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No. 73751-I

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

HENRY TANG,

Appellant / Cross-Respondent,

v.

CITY OF SEATTLE, SEATTLE PUBLIC UTILITIES,

Respondent / Cross-Appellant.

**CITY OF SEATTLE'S REPLY BRIEF
IN SUPPORT OF CROSS-APPEAL**

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A large, stylized handwritten signature in black ink, appearing to be a combination of the letters 'A' and 'V'.

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REPLY BRIEF ON CROSS APPEAL

The Court need not reach the City’s cross-appeal if it affirms the trial court’s order granting summary judgment and dismissing the case. But if the Court does reach it, emotional distress damages are not available under RCW 49.17.160. Tang’s argument relies on a single word—“all”—and ignores the rest of the words in the statute and case law interpreting those words to exclude emotional distress damages. “[I]ntent is not to be determined by a single sentence” in a statute—let alone by a single word. *Wash. State Human Rights Comm’n v. Cheney Sch. Dist.*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982).

A. The Legislature did not intend to provide emotional distress damages under RCW 49.17.

Emotional distress damages are not available under RCW 49.17.160. Tang ignores the full text of the statute and instead focuses on just one word: “all.” The full sentence at issue states: “In any such action the superior court shall have jurisdiction, for cause shown, *to restrain violations* of subsection (1) of this section and order all appropriate relief including *rehiring or reinstatement* of the employee to his or her former position *with back pay*.” RCW 49.17.160(2) (emphasis added). When the phrase “all appropriate relief” is viewed in context, courts recognize that

the statute's enumerated remedies are (a) targeted at restraining violations, (b) limited, and (c) equitable in nature.

“[T]he meaning of words may be indicated or controlled by those with which they are associated.” *In re Detention of Kistenmacher*, 163 Wn.2d 166, 179, 178 P.3d 949 (2008) (quotations omitted); *see also Cheney Sch. Dist.*, 97 Wn.2d at 126. The phrase “all appropriate relief” is modified by the words around it—which focus on “restrain[ing] violations” and particular equitable relief, such as “back pay” and “rehiring or reinstatement.” The statute makes no mention of emotional distress damages, or any other type of damages. “[A]ll appropriate relief” does not mean any and all remedies under the sun.

The Supreme Court recognized precisely that for a statute with the *same* wording as RCW 49.17.160, i.e., “all appropriate relief including rehiring or reinstatement of the employee with back pay.” *Wilmot v. Kaiser Aluminum and Chem. Co.*, 118 Wn.2d 46, 55, 821 P.2d 18 (1991). The Supreme Court said that it was “not clear” whether “all appropriate relief” included emotional distress damages. *Id.* at 61. And this Court “doubt[ed]” that the “all” *in RCW 49.17.160* indicated a legislative intent “to mean all normally available damages in a tort action.” *Wilson v. City of Monroe*, 88 Wn. App. 113, 125-26, 943 P.3d 1134 (1997).

Tang tries to distinguish those cases by saying that the Courts found that the statutory schemes were not exclusive (Tang Ans. Br., at 18, 21), but that just proves the City’s point: under *Wilmot* and *Wilson*, it was because the statutory schemes—including RCW 49.17.160—likely did *not* include emotional distress damages that the Courts held that the plaintiffs could also proceed with a common law tort claim for wrongful discharge in violation of public policy. Put another way, had the statutory schemes in *Wilson* and *Wilmot*—again, one of which was RCW 49.17.160 and the other of which used the same language—actually provided for emotional distress damages, the Courts likely would have held that the statutory scheme was exclusive. “All” did *not* mean all in *Wilson* and *Wilmot*.¹

Another Supreme Court case is instructive on this point: in interpreting a statute that authorized the Public Employment Relations Commission to “prevent any unfair labor practice and to issue appropriate remedial orders” and take “such affirmative action as will effectuate the purposes and policies of this chapter, *such as the payment of damages and the reinstatement of employees,*” the Court held that the statute did “*not*

¹ In *Wilson*, the Court’s holding did not rest, as Tang argues (at 18, 21), on whether the plaintiff sufficiently pled his allegations, or whether he withdrew his “general damages” claim. In fact, the Court noted that Wilson’s decision to withdraw his claim for general damages “is not relevant to the issue of whether Wilson is entitled to initiate a claim for wrongful discharge in contravention of public policy notwithstanding other remedies available to him.” 88 Wn. App. at 126.

clearly authorize all damages that would be available in a tort action,” like emotional distress damages. *Smith v. Bates Tech. College*, 139 Wn.2d 793, 810, 991 P.2d 1135 (2000) (quoting RCW 41.56.160(1) & (2)) (emphasis added).

Moreover, while *Woodbury* involved a different statute, it involved the *same* question raised by this cross-appeal. This Court held that when a statute “enumerates several forms of relief, but does not reference emotional distress damages,” that “indicates an intent *not* to provide emotional distress damages.” *Woodbury v. City of Seattle*, 172 Wn. App. 747, 754, 292 P.3d 134 (2013), *rev. denied*, 177 Wn.2d 1018, 304 P.3d 14 (2013). Nothing in the Court’s opinion suggests that its reasoning and principles of statutory interpretation were limited to the statute at issue in that case.

Finally, Tang misses the point about statutes that allow a plaintiff to recover “actual damages.” As a general matter, when a statute includes the words “actual damages,” courts hold that the legislature intended to include emotional distress damages. *City Cross-Appeal Br.*, at 48 (collecting cases). But even the words “actual damages” are not automatically enough to authorize emotional distress damages, as the Supreme Court recently recognized. *Segura v. Cabrera*, 362 P.3d 1278, 2015 WL 6549175, at *4-5 (Wash. Oct. 29, 2015) (“actual damages has a

chameleon-like quality because the precise meaning of the term changes with the specific statute in which it is found”).

That RCW 49.17.160 says *nothing* about “emotional distress damages” or even “actual damages”—but instead enumerates the specific kinds of equitable relief available—demonstrates that the Legislature did not intend for emotional distress damages to be available. “[T]he statute must be read as a whole; intent is not to be determined by a single sentence (or, in this case, the single phrase ‘or to take such other action’).” *Cheney Sch. Dist.*, 97 Wn.2d at 121. Or, in this case, by a single word: “all.”

The statute’s stated purpose is to prevent “personal injuries and illness *arising out of conditions of employment*” by providing “*safe and healthful working conditions* for every man and woman.” RCW 49.17.010 (emphasis added). The statute’s intent is to make the workplace safe, and most of RCW 49.17 is dedicated to specifying the standards employers must meet to establish a safe workplace. Ensuring workers can raise safety issues without fear of losing their jobs is part of that statutory scheme—awarding them emotional distress damages is not.

B. Tang is not entitled to attorneys’ fees.

Tang argues that he should be awarded attorneys’ fees for responding to the City’s cross-appeal “as previously argued in Tang’s

opening brief,” which sought fees under the Equal Access to Justice Act (EAJA), RCW 4.84.340. Tang. Ans. Br., at 22. That request should be denied for the reasons given in the City’s Cross-Appeal Brief (at 41-42), chief among them that it is clear from the face of the statute that it applies only to plaintiffs who prevail in an action under the *Administrative Procedure Act*, which Tang did not bring. Tang’s continued assertion that the EAJA provides a basis for fees is frivolous and borderline sanctionable.

CONCLUSION

The City respectfully requests that the Court affirm the trial court’s order granting summary judgment and dismissing Tang’s case. If it does so, it need not reach the City’s cross-appeal. If the Court does not affirm, the City respectfully requests that the Court reverse the order denying partial summary judgment and hold that emotional distress damages are unavailable under RCW 49.17.160.

DATED: February 12, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the foregoing CITY OF SEATTLE'S REPLY BRIEF IN SUPPORT OF CROSS-APPEAL to be served *via email* on the individual listed below:

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

DATED: February 12, 2016, at Seattle, Washington.


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