges that the County discharged him, in part, because he created safety-related petitions protected under the Washington Industrial Safety and Health Act of 1973 (WISHA), RCW 49.17.160, it appears the correct framework is the four-part test enunciated in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232-33, 685 P.2d 1081 (1984), and refined by *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991). *See Martin v. Gonzaga Univ.*, ___Wn.2d___, 425 P.3d 837, 842-45 (2018) (applying the *Thompson* and *Wilmot* analysis when plaintiff "allege[d] that he was fired in retaliation for voicing safety complaints"). An analysis of the four-part test would also result in the same conclusion at which we have arrived. Hamilton would not prevail.

discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 800, 120 P.3d 579 (2005) (internal quotation marks omitted) (quoting *Godwin v. Hunt Wesson, Inc*., 150 F.3d 1217, 1220 (9th Cir. 1998).

Here, the County's legitimate nondiscriminatory reason for firing Hamilton was its loss of faith in a corrections officer who harassed an inmate's wife and lied to public servants. Newlin filed a declaration stating that Hamilton's untruthful statements to Martin and to the court during the protection order hearing had the "most significant" impact on his decision to terminate Hamilton. CP at 43. Hamilton did not produce evidence that the petitions were the more likely motivation for his termination or that the County's legitimate nondiscriminatory reason was unworthy of credence.

Thus, even assuming that Hamilton has set forth a prima facie case by meeting each of the three elements for retaliatory discharge, the County still prevails because it put forth a legitimate nondiscriminatory reason for terminating Hamilton, and Hamilton put forth no evidence that the County's reason is mere pretext for a retaliatory motive. *Currier*, 182 Wn. App. at 743. Accordingly, the superior court properly granted the County's summary judgment motion.

The County asks for an award of costs pursuant to RAP 14.2 as the substantially prevailing party on review. We award the County the costs allowed by RAP 14.2 upon its compliance with RAP 14.4.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, P.J.

Johanson, J.

LAW OFFICE OF RODNEY R. MOODY

March 08, 2019 - 11:12 AM

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