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No. 66408-5

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

JAMES WOODBURY,

Plaintiff/Appellant,

v.

CITY OF SEATTLE,

Defendant/Respondent,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
No. 09-2-22704-7 SEA
(Hon. Michael C. Hayden)

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The City of Seattle knows that the main issue before the Court on appeal, the permissive language of RCW 42.41.040 and SMC 4.20.860, was previously decided in *Eklund v. City of Seattle*, 2008 WL 112040 (W.D.Wash. 2008). It is an issue of first impression in Washington.

However, in an attempt to deflect the Court's attention away from the fact that it was unsuccessful in *Eklund*, the City seeks to reframe the issue as a lack of subject matter jurisdiction. The City also knows that the trial court ruled it had subject matter jurisdiction and did not dismiss the case on this basis. The trial court dismissed the case based on its improper reliance on an unpublished wrongful discharge in violation of public policy case, which was cited by the City in its Motion to Dismiss. *Blumhoff v. Tukwila School Dist. No. 406*, 2008 Wn. App. LEXIS 2704 (Div. I, 2008). Chief Woodbury has not been discharged and does not assert a common law wrongful discharge claim. He asks the Court to find that the permissive language of RCW 42.41.040 and SMC 4.20.860 create a cause of action in superior court and do not require administrative exhaustion. Additionally, Chief Woodbury is entitled to actual damages, including emotional harm damages, for the intentional, statutory tort of whistleblower retaliation.

Chief Woodbury has spent his career working for the Seattle Fire Department and he continues to work there. His "million dollar" claim for

emotional harm damages was identified for insurance purposes only. Chief Woodbury does not seek a “golden ticket” or to become a “millionaire” through reporting improper government conduct and ethics violations, as the City suggests. He was demoted in retaliation for reporting misconduct, which City policy encourages its employees to do. He is entitled to have his claims heard before a jury in superior court and receive whatever damages a jury determines are warranted.

In the answering brief, the City relies on the 1982 Supreme Court decision *Human Rights Comm. v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 641 P.2d 163 (1982), for the proposition that a statutory interpretation of the local whistleblower statute, and City code, leads to the conclusion that the Legislature intended to only provide victims of retaliation with an administrative forum, as well as for the proposition that emotional harm damages should be denied because they are not provided for in the statute if a victim of whistleblower retaliation chooses the administrative forum. First, both the City code and the state statute are unambiguous and need not be read or analyzed beyond their clear permissive language, as directed in the 1999 Supreme Court decision *Martini v. Boeing Co.*, 137 Wn.2d 357, 368, 971 P.2d 45 (1999), a case totally ignored by the City in its response, though discussed in the opening brief. Thus, the “ambiguous” statute analysis argued at length by the City is rejected by the holding in

Martini. Second, *Human Rights Comm. v. Cheney* stands for the proposition that administrative agencies cannot award damages that are not specifically provided for in their charter. The limitations imposed on administrative agencies have nothing to do with this case. Here, Chief Woodbury does not seek damages from an administrative agency; he seeks all damages proximately caused by the City's intentional conduct under the municipal tort claims act, RCW 4.96.010, the damages that would be available to any other victim of City misconduct. Chief Woodbury is no more limited in his damages in a superior court action than if he were a victim of discrimination suing under the WLAD, which also provides limited damages for individuals who choose to proceed in the administrative forum under RCW 49.60.250. In both cases, the damage limitations only apply to litigants in the administrative forum.

The trial court erred in finding that Chief Woodbury waived his physician-patient privilege simply by asserting a claim for "garden variety" emotional harm damages. The Court should not permit such a broad waiver standard to this important privilege. Furthermore, the City failed to meet the "in controversy" and "good cause" requirements necessary under CR 35 and the trial court erred in permitting the examination. Lastly, the trial court improperly limited discovery when it denied Chief Woodbury access to comparator personnel files. Chief Dean

criticized Chief Woodbury’s performance in meetings with the Assistant Chiefs and then, according the City’s theory of the case, the Assistant Chiefs selected Chief Woodbury for demotion. Without access to comparator personnel files, Chief Woodbury has no way to compare his performance with that of the other Deputy Chiefs who were not selected for demotion.

II. ARGUMENT

A. The Trial Court Erred in Granting the City’s Motion to Dismiss

1. The City Downplays Its Reliance on *Blumhoff’s Wrongful Discharge Analysis When Clearly This Was the Reasoning Adopted by the Trial Court in Dismissing Chief Woodbury’s Whistleblower Retaliation Claims*

In the answering brief, the City itself does not rely heavily on the unpublished case of *Blumhoff v. Tukwila School Dist. No. 406*, 2008 Wn. App. LEXIS 2704 (Div. I, 2008), and its application of a wrongful discharge in violation of public policy analysis to RCW 42.41, the Local Government Whistleblower Act. One obvious reason for this is that the “jeopardy” element of a wrongful discharge common law claim is not applicable to Chief Woodbury’s statutory tort claims.¹ See *Korslund v.*

¹ Another reason is that the Court cannot consider unpublished opinions. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 577 n.10, 964 P.2d 1173 (1998) (“Unpublished

Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 178, 125 P.3d 119 (2005) (discussing the elements of a wrongful discharge claim); Opening Brief (Op. Br.) at 31. However, is undeniable that this is the reasoning the trial court adopted in dismissing Chief Woodbury’s claims, even though Judge Hayden later backed away from expressly “relying” on the unpublished case in making his ruling. RP 11/19/10. Judge Hayden read directly from the portion of the case which found that the plaintiff had not satisfied the “jeopardy” element of her wrongful discharge claim. RP 11/19/10 at 16. The *Blumhoff* court stated: “We hold that, as a matter of law, existing laws and regulations adequately protect both the rights of disabled students and the rights of District employees who report improper governmental action. Therefore, we decline to recognize a separate tort of wrongful discharge in violation of public policy under these circumstances.” *Blumhoff*, 2008 Wn. App. LEXIS 2704, *21-22. The trial court again read from *Blumhoff* and plaintiff’s counsel again tried to clarify that Chief Woodbury was not asserting a common law wrongful discharge in violation of public policy claim. RP 11/19/10 at 20. Judge Hayden later stated that he was just as persuaded by *Blumhoff* as the federal district court case *Eklund v. City of Seattle*, 2008 WL 112040

opinions have no precedential value and, therefore, we have not considered them”), GR 14.1.

(W.D.Wash. 2008), but that Judge Zilly, on the federal bench, could not reverse him. RP 11/19/10 at 37-38.

The reason the trial court focused on the “jeopardy” element of a wrongful discharge in violation of public policy claim is because the City improperly argued that Chief Woodbury would have to satisfy this element in its Motion to Dismiss. CP 1377-78, Op. Br. at 23-24. There is no reason to believe that the elements of a wrongful discharge claim would apply to other tort claims in Washington. *Tamosaitis v. Bechtel National, Inc.*, 2011 U.S. Dist. LEXIS 12294, *12-13 (E.D.Wash. 2011) (stating that *Korslund*’s wrongful discharge “jeopardy” element is not applicable to other Washington tort claims).²

2. The *Eklund* Court Considered the Same Issue Presented to this Court and Determined that a Cause of Action in the Trial Court Exists Under RCW 42.41 and SMC 4.20.860

The City was also the defendant in *Eklund v. City of Seattle*, 2008 WL 112040 (W.D.Wash. 2008), and the issue before the court in that case is the same issue presented in the instant case. In *Eklund*, and in the answering brief, the City cites to *Ryder v. Port of Seattle*, 50 Wn. App. 144, 151, 748 P.2d 243 (1987), for the elements of when administrative exhaustion is required. *Eklund*, 2008 WL 112040, *8, Brief of Respondent

² Citation to *Eklund* and *Tamosaitis* is proper pursuant to GR 14.1 and Fed. R. App. Pro. 32.1. Copies of these cases are attached as Appendix 1 and 2.

(Resp. Br.) at 21. The *Eklund* court considered and rejected these elements, finding that “Seattle Municipal Code 4.20.860(C) does not establish ‘clearly defined machinery for the submission’ of complaints to an administrative judge; rather it permits an employee to request a hearing, if one is desired by the employee, but it does not require an employee to request a hearing.” *Eklund*, 2008 WL 112040, *8 (quoting *Ryder v. Port of Seattle*, 50 Wn. App. 144, 151, 748 P.2d 243 (1987)).³

Furthermore, in *Ryder*, the court acknowledged that “[t]he doctrine of exhaustion of administrative remedies is ‘founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges.’” *Ryder*, 50 Wn. App. at 151 (quoting *South Hollywood Hills Citizens Ass’n v. King Cy.*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984)). The Office of Administrative Hearings (“OAH”) does not necessarily have “expertise in areas outside the conventional experience of judges” with regard to whistleblower retaliation cases and the City does not argue that it does.

In the answering brief, the City claims that *Eklund*’s wrongful discharge in violation of public policy claim was dismissed because *Eklund* could not satisfy the “jeopardy” element of the claim, but then

³ The elements of administrative exhaustion are also discussed in the Brief of Appellant. Op. Br. at 34-35.

cites to the *Blumhoff* case. Resp. Br. at 22. According to *Eklund*, the wrongful discharge claim was dismissed because the plaintiff stated he was not asserting such a claim. *Eklund*, 2008 WL 112040, *3, n.4.

It is clear that, having been unsuccessful in *Eklund*, the City is now attempting to reframe the issue before the Court from one of “failure to exhaust administrative remedies” to “lack of subject matter jurisdiction.” The City cannot prevail under either theory. This Court should find, as the Court in *Eklund* found, that “[n]either RCW 42.41.040(4) nor SMC 4.20.860(C) require an employee to appeal a local government’s denial of a whistleblower retaliation claim prior to filing a whistleblower claim in court.” *Eklund*, 2008 WL 112040, *9.

3. The Subject Matter Jurisdiction Cases Cited by the City Grant Exclusive, Original Jurisdiction in the Administrative Agencies, Which is Not the Case Here

The City cannot show that exclusive, original jurisdiction of claims arising under RCW 42.41.040 and SMC 4.20.860 rests with the OAH. First, Judge Hayden found that the trial court did have subject matter jurisdiction over the case and did not dismiss the case on that basis. RP 11/19/10 at 50-51. The court ruled there was no cause of action created by the statutes. *Id.* Second, Wash. Const. Art. IV, § 6 states, in part: “The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested

exclusively in some other court.” The City points to no language in either statute vesting exclusive jurisdiction in the OAH. *See* Op. Br. at 29-30 (discussing exclusive, original jurisdiction and the fact that “when the legislature means exclusive original jurisdiction, it says exclusive original jurisdiction”).

The case law cited by the City concerns areas of law where exclusive, original jurisdiction has been expressly granted to an administrative agency. Resp. Br. at 1, 20. In *Marley v. Dept. of Labor & Indus.*, 125 Wn.2d 533, 539-40, 886 P.2d 189 (1994), the Court stated: “Sixty years ago we concluded that the Department [of Labor & Industries] has ‘original and exclusive jurisdiction, in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable injury has occurred.’” (quoting *Abraham v. Department of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934)). In *Trachtenberg v. Wash. State Dept. of Corrections*, 122 Wn. App. 491, 492, 93 P.3d 217 (2004), the court notes initially that the “State Personnel Appeals Board...has exclusive jurisdiction to hear civil service employee disciplinary appeals.”

To fit the facts into this line of cases, the City half-heartedly argues that, “Woodbury seeks to appeal the decision of the Mayor’s Office, which found there was no factual basis for his claim that his short-lived

reduction in rank resulted from his whistleblower complaint. CP 1446 (Labelle Letter),” as though the City were an administrative agency. Resp. Br. at 24. The City is the defendant and its employees committed the actionable wrongs and wrote the letter rejecting appellant’s claim. The City’s analysis does not fit the facts. This case does not involve a cause of action where exclusive, original jurisdiction has been expressly vested with the OAH and, therefore, superior court has subject matter jurisdiction pursuant to Wash. Const. Art. IV, § 6.

4. The City Mischaracterizes the Reasons Chief Woodbury Sought a Stay of the Administrative Proceedings

The City mischaracterizes Chief Woodbury’s original request for a stay of the administrative proceedings, stating that Chief Woodbury sought the stay by claiming the administrative proceedings were “too abbreviated and did not allow adequate time for discovery.” Resp. Br. at 28. Although this was part of Chief Woodbury’s reasoning, the main reason plaintiff requested the stay was based on the permissive language of the statutes. CP 19, CP 84. Even as early on in the case as the request to stay the administrative proceedings, which was filed less than two weeks after the complaint, Chief Woodbury argued that the permissive language of the statutes, and the *Eklund* case, supported a cause of action in superior court under the statutes. CP 16 (complaint filed June 14, 2009), CP 19

(arguing the statutes are permissive), CP 22 (motion to stay administrative proceedings filed June 22, 2009). In June 2009, the trial court agreed with Chief Woodbury's reasoning and granted the stay. CP 89. A year and a half later, the same trial court judge disagreed with the *Eklund* case and granted the City's motion to dismiss. CP 1635. The trial court noted during oral argument that it did not remember its reasons for granting the stay the previous year. RP 11/19/10 at 7-8.

B. Chief Woodbury is Entitled to Actual Damages in Superior Court

1. Emotional Harm Damages Are Available for Intentional Torts

Chief Woodbury's whistleblower retaliation claims are statutory tort claims brought in superior court under RCW 42.41 and SMC 4.20.800, *et seq.* As was required, he properly filed an administrative tort claim with the City pursuant to RCW 4.96.020. "Tort" is defined as a "civil wrong for which a remedy may be obtained, usu. in the form of damages; a breach of a duty that the law imposes on everyone in the same relation to one another as those involved in a given transaction." *Black's Law Dictionary*, 712-13 (Pocket 2d ed. 2001). An "intentional tort" is one which is "committed by someone acting with general or specific intent." *Id.* at 712. Retaliation against a local government employee for having

reported an improper governmental act is an intentional tort. RCW 42.41, SMC 4.20.800, *et seq.*

The City's citation to *Human Rights Comm. v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 641 P.2d 163 (1982), is a red herring. In that case, certain, specific rights and remedies were conferred on an administrative agency, the Human Rights Commission. As the City notes, "an administrative agency may exercise only the power conferred upon it either expressly or by necessary implication." *Id.* at 127, Resp. Br. at 30. Here, Chief Woodbury does not argue that he should be granted additional rights and remedies in the administrative forum. RCW 42.41.040(7) sets forth the relief an administrative law judge ("ALJ") may grant, and SMC 4.20.860(C) refers back to RCW 42.41.040.⁴ However, the statutes are permissive, allowing the plaintiff to choose relief before an ALJ or in superior court. The statutes are silent as to what relief can be granted in superior court and there is no reason to read restrictive language into the statutes. *Martini v. Boeing Co.*, 137 Wn.2d 357, 368, 971 P.2d 45 (1999) ("The statute does not in any way limit the type of compensation that can

⁴ Plaintiff notes some confusion, though, over the remedies suggested in RCW 42.41.040(8), which states, in relevant part, that "the administrative law judge may, *in addition to any other remedy*, impose a civil penalty personally upon the retaliator..." (emphasis added). The "in addition to any other remedy" language could be read quite broadly to include "any remedy," or conversely, only those remedies enumerated in the previous section.

be claimed for discrimination violating RCW 49.60.180(3), but the usual rules which govern the elements of damage for which compensation may be awarded apply”).

In *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 766, 953 P.2d 796 (1998), the Supreme Court agreed with the plaintiff’s argument “that emotional distress damages may be a remedy for a statutory violation but only if the violation sounds in intentional tort.” The Court went on to state:

In the absence of a clear mandate from the Legislature, Washington courts have “liberally” construed damages for emotional distress for causes of action, including those based on statutory violations, if the wrong committed is in the nature of an intentional tort. *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 116, 942 P.2d 968 (1997) (emotional distress damages available for “willful” violation of timber trespass statute); *see also Physicians Ins. Exch.*, 122 Wn.2d at 321 (emotional distress damages not available where the statutory violation requires only proof of negligent, as opposed to intentional, conduct); *Cagle v. Burns and Roe, Inc.*, 106 Wn.2d 911, 726 P.2d 434 (1986) (wrongful termination of employment in violation of public policy is intentional tort and therefore damages for emotional distress were allowed); *Odom v. Williams*, 74 Wn.2d 714, 446 P.2d 335 (1968) (emotional distress damages for violation of malicious prosecution statute).

Id. at 766-67. *Kloepfel v. Bokor*, 149 Wn.2d 192, 201, 66 P.3d 630 (2003)

(“We continue to be more likely to allow recovery of emotional distress damages for intentional acts than for negligent ones”).

Chief Woodbury is not seeking additional remedies in the administrative forum, but actual damages in superior court, as he would be entitled to under any intentional statutory tort. Plaintiff recognizes that damages are limited for both state and local government whistleblowers seeking to adjudicate their claims in an administrative forum, but that is not the issue before the Court. RCW 49.60.250, RCW 42.41.040.

2. The Policy Reasons Proposed by the City for Denying Local Government Whistleblowers Actual Damages Make Little Sense

The City's suggested policy reasons, that perhaps the Legislature intended to grant local government whistleblowers less remedies because local governments have less resources than the state or private entities, makes little sense. Resp. Br. at 36. First, the stated purpose of RCW 42.41 and SMC 4.20.800 suggests a strong interest in both encouraging employees to report improper governmental actions and protecting those employees who do report misconduct from retaliation. Second, the Legislature and the City could have proscribed a mandatory administrative forum, but chose to use permissive language. Third, "[t]he Washington legislature waived sovereign immunity as to the political subdivisions of the State and its municipalities in 1967." *Medina v. Public Util. Dist. No. 1*, 147 Wn.2d 303, 312, 53 P.3d 993 (2002). Municipalities are subject to liability for a host of different statutory and non-statutory tort claims, from

car accidents and property damage to discrimination, retaliation, and wrongful discharge. RCW 4.96.010.

Throughout the answering brief, the City continually refers to Chief Woodbury's "million dollar emotional distress claim." Resp. Br. at 2, 3, 6, 9, 12, 28, 29, 34, 37, 40, 41, 43. In fact, this amount was listed on Chief Woodbury's administrative tort claim forms "for insurance purposes" and in interrogatory responses as "to be determined by the jury at trial." CP 248, CP 350, CP 1371. The City's suggestion that Chief Woodbury, a life-long public servant who reported ethics violations to the SEEC and was demoted, and who continues to work in the Seattle Fire Department, is now seeking a "golden ticket" through his emotional harm damages claim is absurd. Resp. Br. at 2. Chief Woodbury seeks emotional harm damages that a jury would properly award him and he is entitled to those damages.

3. Even if it Were Not for the Permissive Language of the Statutes, Chief Woodbury Would be Entitled to An Implied Cause of Action Under the Statutes

SMC 4.20.860(C) incorporates by reference the administrative process of RCW 42.41.040 ("*If* an employee who has filed a complaint of retaliation under this section is dissatisfied with the response and desires a hearing pursuant to Section 42.41.040 RCW. . ."). The only limitations on damages stated in the statute pertain to victims who choose the

administrative forum. Victims who choose superior court enter that forum under RCW 4.96.010, and may obtain the damages that would be available to any other victim of city misconduct. However, case law exists to support the conclusion that if the tort claims available to victims under RCW 4.96.010 should for some reason not be available to Chief Woodbury, then an implied remedy is appropriate.

In *Bennett v. Hardy*, 113 Wn.2d 912, 915, 784 P.2d 1258 (1990), the Court analyzed RCW 49.44.090, which prohibits age discrimination in employment, but does not create a remedy. The Court borrowed from and adopted the federal court test for recognizing “an implied cause of action under a statute which provides protection to a specified class of persons but creates no remedy.” *Id.* at 920. The issues the court must resolve are:

- 1) whether the plaintiff is within the class for whose “especial” benefit the statute was enacted;
- 2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and
- 3) whether implying a remedy is consistent with the underlying purpose of the legislation.

Id. at 920-21. The court “‘can assume that the legislature is aware of the doctrine of implied statutory causes of action,’ even where the statute is silent as to civil remedies.” *Beggs v. Dept. of Social and Health Services*, 171 Wn.2d 69, 78, 247 P.3d 421 (2011) (citing *Bennett*, 113 Wn.2d at 919). The *Bennett* case is especially relevant because the Court looked to

RCW 49.60, which also prohibits age discrimination in employment, for the elements of the cause of action under the silent statute, RCW 49.44.090. *Bennett*, 113 Wn.2d at 921. The same analysis could be performed here if the Court found such an analysis to be necessary.

Applying the test above, Chief Woodbury would clearly fall within the category of a plaintiff in whose “especial” benefit RCW 42.41 and SMC 4.20 were enacted. He properly and in good faith made a report of improper governmental action to the Seattle Ethics and Elections Commission (“SEEC”). Chief Dean knew Chief Woodbury made the whistleblower complaint and, shortly thereafter, he changed the selection criteria in the planned abrogation from seniority to target and demote Chief Woodbury.

The legislative intent both explicitly and implicitly supports a remedy. Here, the legislature, or the City of Seattle, could have used mandatory language to require the plaintiff to first have his or her claims heard before the OAH. Instead, both statutes use permissive, “may” or “if” language. Furthermore, it is presumed that the legislature is aware of the doctrine of implied cause of action.

Finally, implying a remedy under both RCW 42.41 and SMC 4.20.860 is consistent the stated purposes of the statutes. The policy and purpose of RCW 42.41 is stated as:

It is the policy of the legislature that local government employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions of local government officials and employees. The purpose of this chapter is to protect local government employees who make good-faith reports to appropriate governmental bodies and to provide remedies for such individuals who are subjected to retaliation for having made such reports.

RCW 42.41.010. The policy and purpose of SMC 4.20 is stated as:

Unless prohibited by state law, City employees are encouraged to report on improper governmental action to the appropriate City or other government official, depending on the nature of the improper governmental action. To assist such reporting and to implement Sections 42.41.030 and 42.41.040 of the Revised Code of Washington ("RCW"), Sections 4.20.800 through 4.20.860 provide City employees a process for reporting improper governmental action and protection from retaliatory action for reporting and cooperating in the investigation and/or prosecution of improper governmental action in good faith in accordance with this subchapter.

SMC 4.20.800. Clearly, the policy and purpose of both statutes is to encourage employees to report improper governmental action and to protect employees from retaliation for having done so.

If the Court does not accept that a remedy is available under RCW 4.96.010, then this Court should recognize an implied cause of action is created under both statutes. Additionally, Chief Woodbury would be entitled to reasonable attorney fees and expenses in equity should he prevail at trial. *Panorama Village Condominium Owners Ass'n Bd. of*

Directors v. Allstate Insur. Co., 144 Wn.2d 130, 142-43, 26 P.3d 910

(2001).

C. The Trial Court Erred in Granting the City’s Request for a CR 35 Examination and Requiring Disclosure of Chief Woodbury’s Medical Records Because Chief Woodbury Did Not Place His Mental State “In Controversy” and Did Not Waive His Physician-Patient Privilege

The City, like the trial court, takes the “broad” approach to the issue of waiver of the physician-patient privilege, arguing that “a plaintiff places his or her medical condition at issue and waives the psychotherapist-patient privilege simply by making a claim for emotional distress.” *St. John v. Napolitano*, 2011 U.S. Dist. LEXIS 34484, *15 (D. D.C. 2011) (Attached as Appendix 3). *See also Fitzgerald v. Cassil*, 216 F.R.D. 632, 636 (N.D. CA. 2003). The answering brief appears to make no separate argument related to the release of Chief Woodbury’s medical records, focusing solely on the CR 35 issue. While plaintiff agrees that these two issues are similar, they are somewhat distinct. Specifically, CR 35 sets forth “in controversy” and “good cause” requirements before an examination can be had, while the issue of disclosure of medical records concerns primarily CR 26 and physician-patient privilege. CR 35(a)(1), CR 26(b)(1), RCW 5.60.060(4).

The City sets forth a five factor test, which has not been adopted in Washington, but which some courts have used to determine whether the

“in controversy” requirement of CR 35 has been met. Resp. Br. at 38 (citing *Bethel v. Dixie Homecrafters, Inc.*, 192 F.R.D. 320, 322 (N.D.Ga. 2000)). However, applying this test, it is clear that the City cannot meet any of the “in controversy” requirements. Chief Woodbury does not assert a claim for negligent or intentional infliction of emotional distress. He alleges no specific mental or psychiatric injury or disorder. Indeed, the symptoms Chief Woodbury describes related to his emotional distress are no different than “ordinary pain and suffering experienced in response to adverse employment actions that the plaintiff claims are illegal.” *St. John v. Napolitano*, 2011 U.S. Dist. LEXIS 34484, *20 (D.D.C. 2011). Chief Woodbury does not make a claim of “unusually severe emotional distress.” *Bethel*, 192 F.R.D. at 322. He does not offer expert testimony to support his claim for emotional distress, and has not conceded that his mental condition is in controversy.

The case law cited by the City is not Washington law and is distinguishable from the instant case. Resp. Br. at 39-42. *Ali v. Wang Laboratories, Inc.*, 162 F.R.D. 165 (M.D.Fla. 1995) (plaintiff alleged severe emotional distress); *Shepherd v. American Broadcasting Cos., Inc.*, 151 F.R.D. 194 (D.D.C. 1993) (plaintiffs alleged post-traumatic stress disorder and planned to use expert and treating physician testimony to prove their emotional distress claims); *Schlunt v. Verizon Directories*

Sales-West, Inc., 2006 U.S. Dist. LEXIS 38819 (M.D.Fla. 2006) (plaintiff alleged severe, ongoing emotional distress, from which she stated she believed she would never recover); *Vinson v. Superior Court of Alameda Cty.*, 43 Cal. 3d 833, 740 P.2d 404 (Cal. Sup. Ct. 1987) (plaintiff asserted a claim for intentional infliction of emotional distress); *Henry v. City of Tallahassee*, 2000 U.S. Dist. LEXIS 20469 (N.D.Fla. 2000) (court stated ongoing emotion distress “may” warrant a CR 35 examination); *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296 (E.D.Pa. 1983) (plaintiff sought to prove her emotional distress damages through expert testimony and alleged severe emotional distress); *Eckman v. Univ. of Rhode Island*, 160 F.R.D. 431 (D.R.I. 1995) (plaintiff planned to use expert testimony to prove her emotional distress claim).

As discussed above, the City seeks to highlight Chief Woodbury’s “million dollar” claim for emotional harm damages in an attempt to make the claim more important and place it “in controversy.” The damage amount was listed “for insurance purposes” and is not relevant to whether Chief Woodbury waived his physician-patient privilege with regard to his medical records, or whether the “in controversy” or “good cause” requirements of CR 35 have been met.

A recent case out of the United States District Court for the District of Columbia analyzed the specific issues addressed in this case and found

that the plaintiff did not waive his psychotherapist-patient privilege simply by asserting a claim for “garden variety” emotional harm damages. *St. John v. Napolitano*, 2011 U.S. Dist. LEXIS 34484, *1 (D. D.C. 2011). The *St. John* court noted that: “The question of waiver of the psychotherapist-patient privilege arises frequently in civil actions where a plaintiff alleges emotional distress. In the years since *Jaffee* [*v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923 (1996)], federal courts faced with this situation have developed divergent approaches for determining whether privilege has been waived.” *Id.* at *15. The court went on to discuss the three different approaches federal courts have taken with regard to waiver, which were also discussed in *Fitzgerald v. Cassil*, 216 F.R.D. 632, 636 (N.D. CA. 2003) and in the opening brief. Op. Br. at 43.

In *St. John*, the court identified the same five factor test cited by the City for determining whether the “in controversy” requirement of CR 35 has been met and found that the test was “equally applicable for analyzing whether or not an emotional distress claim is ‘garden variety’ in the waiver context as well.” *St. John v. Napolitano*, 2011 U.S. Dist. LEXIS 34484, *21 (D. D.C. 2011). Ultimately, after considering the different approaches, the court found that the plaintiff did not waive the privilege because “there are no factors showing that the plaintiff has alleged more than ‘garden variety’ emotional distress of the kind an

ordinary person might experience following an episode of discrimination.”

Id. at *23-24.

Washington has yet to determine the issue of whether a plaintiff automatically waives the physician-patient privilege, thus allowing for discovery of his or her medical records, simply by asserting a tort claim seeking emotional harm damages. Chief Woodbury urges this Court to adopt the narrow approach (requiring affirmative reliance on the psychotherapist-patient communications before the privilege will be deemed waived), or at least the middle ground approach (allegations of non-garden-variety emotional distress waives privilege), and find that he did not waive the privilege in the instant case.

D. Chief Woodbury is Entitled to Discovery of His Comparators' Personnel Files, Especially Portions of Personnel Files Related to Substantiated Instances of Misconduct

Personnel files are relevant to Chief Woodbury's defense. CR 26(b)(1). Numerous Assistant Chiefs testified that Chief Dean criticized Chief Woodbury's performance during the meetings held to discuss which Deputy Chief to demote in the planned abrogation. CP 1696-98, CP 1964, CP 2053-58. According to the City's theory of the case, it was the Assistant Chiefs who then selected Chief Woodbury for demotion. CP 885. It is immaterial whether or not the Assistant Chiefs actually reviewed

personnel files in reaching their decision. Resp. Br. 44-45. It is not up to the City to determine what is and is not relevant to Chief Woodbury's claims. *Gammon v. Clark Equipment Co.*, 38 Wn. App. 274, 281, 686 P.2d 1102 (1984). At the least, Chief Woodbury should be entitled to receive information in personnel files related to substantiated claims of misconduct of his comparators, the subjects of his whistleblower complaint, and his superiors. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn. App. 199, 206, 189 P.3d 139 (2008), *Dawson v. Daly*, 120 Wn.2d 782, 800, 845 P.2d 995 (1993). The Seattle Times was permitted to inspect some of the same personnel files requested by Chief Woodbury, subject to limited redactions. CP 208-09.

The appellate court in *Weahkee v. Norton*, 621 F.2d 1080, 1082 (11th Cir. 1980), found the trial court abused its discretion in denying plaintiff discovery of comparator personnel files in his employment discrimination case against the EEOC. Plaintiff had alleged that the defendant denied him promotions based on his race. *Id.* at 1081. The court stated:

The files sought in plaintiff's request were personnel files of EEOC employees who plaintiff claims were hired or promoted in discriminatory preference over him. The qualifications and job performance of these employees in comparison with the plaintiff's qualifications and performance is at the heart of this controversy.

Id. at 1082. *Weahkee* is analogous to the instant case because Chief Woodbury, who was ranked sixth among the eleven Deputy Chiefs, was chosen for demotion over his colleagues and comparators. The testimony of the Assistant Chiefs and Chief Dean was inconsistent as to who criticized who during the meetings to discuss which Deputy Chief to demote. Op. Br. at 19-20. Most of the individuals present at the meeting agree that the performance of at least certain Deputy Chiefs was discussed. *Id.* Without access to the personnel files, or portions of the files, of Chief Woodbury's comparators, Chief Woodbury will be put in a position during trial where evidence will be presented as to his alleged performance deficiencies, but he will not be able to put on evidence of performance problems of his comparators who were not demoted..

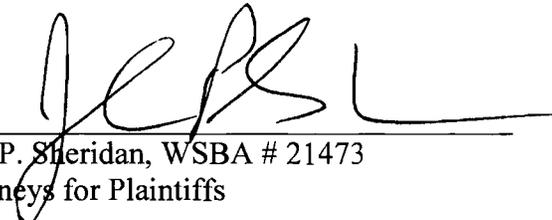
III. CONCLUSION

Chief Woodbury asks that this Court find reversible error in the trial court's dismissal of his statutory whistleblower claims, that Woodbury did not waive his physician-patient privilege by seeking emotional harm damages, that the trial court erred in ordering production of his medical records, and ordering a CR 35 examination. The Court should also find that Woodbury is entitled to all tort remedies under the statute sand to discovery of personnel files.

Respectfully submitted this 6th day of May, 2011.

The Sheridan Law Firm, P.S.

By:



John P. Sheridan, WSBA # 21473
Attorneys for Plaintiffs

DECLARATION OF SERVICE

Brandon Rich states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, and am a legal assistant for Appellant's attorney of record. I make this declaration based on my personal knowledge and belief.

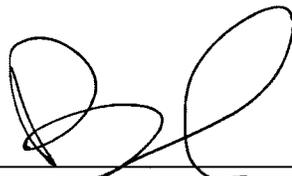
2. On May 6, 2011, I caused to be delivered via legal messenger to the following attorneys:

Frederick E. Wollett
Erin L. Overbey
Seattle City Attorneys Office
P.O. Box 94769
Seattle, WA 98124-4769
Attorneys for Respondent

a copy of REPLY BRIEF OF APPELLANT.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of May, 2011, at Seattle, King County, Washington.



Brandon Rich
Legal Assistant

Appendix 1

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
 at Seattle.

Bruce EKLUND, an individual, Plaintiff/
 Counter-Claim Defendant,

v.

The CITY OF SEATTLE, Seattle Municipal Court,
 a municipal corporation, Defendant/Counter-Claim
 Plaintiff,

and

Fred Bonner and Jane Doe Bonner, and their marital
 community, Gayle Tajima and John Doe Tajima,
 and their marital community; Yolande Williams
 and John Doe Williams, and their marital com-
 munity; and Mark Parcher and Jane Doe Parcher,
 and their marital community, Defendants.

No. C06-1815Z.

Jan. 9, 2008.

Mark K. Davis, Duncan Calvert Turner, Badgley
 Mullins Law Group, Cleveland Stockmeyer,
 Seattle, WA, for Plaintiff Counter-Claim Defend-
 ant.

Amy Lowen, Erin L. Overbey, Seattle City Attor-
 ney's Office, Seattle, WA, for Defendants/
 Counter-Claim Plaintiff.

ORDER

THOMAS S. ZILLY, District Judge.

*1 THIS MATTER comes before the Court on De-
 fendants' Motion for Partial Summary Judgment,
 docket no. 46, and Plaintiff's Rule 56(f) Motion,
 docket no. 57, at 16-17. Having considered the
 pleadings, declarations and exhibits filed in support
 of and in opposition to the motions, and the record
 as a whole, the Court GRANTS IN PART and
 DENIES IN PART Defendants' Motion for Partial

Summary Judgment, and DENIES Plaintiff's Rule
 56(f) Motion.

I. BACKGROUND

Plaintiff, Bruce Eklund, alleges various claims
 against the City of Seattle, Seattle Municipal Court,
 Judge Fred Bonner, Gayle Tajima, Yolande Willi-
 ams, and Mark Parcher (the "Defendants"). Second
 Am. Compl., docket no. 11, ¶ 38. The lawsuit stems
 from Eklund's employment at the Seattle Municipal
 Court, where he worked between February 2003
 and July 2004. Eklund Decl., docket no. 60, ¶ 2.
 Eklund worked directly for then-presiding Judge
 Fred Bonner as well as Judge Bonner's top-level
 managers, namely Gayle Tajima, Yolande Willi-
 ams, and Mark Parcher. *Id.* ¶ 5.

The Seattle Municipal Court's Finance and Admin-
 istration Division hired Eklund as a Strategic Ad-
 visor I. Eklund Decl. ¶ 3. In a letter dated February
 24, 2003, from Ed Meyer, Seattle Municipal Court's
 Human Resources Manager, to Eklund, the Seattle
 Municipal Court set forth "information regarding
 [his] employment," which had an effective start
 date of February 26, 2003. *Id.*, Ex. 1 (the "February
 24, 2003 Letter") at SMC 00414. First, the letter set
 forth Eklund's hourly rate and stated that "[y]our
 performance will be evaluated after four months,
 with a possible increase up to 5%; and reviewed
 every six months thereafter with up to additional
 5% increases per evaluation period during the first
 two years of your appointment." *Id.*, Ex. 1. Second,
 the February 24, 2003 Letter stated that "[a]s an ex-
 empt employee you serve at the discretion of the
 hiring authority; ordinances and personnel rules re-
 garding hiring, discipline or termination from City
 employment do not apply to exempt
 employees." *Id.*, Ex. 1. Third, the February 24, 2003
 Letter set forth Eklund's eligibility "to earn leave
 merit leave in 2003, based on performance, to be
 used in 2004." *Id.*, Ex. 1. Fourth, the February 24,
 2003 Letter stated that Eklund was not eligible for

overtime compensation, and it addressed the procedure for reporting absences. The February 24, 2003 Letter concluded by requesting that Eklund “acknowledge [his] acceptance of this job offer by signing below and returning this letter to the Court’s Human Resources office.”*Id.*, Ex. 1. One day later, Eklund signed and returned the February 24, 2003 Letter. *Id.* ¶ 3.

Eklund also received a copy of the Municipal Court of Seattle Employee Handbook. *Id.* ¶ 4. The Employee Handbook stated, in part, that “[t]his Handbook is a guide. It is not an employment contract...”*Id.*, Ex. 2 (Employee Handbook at 3). The Employee Handbook also contained an “At-will Employer Statement,” which provided:

*2 With the exception of bargaining units positions and positions covered by the civil service, all other positions in the Municipal Court are ‘at-will,’ which means that, just as an employee would be free to resign at any time for any reason, the employer would have the right to terminate employment at any time, with or without cause, and without prior notice.

Parcher Decl., docket no. 48, ¶ 9, Ex. B (Employee Handbook at 6).^{FN1}

FN1. Eklund refers to an Employee Handbook dated 11/08/00, whereas Parcher refers to a 2003 Employee Handbook. Neither party has drawn any significance to the different versions of the Employee Handbook.

In March 2004, all Seattle Municipal Court employees received a memorandum that reminded them that they were required to pay all of their outstanding tickets, fines, and penalties owed to the Seattle Municipal Court. *Id.*, ¶ 2, Ex. A at MO 00353. To ensure that these obligations were met, the Seattle Municipal Court compiled a list of employees with outstanding debts to the Court. *Id.* ¶ 3. The Seattle Municipal Court launched an investigation of potential improprieties in April 2004, which culminated

in a report that showed that a friend of Eklund’s had made several obligation due date extensions on Eklund’s citations. *Id.* ¶¶ 3-4. Eklund’s friend set aside eight default penalties, totaling \$190 in fees that Eklund would have had to pay had it not been for his friend’s intervention. *Id.* ¶ 6. Eklund asserts that in 2003 he made arrangements with a Seattle Municipal Court employee for a payment plan regarding outstanding parking tickets, and that he subsequently paid off the tickets. Eklund Decl. ¶ 27; Davis Decl., docket no. 59, Ex. 3 (Eklund Dep.) at Vol. I, 100:8-23, 105:6-8. On or about July 7, 2004, Eklund was put on administrative leave. Eklund Decl. ¶ 37. On July 29, 2004, Eklund received a letter terminating his employment with the Seattle Municipal Court. *Id.* ¶ 43, Ex. 15 (termination letter).^{FN2}

FN2. For the purposes of this Order, the reasons why Eklund was terminated are of no legal consequence.

On August 26, 2004, Eklund filed a complaint with the Mayor of Seattle’s Office, asserting that he was terminated in retaliation for whistleblowing. *Id.* ¶ 51; LaBelle Decl., docket no. 51, ¶ 2, Ex. A (complaint letter). Specifically, Eklund complained that he was terminated “in retaliation for intending to disclose to the [City of Seattle] Department of Finance information regarding over \$1.5 million of lost parking revenue due to excessive fine reductions by the court’s magistrates.” LaBelle Decl., Ex. A at MO 00418. The Mayor’s Office hired an independent investigator, former assistant U.S. Attorney Holly Morris Bennett, to investigate Eklund’s complaint. *Id.* ¶ 3. After completing a four-month investigation, compiling 1,000 pages of documents and interviewing numerous witnesses, Ms. Bennett presented the Mayor’s Office with her Report of Investigation on December 30, 2004. *Id.* ¶¶ 3-4. Ms. Bennett concluded that “either Eklund never formally ‘blew the whistle’ prior to his termination, or that, if he did, no one at the Seattle Municipal Court was aware of his doing so.” *Id.* ¶ 4. In addition, Ms. Bennett reported that “the evidence showed that

Eklund was terminated for fixing his own tickets, and that the Court was appropriate and justified in such a termination.”*Id.*

*3 On January 3, 2005, the Mayor's Office informed Eklund that his request for relief was denied. *Id.* ¶ 5, Ex. B (letter denying Eklund relief) at MO 00593. The letter from the Mayor's Office explained that “[o]ur investigation has failed to produce any evidence that your previous employer, the Seattle Municipal Court, retaliated against you as a result of your allegations of improper governmental activity.”*Id.*, Ex. B. The letter further stated that “[i]f you are dissatisfied with this response, you may request a hearing pursuant to RCW 42.41.040. If you desire a hearing, you must deliver a request for the hearing to the Office of the Mayor within the time specified in RCW 42.41.040.”*Id.*, Ex. B. Eklund never requested a hearing or otherwise contacted the Mayor's Office to discuss an appeal of the investigation's findings. *Id.* ¶ 5; Trudeau Decl., docket no. 47, Ex. D at 6 (Request for Admission No. 17) (Eklund's admission that he “did not appeal the Mayor's Office investigation of [his] whistleblowing allegations”).

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Eklund's Voluntary Dismissal of Six Claims

Defendants move for partial summary judgment on the following claims: (1) rights to free speech; (2)

right to privacy; (3) breach of contract; (4) whistleblower retaliation; (5) “violation of and conspiracy to violate the Washington Public Disclosure Act” (the “PDA”); (6) “anticipatory violations of the PDA;” (7) negligence; and (8) invasion of privacy. Defs.' Mot. at 1 (quoting Second Am. Compl. ¶ 38).^{FN3} Eklund responds that he “does not assert claims for invasion of privacy, negligence, First Amendment/interference with political participation, violation/anticipatory violation of the public disclosure act, or any free floating wrongful discharge claim....” Pl.'s Opp'n, docket no. 57, at 17-18. Despite Eklund's representation, the Second Amended Complaint, at ¶ 38, expressly contains allegations of such claims. Accordingly, the Court construes Plaintiff's response as a voluntary dismissal and GRANTS Defendants' Motion for Partial Summary Judgment with respect to the six claims Eklund states he does not assert. The Court DISMISSES without prejudice Eklund's claims for: (1) “violation of state and/or federal constitutional rights to free speech, political participation;” (2) “violation of and conspiracy to violate the Washington Public Disclosure Act;” (3) “anticipatory violations of the PDA;” (4) “negligence;” (5) “invasion of privacy;” and (6) “wrongful discharge.”^{FN4} See Second Am. Compl. ¶ 38.

FN3. Defendants do *not* move for summary judgment on Eklund's remaining claims of: (1) wrongful discharge in violation of public policy; (2) “wrongful discharge;” (3) false light; (4) defamation; and (5) violation of Eklund's liberty rights pursuant to 42 U.S.C. § 1983. Defs.' Mot. at 1 n. 1.

FN4. Although Defendants do not move for summary judgment on Eklund's “wrongful discharge” claim, which is alleged separate from Eklund's breach of contract and “discharge in violation of public policy” claims, the Court dismisses Eklund's “free floating” wrongful discharge claim based on Eklund's representa-

tion that he is not asserting such a claim.

*4 The two remaining claims that are the subject of Defendants' Motion for Partial Summary Judgment are Eklund's breach of contract and whistleblower retaliation claims.

C. Eklund's FED.R.CIV.P. 56(f) Motion

Eklund argues that Defendants' Motion for Partial Summary Judgment should be denied pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, which provides:

If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order.

FED.R.CIV.P. 56(f). The party moving for a Rule 56(f) continuance "must show (1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion." *State of Cal. v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). The Court should deny a Rule 56(f) motion if "the evidence sought is almost certainly nonexistent or is the object of pure speculation." *Id.* at 779-80; *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991).

Eklund argues that "outstanding and ongoing discovery is likely to produce additional evidence relevant to claims at issue in this motion." Pl.'s Opp'n at 17.^{FN5} However, Plaintiff has not submitted any affidavit that sets forth the specific and essential facts that he hopes to elicit from further discovery. Eklund is merely speculating on what he might find in any upcoming discovery. Speculation is an inappropriate basis to grant a Rule 56(f) motion. Moreover, no further discovery is needed. Defendants' summary judgment motion on Eklund's breach

of contract claim presents a contract interpretation issue, which is a question of law in this case. *See Dice v. City of Montesano*, 131 Wn.App. 675, 683-84 (2006). Defendants' summary judgment on Eklund's whistleblower retaliation claim presents a purely legal failure to exhaust issue because Eklund has admitted that he did not request a hearing pursuant to RCW 42.41.040 to appeal the City's denial of Eklund's request for relief based on his whistleblower complaint. Accordingly, the Court DENIES Eklund's Rule 56(f) Motion.

FN5. Eklund also asserts that his lead counsel, Cleveland Stockmeyer, has been unavailable since July 2007 to consult on discovery matters because of Mr. Stockmeyer's urgent medical issues. Stockmeyer Decl., docket no. 58, ¶¶ 3-5. Eklund has not been without representation during this period since he is also represented by Duncan Turner and Mark Davis. Mr. Stockmeyer's lack of availability does not provide a basis for granting Plaintiff's Rule 56(f) Motion.

D. Eklund's Breach of Contract Claim

Defendants move for summary judgment on Eklund's breach of contract claim, arguing Eklund was an at-will employee who could have been terminated at any time without cause. Employment in the State of Washington is at will, unless that relationship is modified by an implied or express agreement. *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 393 (1994); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223 (1984). Eklund argues that his at-will status was modified by both an express agreement and an implied agreement.

1. Express Agreement

*5 "In Washington an employer has the right to discharge an employee, with or without cause, in the absence of a contract for a specified period of time." *Greaves*, 124 Wn.2d at 393. The burden of

proving the existence of a contract is on the party asserting its existence. *Siekawitch v. Washington Beef Producers, Inc.*, 58 Wn.App. 454, 461 (1990); *Kuest v. Regent Assisted Living, Inc.*, 111 Wn.App. 36, 50-51 (2002) (to establish modification of the traditional employment-at-will relationship, employee must provide factual evidence of an offer, acceptance, consideration); *Pacific Cascade v. Nimmer*, 25 Wn.App. 552, 556 (1980) (discussing mutual assent requirement).

Defendants argue that the document titled, "Proposed Additions to Bruce's Position Description," Trudeau Decl., Ex. G, and an email that Eklund wrote to himself, Trudeau Decl., Ex. H, are not contracts. The Court agrees, particularly in light of Eklund's lack of opposition to Defendants' arguments. Thus, these documents cannot serve as the basis for Eklund's breach of contract claim. Defendants also move for summary judgment in response to Eklund's allegations that Gayle Tajima "promised Eklund a certain period of employment and/or raises at certain definite periods, as part of his contract, and/or that he would only be discharged for cause." Second Am. Compl. ¶ 9. Defendants argue that Tajima, the Seattle Municipal Court's Director of Finance, did not enter into any contract with Eklund, nor could she have because she lacked the authority to enter into an employment contract. Tajima Decl., docket no. 49, ¶¶ 3-5. In light of Eklund's failure to oppose this argument, the Court assumes that Eklund is no longer asserting that any contract executed by Tajima modified his at-will employment.

Defendants next argue that the February 24, 2003 Letter is not an express agreement that modified Eklund's at-will status. Eklund responds that the February 24, 2003 Letter, which he signed and returned, operated as an offer and acceptance, and thus as an express agreement, and that the agreement modified his at-will status. In their reply, Defendants do not contest that the February 24, 2003 Letter constitutes an offer and acceptance; however, Defendants briefly argue that Eklund has failed to

provide any consideration for the purported modification of his at-will status. Because the consideration issue was not presented in their opening motion, Eklund did not have an opportunity to respond, and the Court will assume for summary judgment purposes, that consideration was given.

Defendants' primary argument is that the February 24, 2003 Letter—even if it is considered an express agreement—did not modify Eklund's at-will status. "[T]he interpretation of an unambiguous contract is a question of law." *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn.App. 507, 517 (2004). "A provision is not ambiguous merely because the parties suggest opposing meanings." *Id.* "Whether a contract provision is ambiguous is also a question of law." *Id.* "An ambiguity exists in a provision when, reading the contract as a whole, two reasonable and fair interpretations are possible." *Allstate Ins. Co. v. Hammonds*, 72 Wn.App. 664, 670 (1994). The February 24, 2003 Letter is unambiguous—it expressly provided that Eklund, "as an exempt employee," is to "serve at the discretion of the hiring authority," and that "ordinances and personnel rules regarding hiring, discipline, or termination from City employment do not apply to exempt employees."^{FN6} Because Eklund's employment was at the discretion of the Seattle Municipal Court, it was clearly at will. Eklund fails to address this important "serve at the discretion" provision of the February 24, 2003 Letter in his response brief.

FN6. Defendants assert that the Employee Handbook's "At-Will Employer Statement" reinforces the Seattle Municipal Court's position that Eklund's employment was at will. The Court agrees that the Employee Handbook's at-will statement is consistent with the February 24, 2003 Letter's provision that Eklund serves at the discretion of the hiring authority. The Court further notes that both sides agree that the Employee Handbook is not a contract.

*6 Instead, Eklund argues that the February 24, 2003 Letter's language about his performance eval-

uations, potential for salary increases, and potential to receive merit leave during the first two years of employment expressly guaranteed him employment for a definite period of two years. Those terms, however, set forth basic benchmarks outlining what would happen at various stages of employment, but in no way guaranteed employment for a definite term. Eklund does not provide any legal authority to support the proposition that providing an at-will employee with the possibility of future pay increases or leave eligibility modifies his at-will status. The February 24, 2003 Letter did not expressly modify Eklund's at-will status.

2. Implied Agreement

As noted above, the February 24, 2003 Letter did not define the duration of Eklund's employment. "Generally, an employment contract, indefinite as to duration, is terminable at will by either the employee or employer" unless there is an "implied agreement" that the "contract is terminable by the employer *only* for cause." *Thompson*, 102 Wn.2d at 223 (emphasis in original). "[C]ourts will look at the alleged 'understanding,' the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstance of the case to ascertain the terms of the claimed [implied] agreement." *Greaves*, 124 Wn.2d at 393 (quoting *Roberts v. ARCO*, 88 Wn.2d 887, 894 (1977)). An implied agreement modifying the at-will relationship "is subject to the usual rules applicable to contract formation." *Kuest*, 111 Wn.App. at 50. "[T]here must be enough factual conduct inconsistent with the express terms of the original contract ... to satisfy the requisites of contractual modification." *Id.* Thus, the employee "must illustrate that [the employer] offered different employment terms after she began employment, and that she accepted those terms and gave consideration." *Id.* This Eklund cannot do.

First, Eklund argues the February 24, 2003 Letter implies that he would be employed for at least two years. The benchmarks for raises and leave at vari-

ous stages of employment did not imply that he would, in fact, be employed for any definite duration. Second, Eklund argues that Defendants' ticket-fixing investigation shows that Defendants believed Eklund could only be terminated for cause. The Court disagrees. The mere undertaking of an investigation of an at-will employee does not imply any modification of the employee's at-will status. Third, Eklund argues that the nature of his employment as a top level Strategic Advisor indicates that his employment was not at will, but he offers no support for this proposition. Defendants point out that, for employees, like Eklund, whose positions require "a particularly high degree of professional responsiveness and individual accountability," or require "a confidential or fiduciary relationship with the appointing authority," the Seattle Municipal Code ("SMC") § 4.13.010 provides for exemptions from the civil service rules that require just cause for discipline. Fourth, Eklund argues that, as a result of the February 24, 2003 Letter, he "believed he was not an at-will employee, and could only be terminated for cause." Pl.'s Opp'n at 20. However, "a subjective understanding that he would be discharged only for cause ... is insufficient to establish an implied contract to that effect." *Thompson*, 102 Wn.2d at 224. Taking all of these circumstances into account, the Court concludes that there was no implied agreement modifying Eklund's at-will status.

3. Conclusion Re: Breach of Contract Claim

*7 In the absence of any express or implied agreement modifying Eklund's at-will employment relationship with the Seattle Municipal Court, Eklund was an at-will employee who could have been terminated at any time without cause. Accordingly, the Court GRANTS Defendants' Motion for Partial Summary Judgment on the merits of Plaintiff's breach of contract claim, and DISMISSES with prejudice Plaintiff's breach of contract claim.

E. Eklund's Whistleblower Retaliation Claim

Eklund's whistleblower retaliation claim is brought pursuant to Washington State statute and Seattle ordinance. The state whistleblower statute makes it "unlawful for any local government official or employee to take retaliatory action against a local government employee because the employee provided information in good faith in accordance with the provisions of this chapter that an improper governmental action occurred." RCW 42.41.040(1). The Seattle ordinance similarly protects employees who report improper governmental action. SMC 4.20.810. Both the state statute and the city ordinance require an employee to file a complaint within thirty days of the occurrence of the alleged retaliatory action. RCW 42.41.040(2)-(3) ("In order to seek relief under this chapter, a local government employee *shall* provide a written notice of the charge of retaliatory action to the governing body of the local government ... no later than thirty days after the occurrence of the alleged retaliatory action."); SMC 4.20.860 ("In order to seek relief, an employee who believes he or she has been retaliated against in violation of Section 4.20.810 *must* file a signed written complaint within thirty (30) days of the occurrence alleged to constitute retaliation") (emphasis added). This first step of the process—the filing of the complaint—is not in dispute in the present case because Defendants concede that Eklund "filed a timely whistleblower complaint." Defs.' Mot. at 11; LaBelle Decl. ¶ 2, Ex. A.

The second step of the process—the appeal—is at issue in the present case. Defendants argue that Eklund failed to exhaust his administrative remedies regarding his whistleblower retaliation claim by failing to request a hearing before an administrative law judge to review the City's denial of relief. Eklund admits that he did not appeal the City's January 3, 2005 denial of his request for relief. The question presented to the Court is whether an appeal is mandatory under state or local law.

The state statute provides, in pertinent part, that:

(4) Upon receipt of ... the response of the local government ..., the local government employee *may* re-

quest a hearing to establish that a retaliatory action occurred and to obtain appropriate relief as defined in this section. The request for a hearing *shall* be delivered to the local government within fifteen days of delivery of the response from the local government....

RCW 42.41.040(4) (emphasis added). Defendants admit that the language in the state statute providing that an "employee may request a hearing" is permissive. Defs.' Reply, docket no. 63, at 9. Defendants attempt to contrast this language with the Seattle ordinance's "shall" request a hearing language. However, Defendants have misconstrued the Seattle ordinance—nowhere does it provide that an employee "shall request a hearing." The applicable section of the Seattle Municipal Code provides in full:

**8 If an employee who has filed a complaint of retaliation under this section is dissatisfied with the response and desires a hearing pursuant to Section 42.41.040 RCW, the employee shall deliver a request for hearing to the Office of the Mayor within the time limitations specified in that section. Within five (5) working days of receipt of the request for hearing, the City shall apply to the state office of administrative hearings for a hearing to be conducted as provided in Section 42.41.040 RCW.*

SMC 4.20.860(C) (emphasis added). The SMC 4.20.860(C)'s language "[i]f an employee ...desires a hearing" is parallel to RCW 42.41.040(4)'s language "the local government employee *may* request a hearing." Both are permissive. Similarly, the SMC 4.20.860(C)'s language following the permissive clause, which states that "the employee *shall* deliver a request for hearing ... within the [state statute's] time limitations" is parallel to RCW 42.41.040(4)'s language following the permissive clause, which states that "[t]he request for a hearing *shall* be delivered to the local government within fifteen days." Under both state and local law, the "shall" language refers to the timing for delivering a request, in situations where an employee desires to make a request. Contrary to Defendants' argument,

the "shall" language in Seattle Municipal Code 4.20.860(C) does not require an employee to request a hearing. The Court's interpretation that Seattle Municipal Code 4.20.860(C) does not require an employee to request a hearing is buttressed by the fact that the city ordinance directly refers to RCW 42.21.040, which permits an employee to request a hearing, but does not require it.

Neither party has provided any case law that supports a different interpretation of Seattle Municipal Code 4.20.860(C). Defendants rely on *Ryder v. Port of Seattle*, which states that "[a]dministrative remedies must be exhausted before the courts will intervene: (1) when a claim is cognizable in the first instance by an agency alone; (2) when the agency's authority establishes clearly defined machinery for the submission, evaluation and resolution of the complaints by aggrieved parties; and (3) when the relief sought can be obtained by resort to an exclusive or adequate procedural remedy." *Ryder* 50 Wn.App. 144, 151 (1987) (internal quotations and citations omitted). Seattle Municipal Code 4.20.860(C) does not establish "clearly defined machinery for the submission" of complaints to an administrative law judge; rather, it permits an employee to request a hearing, if one is desired by the employee, but it does not require an employee to request a hearing. Eklund relies on two cases involving the exhaustion of remedies under collective bargaining agreements. *See Keenan v. Allan*, 889 F.Supp. 1320, 1365 (E.D.Wash.1995); *Morales v. Westinghouse Hanford Co.*, 73 Wn.App. 367, 371 (1994). These cases have no applicability to the present case because Eklund was not a union employee and did not have any collective bargaining agreement with its own grievance process. Defendants also point out that they are not arguing that Eklund failed to exhaust remedies under a collective bargaining agreement (or any other contract) prior to pursuing statutory remedies.

*9 Neither RCW 42.41.040(4) nor SMC 4.20.860(C) require an employee to appeal a local government's denial of a whistleblower retaliation

claim prior to filing a whistleblower claim in court. Accordingly, the Court DENIES Defendants' Motion for Partial Summary Judgment as to Eklund's whistleblower retaliation claim.

III. CONCLUSION

(1) The Court GRANTS IN PART and DENIES IN PART Defendants' Motion for Partial Summary Judgment, docket no. 46, as follows:

(a) The Court GRANTS Defendants' Motion for Partial Summary Judgment with respect to the six claims Eklund states he does not assert, and DISMISSES without prejudice Eklund's claims for: (1) "violation of state and/or federal constitutional rights to free speech, political participation;" (2) "violation of and conspiracy to violate the Washington Public Disclosure Act;" (3) "anticipatory violations of the PDA;" (4) "negligence;" (5) "invasion of privacy;" and (6) "wrongful discharge."

(b) The Court GRANTS Defendants' Motion for Partial Summary Judgment on the merits of Plaintiff's breach of contract claim, and DISMISSES with prejudice Plaintiff's breach of contract claim.

(c) The Court DENIES Defendants' Motion for Partial Summary Judgment as to Plaintiff's whistleblower retaliation claim.

(2) The Court DENIES Plaintiff's Rule 56(f) Motion, docket no. 57, at 16-17.

IT IS SO ORDERED.

W.D.Wash., 2008.
Eklund v. City of Seattle
Slip Copy, 2008 WL 112040 (W.D.Wash.)

END OF DOCUMENT

Appendix 2



1 of 1 DOCUMENT

WALTER L. TAMOSAITIS, PHD, et al., Plaintiffs, v. BECHTEL NATIONAL, INC., et al., Defendants.

NO. CV-10-5116-RHW

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

2011 U.S. Dist. LEXIS 12294

January 31, 2011, Decided

January 31, 2011, Filed

COUNSEL: [*1] For Walter L Tamosaitis, Ph.D an individual, Sandra B Tamosaitis, representing the marital community, Plaintiffs: John P Sheridan, LEAD ATTORNEY, Sheridan & Baker PS, Seattle, WA.

For Bechtel National Inc. a Nevada Corporation, Frank Russo, an individual, Defendants: Kevin C Baumgardner, LEAD ATTORNEY, Corr Cronin Michelson Baumgardner & Preece LLP, Seattle, WA; Michael B Saunders, LEAD ATTORNEY, Halvorson Saunders & Willner, PLLC, Seattle, WA; John P Sheridan, Sheridan & Baker PS, Seattle, WA.

For URS Corporation, a Nevada Corporation, Gregory Ashley, an individual, William Gay, an individual, Dennis Hayes, an individual, Cami Krumm, an individual, Defendants: Matthew W Daley, Timothy Michael Lawlor, LEAD ATTORNEYS, Witherspoon Kelley Davenport & Toole - SPO, Spokane, WA; Charles Carroll Thebaud, Jr, Lewis M Csedrik, PRO HAC VICE, Morgan Lewis & Bockius LLP, Washington, DC; John P Sheridan, Sheridan & Baker PS, Seattle, WA.

JUDGES: ROBERT H. WHALEY, United States District Judge.

OPINION BY: ROBERT H. WHALEY

OPINION

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND

Before the Court are Defendants' Motions to Dismiss (Ct. Recs. 13, 17, and 21), Plaintiffs' Motion to Strike (Ct. Rec. 32) and Plaintiffs' Motion to Remand (Ct. [*2] Rec. 33). The Court held a hearing on these motions on January 25, 2011. Plaintiffs were represented by John Sheridan; Defendants were represented by Kevin Baumgardner, Michael Saunders, and Timothy Lawlor.

The above-captioned matter was removed to this Court on the basis of diversity jurisdiction. However, all individual Defendants are citizens of the State of Washington, so their presence in the case would destroy diversity. Those Defendants argue that they were fraudulently joined, which overlaps with their arguments that they should be dismissed from the matter under *Fed. R. Civ. P. 12(b)(6)*. For the reasons set forth below, the Court finds that individual Defendants Russo and Ashley were not fraudulently joined. Therefore, the Court denies their motion to dismiss and grants Plaintiffs' motion to remand.

FACT SUMMARY

Plaintiff alleges two claims: (1) intentional interference with contract or business expectancy, against Defendant Bechtel and its agents; and (2) civil conspiracy, against all Defendants.

According to the Complaint, Plaintiff Walter Tamosaitis, Ph.D., was the Manager of Research and Technology at the Hanford Waste Treatment Plant (WTP) in Richland, Washington. Plaintiff [*3] alleges that he was transferred from his contract position at the Hanford WTP in retaliation for raising safety and technical concerns. He had been working at this position since 2003. Plaintiff alleges that Defendant Bechtel National, Inc. (BNI) falsely claimed to meet its June 30, 2010, contract requirements to earn a \$6 million fee. The next day, Plaintiff allegedly presented a 50-item list at a meeting with BNI and URS managers. Plaintiff alleges that this list detailed a number of safety and technical concerns with the project, which called into question Bechtel's June 30th claim.

On July 2, 2010, Plaintiff alleges that he returned to work for a scheduled 7:00 a.m. meeting. He alleges that he was informed that he was terminated from the WTP project immediately and was directed to turn in his badge, cell phone, and blackberry. Plaintiff allegedly was instructed to leave the site and was escorted out of the building without retrieving his personal effects from his office.

Plaintiff was reassigned to a URS facility off the Hanford site. He is now working in an office in the basement and alleges that he has been given little or no meaningful work. Plaintiff is still employed by URS.

STANDARD [*4] OF REVIEW

Under *Fed. R. Civ. P. 8(a)*, the complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." A complaint need not contain "'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, U.S. , 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). That is, "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Rather, a complaint must state "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

Under the fraudulent joinder doctrine, "[i]f a plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the well-settled rules of the state, the joinder is fraudulent and 'the defendant's presence in the lawsuit is ignored for purposes of determining diversity.'" *United Computer Sys., Inc. v. AT & T Corp.*, 298 F.3d 756, 761 (9th Cir. 2002) (quoting *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001)).

ANALYSIS

The Court will first analyze Plaintiff's claim against individual [*5] Defendants Russo and Ashley. Because the Court concludes that the Complaint states a plausible claim against them for tortious interference, the Court declines to reach Plaintiff's claim for civil conspiracy and the other Defendants' Motions to Dismiss.

Plaintiff's first claim against Defendants Russo and Ashley is for the tort of intentional interference with contract or business expectancy. The tort has the following elements: "(1) the existence of a valid contractual relationship or business expectancy; (2) that the defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage." *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, 152 Wash. App. 229, 261-62, 215 P.3d 990 (2009).

Defendants' first argument is that they cannot be personally liable for any tort because they were acting in the scope of employment, citing the Complaint's allegation that Defendant Bechtel is liable under the doctrine of *respondeat superior*. According to Defendants, only a master can be held liable for the torts of his servant [*6] under this doctrine. Defendants' argument fundamentally misrepresents the doctrine of *respondeat superior* / vicarious liability, and is contrary to basic principles of tort law: "Where vicarious liability applies, it allows the plaintiff to sue either employer or employee, or both together." WASHINGTON PRACTICE VOL. 16 § 3.2 (citing *Orwick v. Fox*, 65 Wn. App. 71, 80, 828 P.2d 12 (1992) ("An employer and its employees are jointly and severally liable for the negligent acts of the employee in the scope of employment, and one damaged by such acts can sue both the employer and the employee or either separately.)); see also *Vanderpool v. Grange Ins. Ass'n*, 110 Wash. 2d 483, 484, 756 P.2d 111 (1988)

(holding that because both an employer and an employee are liable where vicarious liability applies, the "release of an employer from vicarious liability does not, by operation of law, release the primarily liable employee"); *Ensley v. Pitcher*, 152 Wash. App. 891, 905 n. 11, 222 P.3d 99 (2009) (reaffirming the rule of law stated in *Orwick*); *Cordova v. Holwegner*, 93 Wash. App. 955, 962, 971 P.2d 531 (1999) (same).

Defendants' reliance on *Houser v. City of Redmond*, 91 Wash. 2d 36, 40, 586 P.2d 482 (1978), is misplaced. *Houser* is merely an example of the familiar [*7] proposition that a party cannot interfere with its own contract. That principle animates *Houser's* holding that employees of an entity that is party to a contract cannot function as third-party intermeddlers with that contract unless they act outside the scope of their employment. *Id.* *Houser's* holding cannot apply out of this context, and no language in *Houser* suggests that it should. The case is simply inapposite here, where the Complaint alleges that Ashley and Russo, employees and agents of Bechtel, interfered with a contract between Plaintiff and URS, to which neither Ashley, Russo, nor Bechtel were parties. Other than *Houser*, the cases Defendants cite merely articulate the doctrine of vicarious liability ? that an employer is liable for the torts of its employees acting in the scope of employment, see, e.g., *Kuehn v. White*, 24 Wash. App. 274, 600 P.2d 679 (1979). No authorities state the proposition Defendants urge the Court to recognize: that where an employer is vicariously liable, its employees are somehow immune. Therefore, the Court rejects this argument.

Defendants' next argument is that no cause of action will lie for tortious interference with an employment contract where such a contract [*8] is terminable at will. There is some support for this proposition: see *Woody v. Stapp*, 144 Wash. App. 1041 (2008) ("Generally, at-will employees do not have a business expectancy in continued employment."). *Woody* is an unpublished decision. As support for this general claim, it cites *Raymond v. Pacific Chem.*, 98 Wash. App. 739, 747, 992 P.2d 517 (1999). The page of *Raymond* to which *Woody* cites analyzes the nature of an at-will employment contract in the context of a wrongful discharge claim; the section of *Raymond* that analyzes the plaintiff's tortious interference claim is silent on the issue of the at-will contract, and affirms dismissal of the claim on another basis entirely. *Id.* at 748-49. Defendants also cite a recent opinion written by Judge Shea, which relies on *Woody* to

dismiss a claim for intentional interference with an at-will employment contract. *Nat'l City Bank v. Prime Lending*, 2010 U.S. Dist. LEXIS 92178, 2010 WL 2854247 (E.D. Wash. 2010).

Woody appears to stand alone, contrary to the weight of authority. Two published opinions of the Washington Court of Appeals squarely hold that an at-will contract can satisfy the first element of this cause of action. *Lincor Contractors, Ltd. v. Hyskell*, 39 Wash. App. 317, 323, 692 P.2d 903 (1984) [*9] (holding that a third party could tortiously interfere with contract terminable at will, "so long as neither of the parties had elected to terminate it"); *Island Air, Inc. v. LaBar*, 18 Wash. App. 129, 140, 566 P.2d 972 (1977) ("[T]he fact that a party's terminable at will contract is ended in accordance with its terms does not defeat that party's claim for damages caused by unjustifiable interference, for the wrong for which the courts may give redress includes also the procurement of the termination of a contract which otherwise would have continued in effect.") (quotation omitted). A third published case notes the same: *Eserhut v. Heister*, 52 Wash. App. 515, 519 n. 4, 762 P.2d 6 (1988) ("A contract that is terminable at will is, until terminated, valid and subsisting, and the defendant may not interfere with it.").¹ As Plaintiff points out, persuasive authority also suggests the same. The *RESTATEMENT OF TORTS* 2d § 766, cmt. g, notes that an at will contract is "valid and subsisting, and the defendant may not improperly interfere with it." The Washington Pattern Jury Instructions, 352.01, notes: "[T]here [*10] may be a cause of action for interference with contract, even though the contract is terminable at will."

¹ Defendants argue that *Eserhut I* was disavowed by the Court of Appeals in a later decision. *Eserhut v. Heister*, 62 Wash. App. 10, 812 P.2d 902 (1991). While that is true, the Court of Appeals did so because it found that the defendants did not act with the requisite intent. *Id.* at 16. *Eserhut II* is wholly silent on the issue of at-will employment contracts, and therefore it is incorrect to argue that the opinion supports Defendants' reading of the law.

It appears that the Washington Supreme Court has yet to address this precise issue. Until that occurs, and given the substantial amount of authority supporting Plaintiff's position, the Court finds that Plaintiff's at-will employment relationship can satisfy the first element of

the tort of intentional interference with contract or business expectancy. Moreover, the Court cannot find that Plaintiff fails to state a claim and "the failure is obvious according to the well-settled rules of the state." *United Computer Sys.*, 298 F.3d at 761.

Defendants also argue that Plaintiff has failed to allege that Defendants engaged in some specifically unlawful [*11] conduct, supposedly required under *Pleas v. Seattle*, 112 Wash. 2d 794, 804, 774 P.2d 1158 (1989). Again, Defendants misrepresent the law by failing to quote the entire relevant passage from *Pleas*: "Interference can be 'wrongful' by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession." *Id.* (emphasis added to clause omitted from Defendants' brief). Plaintiff has alleged (both in the Complaint and in a proposed Amended Complaint that Plaintiff would move for leave to file if this Court retains jurisdiction) that Defendants interfered with his employment relationship with URS in retaliation for his raising safety concerns, and that this retaliation violated Bechtel's obligations under contract and regulation. Those allegations (accepted as true at this point) seem more than sufficient to qualify as "wrongful" conduct by reason of both a regulation and an established standard of Plaintiff's engineering profession, as manifested in the contractual and regulatory language Plaintiff cites.

Defendants also argue that Plaintiff's claim is essentially one for retaliatory transfer, a tort that the Washington Supreme Court has expressly [*12] declined to recognize. *White v. State*, 131 Wash. 2d 1, 19-20, 929 P.2d 396 (1997). Also, Defendants argue that "Washington tort law does not extend to retaliation claims based on nuclear safety whistle blower complaints because federal law already provides adequate alternative means for promoting nuclear safety at Hanford and elsewhere" (Ct. Rec. 18, Defendants' Memo in Support, p. 14, citing *Korslund v. DynCorp*, 156 Wash. 2d 168, 125 P.3d 119 (2005)). Defendants point out that Plaintiff currently has a complaint pending before the Department of Labor based on the same basic set of facts involved in this matter.

Plaintiff recognizes the validity of these authorities, but argues that he is not asserting a claim for retaliatory transfer. The Court agrees and finds that Plaintiff's claim here is distinct from the claims advanced in *White* and *Korslund*. Plaintiff does not claim that his employer is

liable for wrongfully transferring him, but rather that third parties are liable for wrongfully interfering with Plaintiff's contract with his employer. Moreover, the Court finds that Defendants read the case law too broadly. No language in *Korslund* suggests that Washington tort law as a whole is preempted by federal law [*13] relating to the nuclear industry. Rather, *Korslund's* analysis centers around the "jeopardy" and public policy elements of a wrongful discharge claim, and declined to recognize a cause of action for wrongful retaliation on that basis alone. 156 Wash. 2d at 184. Those elements are simply not implicated by Plaintiff's tortious interference claim.

Therefore, the Court rejects each of Defendant Ashley and Russo's arguments, and denies their Motion to Dismiss. Because they were thus not fraudulently joined, their presence in the case destroys diversity and the Court must grant Plaintiffs' Motion to Remand.

The final issue before the Court is Plaintiffs' request for costs and fees related to removal under 28 U.S.C. § 1447(c). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Gardner v. UICL*, 508 F.3d 559, 561 (9th Cir. 2007) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)). Given the unclear state of the law discussed above (particularly with respect to tortious interference [*14] with an at-will contract, and the applicability of *Korslund* to Plaintiff's claim here), the Court finds that Defendants did not lack an objectively reasonable basis for seeking removal. Therefore, the Court denies Plaintiffs' request for costs and fees.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendants Ashley and Russo's Motion to Dismiss (Ct. Rec. 17) is **DENIED**.
2. Plaintiffs' Motion to Remand (Ct. Rec. 33) is **GRANTED**.
3. The remaining motions (Ct. Recs. 13, 21, and 32) are **DENIED as moot**.
4. This matter is **remanded** in its entirety to the Superior Court for the State of Washington in and for

Benton County.

/s/ Robert H. Whaley

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, provide copies to counsel, and **close the file.**

ROBERT H. WHALEY

United States District Court

DATED this 31st day of January, 2011.

Appendix 3



1 of 1 DOCUMENT

**SAMUEL ST. JOHN, Plaintiff, v. JANET NAPOLITANO, Secretary, Department of
Homeland Security, Defendant.**

Civil Action No. 10-00216 (BAH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2011 U.S. Dist. LEXIS 34484

March 31, 2011, Decided

March 31, 2011, Filed

COUNSEL: [*1] For SAMUEL ST. JOHN, Plaintiff: Jennifer I. Klar, RELMAN, DANE & COLFAX, PLLC, Washington, DC; Tara K. Ramchandani, PRO HAC VICE, RELMAN, DANE & COLFAX PLLC, Washington, DC.

For JANET NAPOLITANO, Secretary, Department of Homeland Security, Defendant: Jeremy S. Simon, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, Civil Division, Washington, DC.

JUDGES: BERYL A. HOWELL, United States District Judge.

OPINION BY: BERYL A. HOWELL

OPINION

MEMORANDUM OPINION

The defendant in this employment discrimination action has moved to compel discovery of the plaintiff's medical records, including any records of mental health treatment. This motion presents the Court with a question which frequently arises in employment discrimination cases but which has led to divergent outcomes in the courts: Does a plaintiff automatically waive the psychotherapist-patient privilege merely by asserting that the defendant's actions caused the plaintiff to experience

emotional distress? For the reasons that follow, the Court concludes that the answer is no. The Court also concludes that some relevant, non-privileged medical records must be produced. Accordingly, the Court grants in part and denies in part the motion to compel.

I. BACKGROUND

Plaintiff Samuel [*2] St. John filed this employment discrimination action in February 2010 against the Department of Homeland Security. He worked for over thirty years as a federal employee before his retirement, at a civil service grade level of GS-14, on March 31, 2010. Amended and Supplement Complaint ("Am. Compl.") ¶¶ 2, 13. He alleges that the defendant twice denied him promotions, in August 2008 and January 2009, for a director/program manager position at a level GS-15 within the Container Security Initiative ("CSI") Division of the Office of Field Operations, Customs and Border Protection, due to his national origin and age, and in retaliation for protected activity, in violation Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et seq., and the Age Discrimination in Employment Act, 29 U.S.C. § 633a, et seq. Am. Compl. ¶¶ 1, 10, 22, 28. Among the injuries that the plaintiff claims to have suffered due to the defendant's alleged discrimination and retaliation are "irreparable loss and injury, including, but not limited to, humiliation, embarrassment, emotional distress, economic loss, and deprivation of his right to equal employment opportunity," and he seeks compensatory

damages for these injuries [*3] in his prayer for relief. *Id.* ¶ 44, "Prayer for Relief," ¶ (C).

Discovery has been underway in this case and reached an impasse over the defendant's demand that the plaintiff produce medical records for the period of January 1, 2002 to the present. Specifically, the defendant has requested:

o the production of documents that "support or relate to your calculation and allegation of damages as alleged in the Complaint and/or as set forth in Plaintiffs Initial Disclosures." Def's Request No. 9;

o "any and all documents relating to or evidencing the monetary or other benefits, and other items or damage or further relief you are seeking in this lawsuit, including but not limited to, (a) medical, psychiatric, psychological or counseling reports of any kind . . . (b) bills, invoices and/or other documents reflecting the date of, nature of and/or amount paid for counseling, medical, psychiatric, and/or psychological treatment or diagnosis; and/or (c) notes, correspondence or other documents that reflect your need for, attempt to obtain, nature of and/or amount paid for counseling, medical, psychiatric, and/or psychological treatment or diagnosis." Def.'s Request No. 12;

o "all documents of any [*4] health care provider for the period from January 1, 2002 to the present regarding any medical, psychological, or emotional problem or condition experienced by you that relate to the allegations in the Complaint or the alleged injuries for which you seek compensation in this lawsuit." Def.'s Request No. 13.

In addition to these document requests, the defendant posed interrogatories requiring that plaintiff "state whether you are at the present time, or have at any time since January 1, 2002, sought consultation or treatment by a psychiatrist, psychologist or other mental health care professional and, if so, identify the name and address of

any such health care provider and the dates of consultation or treatment." Def.'s Interrog. No. 5; *see also* Def.'s Interrog. No. 6.

The plaintiff has responded to these requests, *inter alia*, by raising various objections and stating that "he has not consulted or obtained treatment from any health care provider for any injury resulting from Defendant's illegal conduct and has not sought or received medical treatment for the conditions listed in response to interrogatory No. 4 [i.e., injuries related to emotional distress] for a two-year period before [*5] his application and non-selection for the CSI Director/Program Manager to the present." Pl.'s Suppl. Resp. to Def.'s Interrog. No. 5. The plaintiff has also refused to provide a HIPAA release form that would enable the defendant to obtain records from any healthcare provider directly.

During a teleconference on February 23, 2011, to resolve this and other discovery disputes, the Court directed the parties to submit their positions and legal authorities in writing for the Court's consideration in determining the defendant's motion to compel production of the plaintiff's medical records for a nine-year period.¹

¹ In a Minute Order, dated February 28, 2011, the Court granted the parties' joint motion to, *inter alia*, file their submissions under seal by March 2, 2011 at a length of five pages.

II. DISCUSSION

A. Relevance

"[W]hen confronted with a discovery demand to which an objection has been made, [the Court must first] ascertain whether there is a reasonable likelihood or possibility that the information sought may be relevant to a claim or defense or likely to lead to such evidence." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489, 2009 U.S. Dist. LEXIS 99187, 2009 WL 3443563, at *3 (D.D.C. Oct. 23, 2009). [*6] Thus, the first question the Court must answer is whether the plaintiff's medical records are relevant to any claims or defenses in this action, and, if so, whether any protective order under *Fed. R. Civ. P. 26(c)* ought to limit their production.

Pursuant to *Rule 26*, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense." *Fed. R. Civ. P. 26(b)(1)*. Relevance

is construed broadly for the purposes of discovery. *Food Lion, Inc. v. United Food and Commercial Workers International Union*, 103 F.3d 1007, 1012, 322 U.S. App. D.C. 301 (D.C. Cir. 1997). On the other hand, the relevance standard is "not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so." *Id.* (internal quotation marks and citation omitted).

Here, the plaintiff argues that his medical records are irrelevant because he has stated that he has not sought treatment from any health care provider for any injury resulting from the defendant's conduct and has indicated that he will not offer any expert testimony or medical records as evidence. See Pl.'s Letter to the Court dated [*7] March 2, 2011 ("Pl.'s Letter") at 3. The defendant argues that the medical records are relevant because the records may reveal some alternative explanation for the emotional distress the plaintiff allegedly suffered, providing the defendant with a potential defense. See Def.'s Letter to the Court dated March 2, 2011 ("Def.'s Letter") at 1.

Mindful that relevance is construed broadly for the purposes of discovery, the Court finds that at least some of the plaintiff's medical history is relevant here. Other courts in this district have also found that a Title VII plaintiff's medical records are relevant under similar circumstances. See *Barnett v. PA Consulting Group, Inc.*, No. 04-1245, 2007 U.S. Dist. LEXIS 18945, 2007 WL 845886, at *4 (D.D.C. Mar. 19, 2007) ("[A] defendant is entitled to explore whether causes unrelated to the alleged wrong contributed to plaintiff's claimed emotional distress, and a defendant may propound discovery of any relevant medical records of plaintiff in an effort to do so.") (internal quotation marks and citation omitted). There is no basis for finding that medical evidence from the entire nine-year period from 2002 through the present is relevant, however.²

2 The defendant has not identified [*8] why its requests seek records dating back to 2002 in particular. The plaintiff does not appear even to have begun working for the CBP's Container Security Initiative Division in Washington, D.C. until 2004. See Am. Compl. ¶ 4.

Yet even assuming *arguendo* that evidence from the entire requested time period were potentially relevant, the Court has "broad discretion to tailor discovery narrowly"

under *Rule 26*, and "[i]t is appropriate for the court, in exercising its discretion. . . , to undertake some substantive balancing of interests." *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1215, 363 U.S. App. D.C. 214 (D.C. Cir. 2004) (quotations omitted). *Rule 26(c)* provides that a court may "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Fed. R. Civ. P. 26(c)(1)*. Such an order may forbid disclosure altogether, or, among other measures, "limit[] the scope of disclosure or discovery to certain matters." *Fed. R. Civ. P. 26(c)(1)(A)* and *(D)*. "[A]lthough *Rule 26(c)* contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule." *Medical Records*, 381 F.3d at 1215 [*9] (quotation omitted). Accordingly, the "court, in its discretion, is authorized by [*Rule 26(c)*] to fashion a set of limitations that allows as much relevant material to be discovered as possible, while preventing unnecessary intrusions into the legitimate interests -- including privacy and other confidentiality interests -- that might be harmed by the release of the material sought." *Id.* at 1216 (quotation omitted).

In balancing the competing interests at stake here, the Court finds that disclosure of some records in the plaintiff's medical history is warranted, but not the wholesale disclosure of medical records for the nine-year period, from 2002 through the present, that the defendant seeks. See *E.E.O.C. v. Nichols Gas & Oil, Inc.*, 256 F.R.D. 114, 123 (W.D.N.Y. 2009) (defendant's "contention that any physical malady might cause emotional distress . . . scarcely gives defendants a license to rummage through all aspects of the plaintiff's life in search of a possible source of stress or distress.") (quoting *Evanko v. Elec. Sys. Assocs., Inc.*, No. 98 Civ. 2851, 1993 U.S. Dist. LEXIS 218, 1993 WL 14458, at *2 (S.D.N.Y. Jan. 8, 1993)). The defendant asserts such a lengthy time period is necessary because latent medical [*10] conditions "can manifest themselves in different ways over a period of time." Def.'s Letter at 4. The Court finds that this is a weak basis for seeking records over such a broad time period, and that the plaintiff's medical records from many years prior to the events alleged in the complaint are highly unlikely to contain much relevant evidence. On the other hand, medical records are likely to contain sensitive personal information, a fact underscored by the existence of statutory confidentiality provisions, like those of the HIPAA Privacy Rule. See Pl.'s Letter at

5. Accordingly, the plaintiff has demonstrated that the burden of producing such records and the harm to the plaintiff's privacy interests from the disclosure significantly outweighs any marginal relevance for the majority of the time period for which the defendant seeks records. The Court finds that the relevant time period for the production of the plaintiff's medical records in response to the defendant's requests should only extend from two years prior to the first date of the alleged discrimination through the present (the "Relevant Time Period").³ In addition, the defendant is not entitled to production of all of [*11] the plaintiff's medical records, but only records that have a logical connection to the plaintiff's claims of injury. See *Nichols Gas & Oil, Inc.*, 256 F.R.D. at 123. Such records include any non-privileged mental or emotional health records, records involving new medical issues for which the plaintiff first sought treatment during the Relevant Time Period, and records involving a medical condition that the defendant has established, through other discovery, may have caused the plaintiff emotional distress.⁴

3 In response to an interrogatory regarding the plaintiff's claims for damages, the plaintiff states that "Plaintiff has been, and continues to be, injured as a result of mental and emotional distress . . . caused by Defendant's illegal actions in an amount to be determined by a jury." Pl.'s Resp. to Interrog. No. 4. Given the plaintiff's continuing claims for emotional distress through the present, the Court finds that the records should be discoverable through the present.

4 The plaintiff relies chiefly on two district court cases in arguing that the medical record evidence should be shielded from discovery entirely. In *Broderick v. Shad*, 117 F.R.D. 306 (D.D.C. 1987), the Court denied [*12] a defendant's motion to compel production of medical records in apparent reliance in part on "physician-patient privilege." See *id.* at 309 (citing an earlier district court case which, in turn, analyzed a physician-patient privilege rooted in *D.C. Code* § 14-307 (1981)). While no general physician-patient privilege applies here because this case is a Title VII action in federal court, see *Morris v. City of Colorado Springs*, No. 09-cv-01506, 2009 U.S. Dist. LEXIS 122239, 2009 WL 4927618, at *1 (D. Colo. Dec. 18, 2009), the D.C. Circuit has instructed that the existence of applicable state law privileges and other statutory confidentiality provisions are

appropriate factors for the district court to weigh in determining the scope of permissible discovery under *Rule 26. Medical Records*, 381 F.3d at 1215-16. Accordingly, the Court has taken those factors into account in reaching its decision here. In *Sanders v. District of Columbia*, No. 97-2938, 2002 U.S. Dist. LEXIS 6816, 2002 WL 648965 (D.D.C. Apr. 15, 2002), the other case relied upon by the plaintiff, the Court upheld a magistrate judge's ruling granting a protective order under *Rule 26(c)* that precluded discovery into the plaintiff's medical records. 2002 U.S. Dist. LEXIS 6816, [WL] at *4-5. It is within a Court's discretion [*13] to preclude discovery of medical records entirely, but such an outcome is not warranted here based on the Court's balancing of the parties' competing interests.

B. Psychotherapist-Patient Privilege

The plaintiff asserts that any confidential communications with mental health professionals are privileged. The defendant counters that the plaintiff has broadly waived the psychotherapist-patient privilege by asserting a claim for damages arising from emotional distress. According to the defendant, the plaintiff has put his mental health in issue, thus waiving any privilege. For the reasons explained below, the Court concludes that the plaintiff has not waived the psychotherapist-patient privilege.

In 1996, the Supreme Court held that "confidential communications between a licensed psychotherapist and [his or her] patients in the course of diagnosis or treatment are protected from compelled disclosure under *Rule 501 of the Federal Rules of Evidence*." *Jaffee v. Redmond*, 518 U.S. 1, 15, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). In recognizing the psychotherapist-patient privilege, "[t]he Court squarely rejected the position that a court should balance the need for relevant information in the particular case before it against [*14] the invasion of a patient's privacy." *Koch v. Cox*, 489 F.3d 384, 388-89, 376 U.S. App. D.C. 376 (D.C. Cir. 2007) (citing *Jaffee*, 518 U.S. at 17 ("Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.")).⁵

5 The *Jaffee* court held that the "psychotherapist privilege covers confidential communications

made to licensed psychiatrists and psychologists" and "should also extend to confidential communications made to licensed social workers in the course of psychotherapy." 518 U.S. at 15-16. *Jaffee* left open the question of whether the privilege extends to mental health counselors other than licensed psychiatrists, psychologists, and social workers, and indicated that future courts would need to "delineate [the] full contours" of the privilege. *Id.* at 18; see also *Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154, 1155-58 (9th Cir. 2001) (extending privilege to unlicensed but trained workplace counselors).

"The *Jaffee* Court also observed that a patient may of course waive the protection of the privilege, but it did not speak further [*15] to the subject of waiver." *Id.* at 389 (internal citation and quotation omitted). "The Court did provide some guidance relevant to waiver, however, when it likened the privilege to the attorney-client and spousal privileges." *Id.*

The question of waiver of the psychotherapist-patient privilege arises frequently in civil actions where a plaintiff alleges emotional distress. In the years since *Jaffee*, federal courts faced with this situation have developed divergent approaches for determining whether privilege has been waived. Courts applying the so-called "narrow" approach have held that "patients only waive the privilege by affirmatively placing the substance of the advice or communication directly in issue." *Koch*, 489 F.3d at 390; see also *Fitzgerald v. Cassil*, 216 F.R.D. 632, 638 (N.D. Cal. 2003). Under the "broad" approach, courts have held that a plaintiff places his or her medical condition at issue and waives the psychotherapist-patient privilege simply by making a claim for emotional distress. See *Koch*, 489 F.3d at 390; see also *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000). A third approach - the "middle ground" approach - draws a distinction between claims for "garden [*16] variety" emotional distress and more severe emotional distress allegations. Under this approach, "[w]here a plaintiff merely alleges 'garden variety' emotional distress and neither alleges a separate tort for the distress, any specific psychiatric injury or disorder, or unusually severe distress, that plaintiff has not placed his/her mental condition at issue to justify a waiver of the psychotherapist-patient privilege." *Koch*, 489 F.3d at 390 (quoting *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 225 n.8 (D.N.J. 2000)).

In *Koch v. Cox*, the D.C. Circuit discussed these different approaches. 489 F.3d at 390. While the facts in *Koch* did not require the Court to adopt a particular approach, the Court's dicta nonetheless provided important points of guidance. First, the *Koch* court implicitly critiqued the "broad" approach to waiver. Analogizing the psychotherapist-patient privilege to the attorney-client privilege, as suggested by the Supreme Court in *Jaffee*, the *Koch* court noted that "[a] client waives that privilege when he puts the attorney-client relationship in issue-for example, by suing the attorney for malpractice or by claiming he relied upon the attorney's advice. . . . By analogy, a [*17] patient would waive the psychotherapist-patient privilege when he sues the therapist for malpractice, or relies upon the therapist's diagnoses or treatment in making or defending a case." *Id.* at 389. In other words, under the analogy to attorney-client privilege, merely alleging the experience of emotional distress would not constitute waiver. Second, the Court voiced concern about the risk of adopting an overly broad standard that would "*sub silentio*" overrule *Jaffee* and instructed that "we must supply a standard for determining whether a patient has waived the privilege . . . that does not eviscerate the privilege." *Id.* at 390. Since the plaintiff in *Koch* was not actually asserting any claim for emotional distress, the Court in that case did not ultimately reach the question of when asserting such a claim may constitute waiver of the privilege. The *Koch* court held that a plaintiff who is not asserting emotional distress implicitly waives the psychotherapist-patient privilege when "he does the sort of thing that would waive the attorney-client privilege, such as basing his claim upon the psychotherapist's communications with him, or, as with the marital privilege, selectively disclosing [*18] part of a privileged communication in order to gain an advantage in litigation." *Id.* at 391 (internal citation, quotation, and alteration omitted).

In *Sims v. Blot*, 534 F.3d 117 (2d Cir. 2008), the Second Circuit did face the "question of whether a plaintiff's claim for injuries that include only the garden-variety emotional injury that would ordinarily result from" the defendant's alleged misconduct constituted a waiver of privilege. *Id.* at 129. The Second Circuit held that a plaintiff's assertion of claims for "garden variety" emotional distress or "unspecified damages" that may include some sort of mental injury does not automatically waive the privilege. *Id.* at 141-42. The *Sims* court strongly endorsed the D.C. Circuit's

reasoning in *Koch*, *id.* at 133-34, and its reliance on applying meaningful analogies between the psychotherapist-patient privilege and other testimonial privileges in assessing waiver. Regarding the argument that any claim for emotional distress waives the privilege, the Second Circuit commented that "[i]n reality respondents simply seek to have the privilege breached whenever there is a possibility that the psychiatric records may be useful in testing the plaintiff's [*19] credibility or may have some other probative value. To accept these contentions would inject the balancing component that *Jaffee* foreclosed . . ." *Id.* at 141. This Court concludes that the concerns of the Second Circuit are well founded and closely aligned with the D.C. Circuit's concerns that an overly broad doctrine of implicit waiver would effectively overrule *Jaffee*.

Courts in this district have also applied the approach endorsed in *Sims*, under which "garden variety" emotional distress allegations are not deemed to waive privilege. In *Barnett v. PA Consulting Group, Inc.*, a discrimination case similar to this one, the Court upheld a magistrate judge's ruling that the plaintiff "had not waived her psychotherapist-patient privilege by claiming emotional damages" that were less than severe. *Barnett*, 2007 U.S. Dist. LEXIS 18945, 2007 WL 845886, at *3. The Court ruled that there was no controlling authority indicating "that [the plaintiff's] allegations of an ordinary reaction of anger, humiliation and anxiety at being fired" placed her mental state at issue and thus waived privilege. 2007 U.S. Dist. LEXIS 18945, [WL] at *4.

This Court agrees that a plaintiff's allegation of ordinary or "garden variety" emotional distress resulting from a defendant's [*20] alleged misconduct does not waive the psychotherapist-patient privilege. This conclusion gives effect to the D.C. Circuit's imperative that "we must supply a standard for determining whether a patient has waived the privilege . . . that does not eviscerate the privilege." *Koch*, 489 F.3d at 390. To hold otherwise would mean that privilege would be waived routinely in any case where a plaintiff sought recompense for the ordinary pain and suffering experienced in response to adverse employment actions that the plaintiff claims are illegal. *Cf. Benham v. Rice*, No. 03-cv-01127, ECF No. 115, at *3 (D.D.C. Sept. 14, 2007) (reaching the same conclusion in the context of ordering mental examinations pursuant to *Fed. R. Civ. P.* 35). Such an outcome would have "an unwarranted chilling effect on persons who believe that they have been subjected to

unlawful discrimination." *Id.*

Federal courts have developed several functional factors to analyze whether a plaintiff's claims for emotional distress are "garden variety" or more severe. The district court in *Turner v. Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995) identified five factors that indicate a plaintiff has put his or her mental state in controversy: [*21] "(1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff's offer of expert testimony to support a claim of emotional distress; and/or (5) plaintiff's concession that his or her mental condition is 'in controversy.'" *Id.* at 95. While *Turner* applied these factors to assess whether a party's mental condition was "in controversy" for the purposes of ordering the party to submit to a mental evaluation pursuant to *Rule 35*, the Court finds these factors equally applicable for analyzing whether or not an emotional distress claim is "garden variety" in the waiver context as well.⁶ Other courts in this district have applied similar factors in determining whether a plaintiff's claim for emotional distress goes beyond the "garden variety." *See Benham*, No. 03-cv-01127, ECF No. 115, at *3-5 (in *Rule 35* context). In addition, the D.C. Circuit also cited similar factors in defining "garden variety" emotional distress claims. *See Koch*, 489 F.3d at 390 (describing "middle ground" approach that does not recognize waiver of privilege "where [*22] a plaintiff merely alleges 'garden variety' emotional distress and neither alleges a separate tort for the distress, any specific psychiatric injury or disorder, or unusually severe distress").

6 A few courts have suggested that distinguishing "garden variety" emotional distress allegations from more severe allegations may be useful in the *Rule 35* context, but not in the context of determining waiver of privilege. *See, e.g., McKinney v. Del. Cnty. Mem'l Hosp.*, No. 08-1054, 2009 U.S. Dist. LEXIS 23625, 2009 WL 750181, at *5 (E.D. Pa. Mar. 20, 2009). This Court disagrees and joins those courts that have found the contexts to be analogous. *See Jackson v. Chubb Corp.*, 193 F.R.D. 216, 225 n.8 (D.N.J. 2000). Under *Rule 35*, "[t]he court . . . may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified

examiner." *Fed. R. Civ. P. 35(a)(1)*. Rule 35 also imposes other requirements, such as the requirement that an order to submit to examination be made "on motion for good cause," *Fed. R. Civ. P. 35(a)(2)(A)*, but the condition precedent to a Rule 35 order - that the party's mental condition be "in controversy" - raises essentially [*23] the same question as whether a party has sufficiently put his or her mental condition at issue to justify a finding that privilege has been waived. At a practical level, the Court notes that while a Rule 35 order to submit to a mental examination may generally be more burdensome to a party than an order to produce documents, the harm to a party's privacy interests occasioned by a broad finding of waiver of the psychotherapist-patient privilege may be significantly greater, depending on the situation. See *E.E.O.C. v. Serramonte*, 237 F.R.D. 220, 224 (N.D. Cal. 2006). ("This Court finds that if anything, delving into a plaintiff's medical or psychiatric records is even more invasive than conducting a medical or psychological examination, and that the standard for waiver should be at least as rigorous as that in *Turner*.") The Court also emphasizes the important distinction between the question of waiver, to which the *Turner* factors are germane, and the threshold question of relevance, which the Court has independently analyzed above.

In this case, there are no factors showing that the plaintiff has alleged more than "garden variety" emotional distress of the kind an ordinary person might [*24] experience following an episode of discrimination. The plaintiff has not alleged that a specific mental or psychiatric injury or disorder resulted from the defendant's actions. See Am. Compl. ¶¶ 44-45; see also Pl.'s Resp. to Interrog. No. 6 ("Plaintiff states that he has not consulted or obtained treatment from any health care provider for any injury resulting from Defendant's . . . conduct."). Nor has the plaintiff asserted a separate cause of action for emotional distress. See Am. Compl. ¶¶ 46-50. The plaintiff here has indicated that he will not offer expert testimony or rely on medical records as evidence of emotional distress. See Pl.'s Letter at 3. Nor does the Court find that the plaintiff alleged that his emotional distress is "unusually severe." In the Amended Complaint, the plaintiff alleged injuries including "humiliation, embarrassment, emotional distress,

economic loss, and deprivation of his right to equal employment opportunity." Am. Compl. ¶ 44. In his Rule 26 initial disclosures, he described his injuries as including "severe embarrassment and humiliation, loss of self-esteem, loss of career satisfaction, and feelings of worthlessness and shame." Pl.'s Init. Disclosures [*25] at 2. Despite the plaintiff's use of the word "severe," the Court does not find that these statements describe emotional distress that is "unusually severe" or goes beyond the ordinary emotional distress that would be engendered in reaction to illegal discrimination. Accordingly, the plaintiff here has alleged only "garden variety" emotional distress and has not waived the psychotherapist-patient privilege.

In arguing that the plaintiff has implicitly waived the privilege, the defendant relies chiefly on *Kalinoski v. Evans*, 377 F. Supp. 2d 136 (D.D.C. 2005) and *Roberson v. Bair*, 242 F.R.D. 130 (D.D.C. 2007). These cases are unavailing for two key reasons. First, they were decided before the D.C. Circuit's ruling in *Koch v. Cox*, which provided valuable guidance on these issues. Indeed, *Kalinoski* appears to have applied the "broad" approach to waiver of privilege in reliance on language from an Eighth Circuit opinion that was explicitly critiqued by the D.C. Circuit in *Koch*. See *Kalinoski* 377 F. Supp. 2d at 138 (citing *Schoffstall v. Henderson*, 223 F.3d 818, 822 (8th Cir. 2000)); *Koch*, 489 F.3d at 389 ("We need not decide whether making a claim for emotional distress necessarily waives [*26] the privilege . . . in order to observe that an affirmative answer does not follow from the *Schoffstall* court's analogy to the attorney-client privilege."). Second, in any event, the plaintiffs in *Kalinoski* and *Roberson* appear to have alleged more than "garden variety" emotional distress. In *Kalinoski*, the plaintiff alleged "that defendant's actions caused her severe emotional distress and led her to seek the services of a mental health professional." 377 F. Supp. 2d at 138. In *Roberson*, the plaintiff did not "contest that her mental condition [was] in controversy. She unquestionably claim[ed] that she [was] suffering from two identifiable forms of mental illness or disorder and that those conditions were caused by Defendant." 242 F.R.D. at 137. The *Roberson* plaintiff also intended to rely on expert testimony regarding her mental conditions. *Id.*

Accordingly, the plaintiff here has not waived the psychotherapist-patient privilege and may assert the privilege where appropriate.

C. Privilege Log

Given the Court's conclusion that the plaintiff may invoke the psychotherapist-patient privilege, the defendant contends that the plaintiff must still produce a privilege log specifying any otherwise [*27] responsive documents over which the plaintiff is asserting the psychotherapist-patient privilege. *Rule 26(b)(5)(A)* states that "[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged . . ., the party must (i) expressly make the claim [and] (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." *Fed. R. Civ. P. 26(b)(5)(A)*. While the Court could require the plaintiff to produce a document-by-document privilege log in appropriate circumstances, such a log is unnecessary to satisfy *Rule 26(b)(5)(A)* for documents subject to psychotherapist-patient privilege in this case. *See In re Imperial Corp. of America*, 174 F.R.D. 475, 477-79 (S.D. Cal. 1997) (ordering categorical privilege log instead of document-by-document log). The Court finds that the plaintiff may assert the psychotherapist-patient privilege in satisfaction of *Rule 26(b)(5)* by producing a categorical privilege log here. That privilege log should specify the following information with respect to each [*28] mental health professional whose communications with the plaintiff have resulted in documents that are withheld for privilege:

1. The name, address, and relevant qualifications of the mental health professional;
2. The approximate time period of the privileged communications;
3. The general nature of the communications (e.g., "marriage counseling records");

As discussed above, the Relevant Time Period for which the plaintiff should provide responsive medical records, including mental health records, is from two years prior to the alleged discrimination through the present.

D. Sealed Submissions

As mentioned above, in a Minute Order, dated

February 28, 2011, the Court granted the parties' joint motion to, *inter alia*, file their submissions under seal by March 2, 2011 at a length of five pages. While the Court has discretion to seal filings where appropriate, "the general presumption [is] that court documents are to be available to the public." *In re Pepco Employment Litig.*, No. 86-0603, 1992 U.S. Dist. LEXIS 6336, 1992 WL 115611, at *5-7 (D.D.C. May, 8 1992); *see also Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277, 293 U.S. App. D.C. 1 (D.C. Cir. 1991) (noting the "strong [*29] presumption in favor of public access to judicial proceedings" and the factors to be weighed in deciding to seal documents). In light of the limited amount of sensitive material contained in the parties' letters, the Court now directs the parties to redact any sensitive information from the letters and refile copies of the letters with the Court for filing on the public record. The parties shall meet and confer to agree upon the necessary redactions, if any, and shall jointly refile copies of their letters within ten days of this opinion and the accompanying order.

IV. CONCLUSION

For the reasons stated above, the Court grants in part and denies in part the motion to compel. The plaintiff must provide medical record documents for the period from two years prior to the alleged discrimination through the present that are responsive to the defendant's requests and that have a logical connection to the plaintiff's claims of injury. Records with a connection to the plaintiff's injuries include non-privileged mental or emotional health records, records involving new medical issues for which the plaintiff first sought treatment during the Relevant Time Period, and records involving a medical [*30] condition that the defendant has established, through other discovery, may have caused the plaintiff emotional distress. The plaintiff has not waived the psychotherapist-patient privilege and may assert the privilege where applicable in the manner described by the Court. Finally, the parties must refile redacted copies of their sealed letters within ten days for public filing on the record.

DATE: March 31, 2011

/s/ Beryl A. Howell

BERYL A. HOWELL

United States District Judge