

FILED
2014 MAR 27 2 20 PM
COURT OF APPEALS DIVISION I
EVERETT, WA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
22
23
24
25

No. 71328-1

COURT OF APPEALS DIVISION I OF THE STATE OF
WASHINGTON

In the Matter of

MITCH MICHKOWSKI

MITCH MICHKOWSKI, a single man,

Plaintiff - Appellant,

v.

SNOHOMISH COUNTY,

Defendant - Defendant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 28 PM 1:24

OPENING BRIEF OF APPELLANT

Rodney R. Moody, WSBA # 17416
Attorney for Appellant
2820 Oakes Ave., Ste. D
Everett, WA 98201
(425) 740-2940

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
22
23
24
25

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR Pg. 3
 Issues pertaining to the Assignments of error Pg. 3
II. STATEMENT OF THE CASE Pg. 3-12
 Actual Knowledge Pg. 4-6
 2013 Budget Pg. 6-12
 Alliance Credit Pg. 12
III. SUMMARY JUDGMENT STANDARD Pg. 13-14
IV. RETALIATION; WRONGFUL TERMINATION Pg. 14-22
V. PRETEXT Pg. 22-25
VII. CONCLUSION Pg. 25-26

TABLE OF CASES

RCW 49.17.160; Pg. 15
WAC 296-800-140; Pg. 15
Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796, (9th Cir. 1982); Pg. 19
Hill v. Cox, 110 Wn.App. 394, 402-403 41 P.3d 495 (2002); Pg. 13
Kaiser Aluminum v. Washington Fruit and Produce, 118 Wn.2d 46, 68,
821 P.2d 18 (1991); Pg. 22
Kimbrow v. Atlantic Richfield Co., 889 F.2d 869, 876 (1989); Pg. 16
Luckie v. Ameritech Corp., 389 F.3d 708,715,(7th Cir. 2004); Pg. 20, 21
Piling v. Eastern & Pacific Enterprises, 41 Wn.App. 158, 163, 702 P.2d
1352 (1981); Pg. 16
Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 (1960); Pg. 13
Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185 (9th
Cir. 2003); Pg. 19, 20
Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 89, 272 P.3d 865, review
denied 174 Wn.2d 1016 (2012); Pg. 22

1 Westberry v. Interstate Distributor Co., 164 Wn.App 196, 204, 263

2 P.3d 1251 (2011); Pg. 13

3 Zwink v. Burlington Northern, Inc., 13 Wn.App. 560, 566, 536 P.2d 13

4 (1975) (quoting 3 Am.Jur.2d agency § 273 at 635 (1962); Pg. 16

5 **I. ASSIGNMENTS OF ERROR**

6 The Court committed error by granting the motion for summary
7 judgment as to the wrongful termination cause of action.

8 **Issues pertaining to Assignments of error.**

9 The Court erred in granting summary judgment because the
10 factual question of whether the Judges of the Snohomish County
11 District Court possessed knowledge the Appellant engaged in protected
12 activities prior to voting to terminate his employment was merely
13 speculative.

14 **II. STATEMENT OF THE CASE**

15 The Appellant filed this Complaint alleging a wrongful termination
16 cause of action. CP 554-561. On November 20, 2013, the Defendants
17 filed a motion for summary judgment. CP 525-542. This motion was
18 untimely as discovery had not yet been completed and Michkowski filed a
19 timely motion for a continuance of motion for summary judgment. CP
20 281-285, 311-315. This motion was heard on December 6, 2013, and
21 granted by the Court but a continuance of only two days was granted from
22 the original date of December 18 to December 20, 2013. CP 180.
23 Michkowski then filed a timely response to Defendants motion for
24 summary judgment. CP 162-178. On December 20, 2013, Judge
25

1 Dingley of the Snohomish County Superior Court granted summary
2 judgment. CP 9-11.

3 The following facts support the cause of action on appeal.

4 **Actual Knowledge**

5 The Appellant, Mitch Michkowski was hired as the Court
6 Administrator for the Snohomish County District Court in January
7 2012. CP 453. Immediately after being hired he attended a meeting
8 attended by all eight Judges of the Snohomish County District Court.
9 CP 458-461. During this meeting a discussion was held regarding the
10 idea of arming the court room bailiffs because of safety concerns. CP
11 458-459. This put Michkowski on notice that safety was an ongoing
12 issue within the court system and as the court administrator it was his
13 responsibility to address this issue. CP 136-139.

14 Michkowski's immediate supervisor was then Presiding Judge
15 Tam Bui. His office was physically located adjacent to hers within the
16 Snohomish County Courthouse located in Everett. CP 76. The
17 Presiding Judge and the Court Administrator established regularly
18 scheduled meeting on Tuesdays of each week at which time all issues
19 regarding the court were discussed. CP 76. Michkowski has testified
20 that safety-related issues were the subject of discussion with Judge Bui
21 over numerous weekly meetings during his employment. CP 76
22
23
24
25

1 In August 2012, two separate safety-related issues occurred
2 within the court system in which an individual ordered to be placed
3 under arrest and held for law enforcement physically escaped from
4 custody from the District Court's Evergreen Courthouse. CP 152-158.

5 Because of the safety related issues, Michkowski authored a
6 memorandum on August 23, 2012 which he presented to Judge Bui.
7 CP 141-142. Judge Bui was asked to initial for receipt of a copy of this
8 memorandum which she declined to do. CP 77. Michkowski then
9 forwarded the memorandum to her by email. CP 144. Judge Bui
10 responded by sending an email to Michkowski on August 22, 2012,
11 which in a very brusque manner directed him to find an alternative
12 method of filing such documents in the future. CP 144. Judge Bui's
13 email directly addressed the safety memorandum. A copy of this email
14 was forwarded to Judge Ryan on August 24th. CP 449.

15
16
17 It was common knowledge amongst the courts staff that
18 Michkowski as the court administrator had been discussing safety
19 issues and voiced his concerns regarding the level of safety within the
20 court rooms, particularly within the District Court's outlying
21 courtrooms. CP 75-76. It was also common knowledge that he had
22 made recommendations for change as acknowledged by Bill Hawkins,
23 a bailiff employed with the court system for 7 ½ years. CP 71.
24
25

1 Michkowski in the creation of this budget. CP 97-98, 100, 102.
2 Michkowski was required to use a Snohomish County proprietary tool
3 called the Budget Development Tool. (BDT)

4 Michkowski had multiple discussions with Judge Bui regarding
5 the union applied rules and the need to specifically code an LPA II
6 position. Judge Bui complimented him on his perception of this issue.
7 CP 79. During her deposition Judge Bui could not recall this specific
8 complement, but did not deny its possibility. CP 41.

9
10 One issue in particular which created substantial confusion in
11 the creation of the 2013 budget was the distinction between the desired
12 LPA II and LPA III positions. Judge Bui sent multiple e-mails to
13 Michkowski indicating that the court was requesting one LPA II and
14 one LPA III position. CP 97-98, 100, 102. Judge Ryan indicated on
15 June 29, 2012, that the Budget Committee had voted to add two LPA
16 II's. CP 94-95. Judge Bui was asked to explain this conflict. She
17 stated in response to this question:
18

19 I can only surmise that I put down LPA II and LPA III
20 because, and I'm looking at the dates, July 3 has come
21 and gone. There -- we haven't -- the BDT -- the things
22 that should be finalized and put into the BDT in the
23 narrative portions, the priority package, isn't finalized.
24 To the best of my recollection, if there have been --
25 because the narrative is still there, it would have been
let's just put something down and, then, just meet the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

deadline so that finance has something in the BDT.
That's my best guess.
CP 43.

Judge Bui also stated, "I recollect a discussion between those two judges, and the budget committee agreed that it was going to be an LPA II and LPA III." "That's how there was a difference in terms of what was the initial vote and an LPA II turned out to be LPA III." "And I just – my recollection is just a discussion with them." "The reasons for that I don't recollect at this time, but I knew that there was a discussion." CP 48. All of this testimony fails to explain the conflict between Judge Bui and Judge Ryan's inconsistent positions and directives to the Court Administrator.

There was no consensus amongst the Judges on the Budget Committee on this issue. Judge Bui continued to state to Michkowski that the Court was requesting one LPA II and one LPA III while Judge Ryan continued to state what was being requested was two LPA II's.

Despite the inconsistent information Michkowski was receiving from Judge Bui and Judge Ryan he met the BDT deadline and submitted the proposed budget on July 3rd. CP 97-98. Judge Bui stated she was frustrated and angry over this submittal. She claimed that the "budget committee was very clear in terms of what we were going to be requesting, what was going to be our priority packages." CP 44. Judge

1 Bui acknowledged that she probably had not even scanned the e-mail
2 dated July 3rd in which Michkowski informed the Budget Committee
3 the deadline had been met. She mistakenly believed that the BDT was
4 not completed. CP 100. Judge Bui was asked during her deposition
5 whether she was aware that Michkowski had in fact met the July 3,
6 2012, 1 PM deadline. She stated, "With this e-mail on July the 5th, it
7 strikes me as he didn't meet the deadline." CP 45. She then testified, "I
8 was not aware that he inputted something in the BDT -- I was aware
9 that he inputted something in the BDT. There was something in the
10 BDT." CP 45. In fact Michkowski met the July 3, 2012, 1 PM
11 deadline and submitted materials which constituted the priority package
12 for the District Court. As he stated to the three Judges on the Budget
13 Committee these were "placeholder" materials which he intended to
14 modify as directed. CP 80.

17 Judge Bui was specifically asked whether she had ever heard
18 the term "placeholder" used by Michkowski in relation to the BDT
19 materials. She testified "I've never heard of the term from Mr.
20 Michkowski." CP 43. She was presented the e-mail from Michkowski
21 of July 5, 2012 at 8:39 AM. CP 97-98. In this e-mail Michkowski
22 clearly stated the BDT materials submitted on July 3 were a
23 "placeholder". When asked to explain her earlier testimony that she
24
25

1 had never heard this from Michkowski her reply was to state that she
2 was "just infuriated, frustrated to no end that the BDT is not done and
3 submitted, hence, my very short and terse response." CP 44.

4 The BDT materials submitted by Michkowski were modified to
5 reflect the first request for an LPA II position and a second request for an
6 LPA III. CP 103-112. Judge Bui did not understand this. When
7 discussing her email dated July 5, 2012, she was asked why she referred to
8 a singular LPA II position. CP 102. Her response, "Because I believed
9 that in sending this e-mail, still in the BDT is an accounting person and it
10 should have been LPA II. We -- the -- the budget committee did not agree
11 to an accounting person." CP 46. Judge Bui did not understand that
12 Michkowski had modified the BDT submitted materials to reflect one
13 LPA II position and one LPA III position as she had specifically directed
14 him to do on their July 3rd meeting. CP 80-81.

17 Ultimately Judge Bui acknowledged that the BDT materials
18 submitted by Michkowski reflected the directions that she had provided to
19 Michkowski to submit. She was asked, "Would you agree with me that
20 the BDT materials, as we just discussed, the LPA II and LPA III positions
21 seems to reflect the directions of Judge Bui from the July 5, 2012 e-mail?"
22 She replied, "It seems to reflect the same identification of LPA II and LPA
23 III as what is stated in that e-mail, yes." CP 47. This confusion and
24
25

1 inconsistent positions taken by Judge Bui and Ryan impacted
2 Michkowski's ability to submit the BDT materials. He was receiving
3 silence from Judge Lyon, a statement from Judge Ryan that what was
4 being requested were two LPA II positions, and directions from his
5 immediate supervisor, Judge Bui, that she wanted one LPA II and one
6 LPA III position. He submitted materials reflecting what his immediate
7 supervisor directed him to submit. In drafting the July 27, 2012, written
8 reprimand letter, Judge Bui once again changed her position. CP 123.
9 During her deposition in relation to this reprimand she was asked, "Why
10 are we back to just talking about two LPA II positions now?" CP 49. Her
11 answer; "Yes that accurately reflects what the budget committee's
12 directive and instructions to Michkowski as to what to ask in the priority
13 package" CP 49.
14
15

16 Judge Bui was asked if she had seen a copy of the budget
17 priority package before it was submitted on July 3rd. She replied, "To
18 the best of my recollection, probably, yeah, yes. I -- it's also very
19 possible that when we discussed what the budget committee -- when the
20 budget committee discussed with Mr. Michkowski about what was to
21 be submitted to the BDT and the narrative portions of it, historically,
22 based upon my experience on the budget committee, is that the director
23 and administrator does it." CP 50-51. She finalized this answer stating,
24
25

1 "So if I received this July -- prior to July the 3rd, more likely than not I
2 would just -- okay, brief through it. I had many other priorities, other
3 priorities in my mind at the time. Budget was one of my priorities, but
4 not the only one." CP 51.
5

6 **Alliance Credit**

7 Judge Bui in her declaration in support of Defendant's motion for
8 summary judgment acknowledged that Michkowski had come to her and
9 requested authorization to solicit input regarding exploring the potential to
10 structure a pilot project within the Everett Division. CP 446. Both Judge
11 Bui and Judge Fisher acknowledged that Michkowski had discussed this
12 specific issue with each of them. CP 394. The uncontested evidence from
13 Michkowski demonstrates that his sole intention was to explore a pilot
14 program in a District Court Division outside of the Court's South Division
15 which is accurately reflected by an e-mail sent to Judge Goodwin. CP
16 134. The declaration of Michkowski in opposition to Defendants motion
17 for summary judgment indicates that after the South District Judges voted
18 against this pilot program he did not pursue it further for the Court's South
19 District. CP 84. Michkowski sought and received authorization from his
20 immediate supervisor to pursue the program in Districts outside of the
21 South District. CP 129.
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
22
23
24
25

IV. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Westberry v. Interstate Distributor Co., 164 Wn.App 196, 204, 263 P.3d 1251 (2011). A trial is not useless, but absolutely necessary, where there is a genuine issue as to any material fact. Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). A material fact is one upon which all or part of the outcome of litigation depends. Hill v. Cox, 110 Wn.App. 394, 402-403 41 P.3d 495 (2002).

Initially, the moving party must meet the burden of showing that no material fact issue remains with the trial court resolving all reasonable inferences in favor of the nonmoving party. Hill, Supra at 402-403. This burden is met only when the trial court is convinced reasonable persons could reach but one conclusion or could not differ about the alleged facts. Id. at 403.

Once the employer meets its burden on a motion for summary judgment, the presumption of discrimination raised by the establishment of a prima facie case is rebutted. Rice v. Offshore Sys., Inc., 167 Wn.App. 77, 89, 272 P.3d 865, review denied 174 Wn.2d 1016 (2012). The employee resisting summary judgment then must produce evidence that raises a genuine issue of material fact on whether

1 the reasons given by the employer for discharging the employee are
2 unworthy of belief or are mere pretext for what is in fact a
3 discriminatory purpose. Id. at 89. The employee is not required to
4 produce evidence beyond that offered to establish the prima facie case,
5 nor introduce direct or “smoking gun” evidence. Id. at 89.
6 Circumstantial, indirect, and inferential evidence will suffice to
7 discharge the plaintiff’s burden. Id. at 89. The employee must meet his
8 burden of production to establish an issue of fact, but is not required to
9 resolve that issue on summary judgment. "For these reasons, summary
10 judgment in favor of employers is often inappropriate in employment
11 discrimination cases." Id. at 89.
12

13 **V. WRONGFUL TERMINATION/RETALIATION**

14
15 In a retaliation discharge case such as the present the plaintiff is
16 required to establish three elements to make it a prima facie case. A
17 plaintiff must demonstrate: (1) that he exercised a statutory right to
18 which he was entitled; (2) that he was discharged; and (3) that there is a
19 causal connection between the exercise of legal rights and the
20 discharge, *i.e.*, that the employer's motivation for the discharge was the
21 employees exercise or intent to exercise a statutory right. Kaiser, *Supra*
22 at 68.
23
24
25

1 By law Michkowski has a right pursuant to RCW 49.17.160 to
2 be free from discharge or discrimination because he raised safety
3 related issues in the workplace. Snohomish County has a requirement
4 pursuant to WAC 296-800-140 to develop, supervise, implement, and
5 enforce a safety and health training program that was effective in
6 practice. Snohomish County failed to remedy the safety concerns
7 brought to the attention of the Court by Michkowski and received a
8 Citation and Notice of Assessment from L&I on March 14, 2013,
9 resulting from the complaint filed by Michkowski. CP 58-67. This
10 satisfies the first element of his prima facie case which is also admitted
11 by Snohomish County.
12

13 There is no dispute that Michkowski was discharged from
14 employment on December 5, 2012, satisfying the second element. The
15 only element of this cause of action which remains in dispute is the
16 third element requiring proof of a causal connection between
17 Michkowski's raising the safety issue with Presiding Judge Bui who is
18 his immediate supervisor and his discharge on December 5, 2012. CP
19 86.
20
21

22 Snohomish County argues that the only Judge aware of the
23 safety issues being raised by Michkowski was Judge Bui. Therefore it
24 is argued because she abstained in the vote to terminate his employment
25

1 the causal connection required cannot be established. As a matter of
2 law this is incorrect. "It is well settled under Washington law that 'the
3 principle is chargeable with, and bound by, the knowledge of or notice
4 to his agent received while the agent is acting as such within the scope
5 of his authority and in reference to a matter over which his authority
6 extends.'" Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 876 (1989);
7 Zwink v. Burlington Northern, Inc., 13 Wn.App. 560, 566, 536 P.2d 13
8 (1975) (quoting 3 Am.Jur.2d agency § 273 at 635 (1962); Piling v.
9 Eastern & Pacific Enterprises, 41 Wn.App. 158, 163, 702 P.2d 1352
10 (1981). As Presiding Judge, Judge Bui is clearly an agent of
11 Snohomish County as are the other seven Judges of the District Court.
12 As the Presiding Judge she is the direct supervisor of the court
13 administrator, and it was her responsibility to bring to the attention of
14 her peer Judges any safety concerns raised by the court administrator.
15 Issues regarding courtroom safety for both the court employees as well
16 as the general public are within the scope of her responsibility as the
17 Presiding Judge.
18
19

20 Several additional factual points also establish that a reasonable
21 trier of fact could conclude that the remaining seven Judges in fact
22 possessed direct knowledge that Michkowski, their Court
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Administrator, raised these safety concerns prior to the vote to terminate Michkowski's employment.

- It has been acknowledged that safety issues concerning court staff as well as the public were clearly issues for all of the Judges of this Court. It was admitted that the very safety issues specifically raised by Michkowski were a topic of discussion within this judicial system for years. In fact the Snohomish County District Court was fined by the Department of Labor and Industries for the very safety issues raised by Michkowski. CP 58-64.
- In one of the L&I interviews which resulted from Michkowski's complaint Bill Hawkins, a bailiff within this court system for 7 ½ years, stated that Michkowski "has voiced safety concerns on several occasions, and has made recommendations." CP 71. A reasonable inference can certainly be drawn, and the Court is required in a motion for summary judgment to resolve every reasonable inference in the favor of the nonmoving party, that if a bailiff within this court system has direct knowledge that Michkowski was raising safety concerns that the eight Judges would have this knowledge as well.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- Two safety-related incidents occurred in August 2012. CP 152-158. These safety incidents prompted the creation of the safety memorandum prepared by Michkowski and presented to Judge Bui on August 23, 2012. CP 141-142. Certainly all of the Judges on the Snohomish County District Court were aware that these two safety-related issues occurred.
- Judge Bui acknowledged forwarding her email of August 24, 2012, which specifically addressed this safety memorandum to Judge Ryan on August 24, 2012, at 8:23 AM. CP 518. This email chastised Michkowski in a very brusque manner for requesting her signature on the safety memorandum. While not explicitly stated in the email, the clear subject of this email is the safety memorandum prepared by Michkowski. Judge Bui testified during her deposition to the frequent discussions she would have with Judge Ryan during the course of her normal work day. CP 449. A reasonable inference can certainly be drawn that the Presiding Judge and Judge Ryan would discuss this email and its substance with her directly which is of course the underlying safety memorandum. Judge Ryan is one of the Judges who voted to terminate Michkowski's employment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
22
23
24
25

- During the meeting on December 5, 2012, at which time the vote was taken to terminate Michkowski’s employment, Judge Bui was both present and participated in this discussion. CP 450. Ultimately she abstained in the vote.

Argument was made by Snohomish County that summary judgment was appropriate because Michkowski failed to demonstrate that the six Judges who voted to terminate his employment lacked actual knowledge that he had engaged in protected activity. In support of this argument the County cited to Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185 (9th Cir. 2003). On a retaliation claim however a plaintiff must merely present sufficient evidence which would permit a reasonable trier of fact to conclude that the party charged with engaging in retaliatory behavior was aware that the employee engaged in protected activity. *Id.* at 1197; Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796, (9th Cir. 1982).

This case is factually distinguishable from the authority cited by the County and demonstrates the fallacy of the summary judgment argument. In Raad the employee terminated failed to demonstrate that two school principals in physically separate schools who each declined to hire her were actually aware of her prior complaints of racial discrimination. There was no evidence to demonstrate that these two principles had direct

1 discussions with their fellow principals or school administration staff
2 regarding this particular employee, direct discussions with the employee,
3 or possessed any direct knowledge of discriminatory complaints which she
4 had made.

5 Under the present facts the six voting Judges specifically met to
6 discuss terminating Michkowski's employment on December 5, 2012. CP
7 450. Judge Bui who was the Presiding Judge and Michkowski's direct
8 supervisor was responsible for bringing the knowledge of Michkowski's
9 clearly relevant safety issues to the attention of her fellow Judges. At the
10 December 5th meeting she was both present and actually participating in
11 the discussion regarding his termination. This is a clear factual distinction
12 from the facts supporting the decision in Raad. Id. at 1197.

13 Similarly, Snohomish County cites to Luckie v. Ameritech Corp.,
14 389 F.3d 708, 715, (7th Cir. 2004), for the principle that actual knowledge
15 must be held by the decision-maker. Once again, there is a factual
16 distinction between Luckie and the present facts. In Luckie the individual
17 to whom the employee had made the relevant complaints testified that she
18 had not discussed the allegations with the employee's supervisor who fired
19 the employee; in fact, this individual stated that the two had never met or
20 even spoken. As pointed out above, Judge Bui was both present and
21 participated in the meeting with her fellow Judges at which time six voted

1 to terminate his employment and Judge Bui herself abstained. CP 450.
2 Once again a clear factual distinction exists between the facts of Luckie
3 and the present facts.

4 A reasonable fact finder could conclude in light of all relevant
5 evidence presented that the claims made by the six various Judges that
6 they had no knowledge of Michkowski's reported safety concerns lacks
7 credibility. It was common knowledge amongst court staff that
8 Michkowski had raised safety issues and made recommendations for
9 change; the safety issues raised by Michkowski were known to all of these
10 Judges and had been discussed for years; Snohomish County was in fact
11 fined for the very safety issues raised by Michkowski; Michkowski's
12 direct supervisor, Presiding Judge Bui whose responsibility it was to bring
13 the safety-related issues to the attention of the other peer Judges when she
14 was apprised of them by the court administrator, forwarded an email
15 directly to Judge Ryan who was one of the six Judges who voted in favor
16 of termination specifically discussing her response to the request to sign
17 the safety memorandum; and during the meeting of December 5th Judge
18 Bui was both present and a participant in the discussion regarding whether
19 to terminate Michkowski's employment. In defense of the claim that they
20 lacked actual knowledge in the face of all of these facts all that is
21 presented are the legally convenient declarations of the various Judges

1 claiming to have possessed no prior knowledge. These facts demonstrate
2 that Michkowski has met his burden of proof on a motion for summary
3 judgment. A reasonable trier of fact could conclude that these Judges in
4 fact did have actual knowledge of Michkowski's raising the safety
5 concerns when they voted to terminate his employment.
6

7 **VI. PRETEXT**

8 In the context of employment discrimination and retaliation
9 cases an employee can show that the employers proffered reason for
10 termination or discriminatory conduct is pretextual. This can be
11 accomplished by demonstrating: "(1) the company's reasons have no
12 basis in fact; or (2) if they have a basis in fact, by showing that they
13 were not really motivating factors; or (3) if they are factors, by showing
14 they were jointly insufficient to motivate the adverse employment
15 decision . . ." Rice, *Supra* at 89-90.
16

17 In Kaiser Aluminum v. Washington Fruit and Produce, 118
18 Wn.2d 46, 821 P.2d 18 (1991), the Court stated that the employee need
19 not attempt to prove the employer's sole motivation was retaliation or
20 discrimination based upon the employee's claim of a statutory right. *Id.*
21 at 70. In the context of making a claim for workers compensation the
22 Court stated, "the employee must produce evidence that pursuit of a
23 workers compensation claim was a cause of the firing, and may do so
24
25

1 by circumstantial evidence as described above." Id. at 70 (emphasis in
2 original). The Court went on to discuss the distinction between the
3 "substantial" or "significant" factor test and the "determinative" factor
4 test. Id. at 71.

5
6 The Court noted that the employee must prove the employer's
7 wrongful conduct, "and it must do so without the benefit of the
8 employer's own knowledge of the reason for the discharge, and
9 generally without the access to prove which the employer has." Id. at
10 71. For this reason the Court adopted the substantial factor test as
11 opposed to the determinative factor test which in essence is a "but for"
12 test. Id. at 71-72. The substantial or significant factor test is therefore a
13 lesser test of proof because the Court recognized that the real basis or
14 motivation for termination will rarely be stated by the employer and is
15 frequently not known by the employee. Id. at 71-72. It is for these
16 reasons that summary judgment should rarely be granted in an
17 employee discrimination case which is, of course, similar to the
18 retaliatory discharge claim at issue.
19

20
21 The claim that Michkowski was terminated because of his efforts
22 regarding the 2013 budget creation is factually baseless. The evidence
23 previously cited in the declaration of Michkowski (CP 78-83) as well as
24 the testimony of Judge Bui (CP 38-56) and the supporting e-mails between
25

1 these parties' (CP 97-98, 100, 102) show a pattern of inconsistent
2 communications and directives to Michkowski from and between Judge's
3 Bui and Ryan. These inconsistent positions were communicated to
4 Michkowski who in turn was expected to draft a unified BDT priority
5 package. He drafted the priority package which he was specifically
6 instructed to draft by his supervisor and indicated to all members of the
7 Committee that this was subject to edit. CP 97-98. The claim he handled
8 the budget issue in an incompetent manner is factually baseless.
9

10 Similarly, the claim that he continued to pursue the Alliance/Signal
11 project after being directed by two out of the three Judges of the South
12 District to no longer pursue this is equally factually baseless. Indeed it is
13 acknowledged by both Judges Bui (CP 446) and Fischer (CP 394) in their
14 declarations that Michkowski came to discuss with them the potential of
15 locating the collection pilot program in the Everett Division. CP 84. Most
16 importantly Michkowski sought authorization from Judge Bui before
17 pursuing this further and she specifically authorized him to continue to
18 move forward. CP 446. Michkowski sought a legal opinion from the
19 prosecuting attorney's office as it relates to establishing a collection
20 agency in the Everett division. CP 131-132. Michkowski sought and
21 received permission from Judge Bui to explore the pilot program within
22 the District Court's Everett Division. Therefore, because Michkowski was
23
24
25

1 acting under the express authority of his supervisor the claim that this is a
2 basis for his termination is a pretext excuse. This is factually baseless and
3 does not support and in fact requires dismissal of this motion for summary
4 judgment.

5
6 The remaining issues claimed as a basis for his termination are not
7 worthy of discussion. Statistically recording the number of affidavits of
8 prejudice recorded against individual Judges given the small number of
9 Judges available in the outlying Districts is an appropriate and relevant
10 statistic for a court administrator to maintain and certainly within his
11 authority.

12
13 The claimed bases for termination of Michkowski are in fact
14 pretextual. This demonstrates that the true basis for his termination is the
15 retaliatory motive because he was raising safety issues which the District
16 Court Judges simply preferred not to address. As has already been noted,
17 once these safety concerns were brought to the attention of L&I, the
18 Snohomish County District Court was actually fined for what were
19 considered to be serious safety violations. CP 58-64.

20 **VII. CONCLUSION**

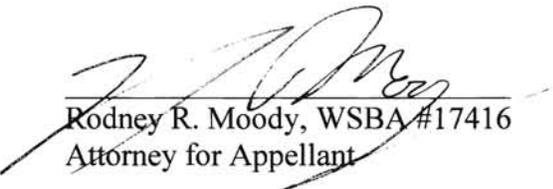
21
22
23 Michkowski was fired because he raised and continued to press
24 safety issues which the Judges of the Snohomish County District Court did
25 not want to address. The substantial evidence presented shows the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
22
23
24
25

pretextual nature of the claimed basis for his termination. Judge Bui certainly possessed direct knowledge of the safety memorandum of August 23rd. She forwarded her displeasure for being asked to sign a copy of this memorandum to both Michkowski and Judge Ryan by way of a direct email which is in the record. On December 5th Judge Bui was both present and an actual participant in the discussion of whether to terminate Michkowski.

A reasonable inference which must be drawn from these facts in favor of Michkowski for the purpose of this motion is that the voting Judges who acted to terminate Michkowski's employment also had actual knowledge of his engaging in protected activities. As such the granting of summary judgment was legal error.

RESPECTFULLY SUBMITTED this 26th day of March, 2014.


Rodney R. Moody, WSBA #17416
Attorney for Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE**

MITCH MICHKOWSKI,
Plaintiff - Appellant,

vs.

SNOHOMISH COUNTY,
Defendant - Defendant.

NO. 71328-1-I

Case No.: 13-2-05973-6
Snohomish County Superior Court, WA

DECLARATION OF SERVICE

I certify that on the 26th day of March, 2014, I filed true and correct copies of Appellants Opening Brief, by depositing the same in the United States mail, postage prepaid, to Washington State Court of Appeals Division I, and by provided a copy by personal service to Steven Bladek and Katherine H. Bosch:

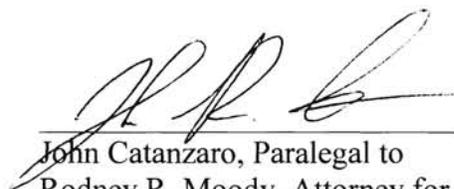
Washington State Court of Appeals Division I
950 Broadway, Ste., 300
Tacoma, WA 98402-4454

Counsel for Defendant's

Steven Bladek and Katherine H. Bosch
Snohomish County Prosecuting Attorney / Civil Division
Robert J. Drewel Bldg, M/S 504
3000 Rockefeller Ave
Everett, WA 98201

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 28 PM 1:24

Dated this 26th day of March, 2014.



John Catanzaro, Paralegal to
Rodney R. Moody, Attorney for Appellant

DECLARATION OF SERVICE

Law Office of
RODNEY R. MOODY
2825 Colby Avenue, Suite 302
Everett, WA 98201
WSBA #17416
(425)259-5656 Fax (425)258-2658