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STATE OF WASHINGTON
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NO. 34458-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

SUSAN BLACK and DAVID WALKER,

Appellants,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

ROB MCKENNA
Attorney General

MARK A. ANDERSON
Assistant Attorney General
WSBA 26352
629 Woodland Square Loop S.E.
P.O. Box 40126
Olympia, WA 98504-0126
(360) 459-6600

ORIGINAL

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I. NATURE OF THE CASE

Plaintiff/Appellant was a part-time (20 hours per week) employee of the Department of Social and Health Services at the Frances Haddon Morgan Center, a residential facility for individuals with developmental disabilities and autism. Plaintiff's duties included assisting the four residents assigned to her with their daily grooming and assisting with their basic health care needs as directed by a doctor or the nursing staff.

In August 1999, a resident assigned to Plaintiff, Johnny H., began to hit himself in the head with his fist, causing bleeding. A medical doctor ordered that a hard helmet be kept on Johnny H. in order to prevent him from further injuring himself. Plaintiff was notified of the doctor's order, and was directed to make sure that Johnny kept his helmet on. Plaintiff failed to comply with the doctor's order. Johnny was observed on several occasions without his helmet during times that Plaintiff was responsible for him.

Superintendent Carol Kirk decided to impose a one-week (20 hour) suspension on Plaintiff because of her failure to properly care for Johnny. Superintendent Kirk also decided that Plaintiff should be assigned to a different work unit with a different schedule where she would no longer be responsible for Johnny's care. After the one-week suspension, Plaintiff never returned to work. She initially exercised her civil service rights to

challenge the suspension by appealing to the Personnel Appeals Board. However, before her appeal was heard, she quit her job, withdrew her civil service appeal, and filed this lawsuit. In her complaint, Plaintiff asserts three claims: (1) violation of the National Labor Relations Act, (2) constructive wrongful discharge, and (3) outrage. Facing summary judgment, Plaintiff abandoned her claims for violation of the National Labor Relations Act and outrage. Verbatim Report of Proceedings (VRP) at 10. After considering the parties' arguments, the trial court dismissed Plaintiff's only remaining claim, constructive wrongful discharge.¹ Plaintiff timely appealed.

II. RESTATEMENT OF THE ISSUE

Was Plaintiff's claim of constructive wrongful discharge in violation of public policy properly dismissed when: (1) she voluntarily resigned her position; (2) she failed to establish the elements of a wrongful termination in violation of public policy claim after she sought to protect her own private interests under the terms of the collective bargaining agreement; and (3) primary jurisdiction for this personnel dispute was with the Personnel Appeals Board?

¹ Plaintiff admits in her Brief to this Court that the National Labor Relations Act claim is pre-empted by federal law and that her claim for outrage is "melded into discharge claim." Brief of Appellant (Appellant Br.) at 2. Thus, the only remaining issue is whether the trial court properly dismissed Plaintiff's claim of constructive wrongful discharge.

III. RESTATEMENT OF THE CASE

Plaintiff was a part-time (20 hours per week) employee of the Department of Social and Health Services at the Frances Haddon Morgan Center, a residential center in Bremerton for individuals with developmental disabilities and autism. Plaintiff's position at the Center was Attendant Counselor, where she was responsible to care for the developmentally disabled residents assigned to her. Clerk's Papers (CP) at 47.

Each Attendant Counselor is typically assigned to provide daily care to four residents. The Attendant Counselors assist their assigned residents with dressing, grooming, and similar daily care. Attendant Counselors also assist with the safety and basic healthcare needs of the Center's developmentally disabled residents as directed by a doctor or the nursing staff. CP at 47.

In August 1999, resident Johnny began to hit himself in the head with his fist, causing bleeding. CP at 40. His self-injurious behavior was monitored by Sherri Wilson, a Registered Nurse at the Center. On August 25, 1999, RN Wilson observed that Johnny had developed a bleeding open wound about 2 1/2 inches in diameter. CP at 40. Wilson conferred with Dr. Lila Aflatooni, who ordered that Johnny wear a helmet to protect him from further injuring himself. CP at 40. Wilson explained

to Plaintiff that use of the helmet was necessary for Johnny's well-being. CP at 40.

RN Wilson also notified Plaintiff's second-line supervisor, Jamie Stevens, of the doctor's order so that she, in turn, could provide notice to all of Johnny's attendants, including those on other shifts, that Johnny must wear his helmet. CP at 41. Ms. Stevens issued a memorandum stating that Johnny "must wear the helmet through Friday. All staff MUST comply with the doctor's order." CP at 41-42, 45, 47-48, 53.

In her deposition, Plaintiff admitted that when she came to work the next morning (August 26, 1999) she read the written directive that Johnny was to wear the hard helmet. CP at 67, lines 16-20. Plaintiff also admitted she understood that Johnny was to wear his helmet. CP at 70, lines 12-25.

Nevertheless, at approximately 7:00 a.m. on August 26, 1999, Johnny came into the dining room for breakfast without his helmet on. CP at 42. RN Wilson noticed that blood was oozing from the crown area of Johnny's head. Wilson observed that Plaintiff was present and was standing close to Johnny, but made no effort to put the helmet on. Wilson asked Plaintiff why Johnny was not wearing his helmet. Wilson explained that it was imperative that Johnny wear his helmet and repeated her

direction several times. Wilson then personally placed the helmet on Johnny's head. CP at 42.

After momentarily leaving the dining room to attend to other duties, Wilson re-entered the dining room and saw that the helmet was again not on Johnny's head. CP at 42. Wilson also noticed that Plaintiff was no longer in the dining room. CP at 42.

Later that same morning, Wilson observed for the third time Johnny without his helmet on. CP at 43. She again personally placed the helmet on Johnny. CP at 43. At that time it was apparent to Wilson that Plaintiff was failing in her duty to keep the helmet on Johnny's head as had been directed by Doctor Aflatooni. CP at 43.

Plaintiff was responsible as an attendant for Johnny and three other residents. Plaintiff admitted in her declaration that she was responsible to provide care for Johnny and only three other clients. CP at 112, lines 1-2. In contrast, Wilson was responsible as a primary care nurse to attend to the nursing needs of over fifty residents. CP at 43. Wilson could not continue to monitor Johnny closely all day without neglecting her other duties. CP at 43. Wilson felt it was unacceptable and dangerous for Johnny to not wear his helmet. Johnny already had an injury to his head, and, in Wilson's professional nursing judgment, his injury would worsen if he was allowed to continue to hit himself. CP at 43. Although it had become

apparent to Wilson that Plaintiff was failing to keep Johnny's helmet on, Wilson had no formal supervisory authority over Plaintiff or the other Attendant Counselors. CP at 43. Therefore, Wilson conferred with the attendant counselor shift charge and informed her that Plaintiff was failing to implement the medical directives. Wilson explained that Johnny needed to be monitored closely by an attendant who would make sure that his helmet stayed on to keep his wound protected. CP at 43. The person who was in charge of Attendant Counselors during that shift agreed to move Johnny to a different area where a different attendant other than Plaintiff could be assigned to care for Johnny. CP at 43-44.

Plaintiff admitted in her declaration that Johnny repeatedly removed his helmet. CP at 111, line 8; 112, lines 9-10; 113, lines 15-16. Plaintiff also admitted that Johnny had been hitting himself. CP at 110, line 14. However, after Johnny was moved to the care of a different attendant the problems ceased--the helmet remained on Johnny's head. CP at 44.

Superintendent Kirk was notified that Plaintiff had not followed the doctor's order that Johnny wear a hard helmet. CP at 47. Superintendent Kirk was very concerned. CP at 48. Before taking any administrative action, however, she decided to personally investigate to make sure she had a clear understanding of the facts. CP at 48.

Superintendent Kirk met with each person who had witnessed the events of August 25 and 26, 1999 involving Johnny. CP at 48. She interviewed RN Wilson. CP at 48. She also interviewed another RN who was present on August 25, 1999. CP at 49. She interviewed the lead Attendant Counselors for both the graveyard shift and the day shift. CP at 49. She also interviewed Plaintiff on two dates, October 12 and October 19, 1999. CP at 49. After completing her interviews and reviewing the medical records, Superintendent Kirk determined that Plaintiff had committed misconduct and that a one-week suspension without pay was the appropriate sanction.² CP at 50.

Superintendent Kirk wrote a letter to Plaintiff providing notice of the disciplinary action, stating both the factual basis for the discipline and the reasons for the level of discipline chosen. CP at 50. While the disciplinary letter conveyed to Plaintiff the serious nature of the charges, Kirk decided not to impose a stronger level of discipline, such as a longer suspension, a demotion or dismissal, because her review of Plaintiff's personnel file indicated that Plaintiff had been employed since February 1991 and had no previous disciplinary actions. CP at 50. Superintendent Kirk reminded Plaintiff in the disciplinary letter that she had a right under the state civil service law, WAC 356-34, to appeal the one week

² The one-week suspension resulted in a monetary sanction of a loss of 20 scheduled hours of pay.

suspension to the Personnel Appeals Board. CP at 50. Superintendent Kirk also reminded Plaintiff that she had a right to file a grievance under Article 25 of the Collective Bargaining Agreement with her union, the Washington Federation of State Employees. CP at 51.

At the same time that Superintendent Kirk took the disciplinary action, she also made the decision that Plaintiff should not continue to provide care to Johnny. CP at 51. Exercising her authority as the executive officer administratively responsible for all operations at the Frances Haddon Morgan Center, Superintendent Kirk decided to transfer Plaintiff to a vacant position. CP at 51. The vacant position was a part time position on day shift, but with different days off. In the new position, Ms. Black would continue to receive a minimum of at least 20 work hours per week. CP at 51.

After the one week (20 hour) suspension without pay concluded, Plaintiff did not return to work at the Center. CP at 51. She called in and left a recorded telephone message with an administrative assistant indicating she would no longer be coming to work. CP at 51. She did not speak with Superintendent Kirk to indicate why she was quitting her job. CP at 52.

Plaintiff admitted in her deposition that she had looked for, and found, a new job at Peninsula Services. CP at 66. At the job interview,

she told her new prospective employer that the reason she was leaving her position with the Department of Social and Health Services was because "it was time to move on." CP at 66, lines 15-16.

Plaintiff exercised her right under the state civil service law and appealed her suspension to the Washington State Personnel Appeals Board. CP at 52. However, Plaintiff withdrew her case before the appeal was heard. CP at 52.

IV. STANDARD OF REVIEW

Review of an order granting summary judgment is de novo, with the appellate court engaging in the same inquiry under CR 56 as the trial court. Tyrrell v. Farmers Ins. Co. of Washington, 140 Wn.2d 129, 132-33, 994 P.2d 833 (2000). The trial court can be affirmed on any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. Piper v. Department of Labor & Indus., 120 Wn. App. 886, 890, 86 P.3d 1231 (2004).

V. SUMMARY OF ARGUMENT

Plaintiff has failed to show that she was constructively discharged, and she has failed to establish the prima facie elements of a claim of wrongful termination in violation of public policy.

First, Plaintiff fails to rebut the presumption that her resignation was voluntary. Thus, Plaintiff's claim of constructive discharge fails. She

fails to show (1) that her employer deliberately made her working conditions so intolerable that a reasonable person would have felt compelled to resign, and (2) that she resigned because of objectively intolerable working conditions.

Second, Plaintiff fails to establish any of the four elements of wrongful termination in violation of public policy. (1) Plaintiff fails to show that a clear public policy is implicated. She only seeks to protect her own personal interests rather than a legitimate public policy. (2) Plaintiff fails to show that a public policy would be jeopardized because she had available remedies to challenge her discipline and reassignment. (3) Plaintiff fails to show that her union activity caused her termination. (4) Plaintiff fails to show that the legitimate reasons for the one week suspension stated by the employer are pretext. That is, she fails to show an absence of justification.

Third, there is no cause of action for wrongful schedule change in violation of public policy.

Fourth, primary jurisdiction for challenging civil service discipline lies with the Personnel Appeals Board, not the judiciary.

The trial court properly granted summary judgment. That decision should be affirmed.

VI. ARGUMENT

A. The Analytical Framework For Constructive Wrongful Discharge Claims

Washington law does not recognize a cause of action for "constructive discharge"; rather, Washington law recognizes a cause of action for wrongful discharge which may be either express or constructive. Snyder v. Med. Serv. Corp., 145 Wn.2d 233, 238, 35 P.3d 1158 (2001) (citing Riccobono v. Pierce County, 92 Wn. App. 254, 263, 966 P.2d 327 (1998)).

Where a plaintiff is not actually terminated, but instead resigns, Washington courts first analyze whether there was a constructive discharge before considering whether the discharge was wrongful. If the plaintiff was not constructively discharged, the analysis ends at that point, in defendant's favor. Only if the plaintiff was constructively discharged will the Court then decide whether the constructive discharge was also wrongful. Korslund v. DynCorp Tri-Cities Services, Inc., 121 Wn. App. 295, 318-319, 88 P.3d 966 (2004).

B. Plaintiff's Claim Of Constructive Discharge Fails

1. Plaintiff's Voluntary Resignation Defeats Her Claim Of Constructive Discharge

"A resignation is presumed to be voluntary and the claimant bears the burden of introducing evidence to rebut that presumption." Molsness v. Walla Walla, 84 Wn. App. 393, 398, 928 P.2d 1108 (1996). The presumption that a resignation is voluntary applies even when an employee is threatened with termination for cause, where there is good cause for termination. Travis v. Tacoma Public School Dist., 120 Wn. App. 542, 551, 85 P.3d 959, 964 (2004); Nielson v. AgriNorthwest, 95 Wn. App. 571, 576, 977 P.2d 613 (1999). Further, the employee's subjective belief that she had no choice but to resign is irrelevant. Travis, 120 Wn. App. at 51; Molsness, 84 Wn. App. at 399.

Plaintiff here fails to rebut the presumption that her resignation was voluntary. The objective facts demonstrate that Plaintiff voluntarily resigned her position. She was not forced to quit.

After Plaintiff was disciplined for the first time and after she was reassigned to a different work schedule in March 2000, Plaintiff quit her job. In the past, management had demonstrated a willingness to work with Plaintiff to resolve disagreements. Plaintiff admits that she had exercised her rights under the collective bargaining agreement previously on several

occasions, and had received a favorable outcome each time. In the facts section of her complaint, Plaintiff alleges that she received "Personnel Conduct Reports" and a letter of reprimand in 1998 that she felt were unjustified. CP at 5, Fact ¶ 2.³ She also complains that she was scheduled to work over the holidays (Thanksgiving Day and Christmas Day) in November 1998. CP at 5, Fact ¶ 4.⁴ However, she admits that she filed collective bargaining agreement grievances regarding these matters. CP at 5, Fact ¶ 5. Plaintiff acknowledges in her complaint that the letter of reprimand was removed from her personnel file. CP at 5-6, Fact ¶ 6. She also admitted in her deposition that the issue regarding working on Thanksgiving Day and Christmas Day was resolved in her favor. CP at 69, lines 22-25.

³ A "Personnel Conduct Report" is not a corrective or disciplinary action, but is merely the means by which the Department of Social and Health Services initiates an investigation into allegations of employee misconduct. If the investigation results in a finding that misconduct occurred, disciplinary action may be taken. However, if the investigation concludes with no finding of employee misconduct, then no disciplinary action will be taken. Here, although an investigation was initiated regarding an allegation that Plaintiff had inappropriately cut window blinds in 1998, no disciplinary action was taken.

⁴ Plaintiff, a part-time employee, complained of being scheduled to work on Thanksgiving and Christmas 1998, despite the fact that she had on the previous years worked the holidays so that full-time employees could be with their families. Although Plaintiff complains of her hours being reduced, here Plaintiff turned down hours being offered to her by management.

In each of these instances, management had demonstrated a willingness to work with Plaintiff to resolve disagreements.⁵ But, after Superintendent Kirk exercised her managerial authority in March 2000 under the state civil service law, imposing discipline upon Plaintiff for the first time and reassigning her to a different work schedule, Plaintiff ignored her available remedies and quit her job. While Superintendent Kirk believed that the disciplinary action was appropriate, she stated in her declaration that she was willing to change the scheduled days off for the new position to accommodate Plaintiff. CP at 51. Management was willing to work with Plaintiff. Plaintiff, however, made no effort to work with management. Rather, she looked for a new job, found one, and quit. When she quit, she did not even speak with Superintendent Kirk about her reasons for doing so. She simply left a voice mail message with one of

⁵ The events of August through December 1998 occurred 16 to 20 months prior to the time that Plaintiff quit her job in April 2000. Given the lack of temporal proximity, Plaintiff cannot establish that the events of 1998 created an objectively intolerable working environment or forced her to resign. Logically, if the working environment was "intolerable" in 1998, Plaintiff could not have continued working at the Center until 2000. Thus, Plaintiff cannot establish that she quit her job in 2000 because of events that occurred in 1998. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-274, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001); Washington v. Boeing, 105 Wn. App. 1, 15, 19 P.3d 1041 (2000). The 19-month passage of time dispels any inference of a nexus. Plaintiff fails to establish that there is any connection between her union activity in 1998 and the disciplinary action imposed in 2000. Furthermore, Plaintiff cannot show that the events of 1998 were deliberately orchestrated by her employer to make working conditions so intolerable that a reasonable person would have felt compelled to resign, as required by Bulaich v. AT&T Information Systems, 113 Wn.2d 254, 260, 778 P.2d 1031 (1989).

Superintendent Kirk's administrative assistants indicating she would no longer be coming to work. CP at 51.

The voluntariness of Plaintiff's resignation is supported by the fact that plaintiff did not pursue her right under the civil service law to appeal the discipline imposed on her to the Personnel Appeals Board. As a civil service employee, Plaintiff was entitled to the protections offered by the civil service law, including the right to make her employer prove the legitimacy of the one-week suspension at a hearing before the Personnel Appeals Board. WAC 356-34. Superintendent Kirk, as the appointing authority, had the burden of proving the charges. WAC 358-30-170. If Plaintiff had prevailed before the Personnel Appeals Board, she would have been entitled to restoration of all lost pay and to be restored to her former position. WAC 358-30-180. Superintendent Kirk reminded Plaintiff in the suspension letter of her right to appeal to the Board. CP at 50-51. However, although Plaintiff initially appealed the suspension, she withdrew her case before the appeal was heard on its merits. CP at 52. Thus, her suspension became final. Plaintiff's failure to pursue her appeal to the Personnel Appeals Board undermines any argument her resignation was not voluntary.

Plaintiff's voluntary resignation defeats her claim of constructive discharge.

2. Plaintiff Fails To Show (a) A Deliberate Act By The Employer That Made Her Working Conditions Intolerable, And (b) That She Resigned Because Of Objectively Intolerable Working Conditions

To establish constructive discharge, a plaintiff must show: "(1) a deliberate act by the employer that made [her] working conditions so intolerable that a reasonable person would have felt compelled to resign; and (2) that he or she resigned because of the conditions and not for some other reason." Washington v. Boeing, 105 Wn. App. 1, 15, 19 P.3d 1041 (2000).

a. Plaintiff Fails To Show A Deliberate Act By The Employer That Made Her Working Conditions Intolerable

A resignation is involuntary or coerced only if the employer "deliberately makes working conditions so intolerable that a reasonable person would have felt compelled to resign in the circumstances" (emphasis in original). Bulaich v. AT&T Information Systems, 113 Wn.2d 254, 260, 778 P.2d 1031 (1989). To establish "intolerable" working conditions, a plaintiff must show "aggravated circumstances or a continuous pattern of discriminatory behavior." Washington v. Boeing, 105 Wn. App. at 16. Plaintiff's subjective belief is not determinative of whether the working conditions are intolerable:

Duress is not measured by the employee's subjective evaluation of a situation. Rather, the test is an objective one. While it is possible plaintiff, herself, perceived no

viable alternative but to tender her resignation, the record evidence supports [the Civil Service Commission's] finding that plaintiff chose to resign . . . rather than challenge the validity of her proposed discharge for cause. The fact remains, plaintiff *had a choice*. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation.

Molsness, 84 Wn. App. at 398 (quoting Christie v. United States, 207 Ct. Cl. 333, 518 F.2d 584, 587 (Ct. Cl. 1975) (emphasis in original)).

Washington appellate courts have affirmed summary judgment decisions against government-employee plaintiffs who resigned under threat of performance related job loss or dismissal. Travis v. Tacoma Public School Dist., 120 Wn. App. 542, 551-52, 85 P.3d 959 (Div. 2, 2004); Molsness, 84 Wn. App. at 398.

In 2004, this Division considered a case brought by a school teacher who had been performing poorly and who felt threatened by the school district's threats that it may not renew his contract. Travis, 120 Wn. App. at 547. The school teacher submitted a resignation. In his subsequent lawsuit, he claimed that his resignation was coerced and involuntary. This Division rejected the school teacher's argument, holding that the teacher failed to overcome the presumption he resigned voluntarily. Id. at 552. The court held that "a resignation is not rendered involuntary because an employee tenders his resignation to avoid

termination for cause." Id. (citing Molsness, 84 Wn. App. at 399). This court reasoned that while plaintiff "may have subjectively believed he had to resign to avoid a nonrenewal, objectively he had the choice to remain in his current position and ask [management] to reconsider." Id.

Here, Plaintiff's case is weaker than either Travis or Molsness. Plaintiff was not threatened with termination. She was not facing the possibility of losing her job. She received only a one-week suspension (20 hours) without pay and was subjected to a change in her days off. Superintendent Carol Kirk had good reason for imposing the disciplinary action and schedule change, given her finding that Plaintiff failed to comply with a doctor's order issued for the purpose of preventing a developmentally disabled client from injuring himself. Moreover, Superintendent Kirk stated in her declaration that she was willing to change the scheduled days off for the new position to accommodate Plaintiff. CP at 51. Plaintiff's weekly hours were not reduced as a consequence of the schedule change. CP at 51. Given Plaintiff's poor performance and misconduct, Kirk acted reasonably. Kirk's actions cannot be characterized as creating intolerable working conditions for Plaintiff, nor would they have caused a reasonable person to feel compelled to resign.

Plaintiff offers no direct evidence that Superintendent Kirk intentionally made her working environment intolerable. At best, Plaintiff offers only subjective assertions and argumentative legal conclusions, which should be stricken or disregarded. Speculation, argumentative assertions or conclusory statements, even if set forth in affidavits or declarations, are insufficient to create an issue of fact and may not be considered. Chen v. State, 86 Wn. App. 183, 191, 937 P.2d 612 (1997). "A party to a lawsuit cannot ward off summary judgment with an affidavit or deposition based on rumor or conjecture." Public Utility District No. 1 v. WPPSS, 104 Wn.2d 353, 360-61, 705 P.2d 1195 (1985).

As stated in Molsness, Plaintiff had a duty to stand pat and fight, rather than quit. 84 Wn. App. at 398. Even if Plaintiff perceived her situation as unpleasant, that does not obviate the voluntariness of her resignation. Id. Plaintiff did not pursue her right to appeal to the Personnel Appeals Board. She did not file a union grievance contending that her position and shift had been improperly changed. She admitted in her deposition that she did not inquire with the Human Resources Department about whether other Attendant Counselor positions might be available at other facilities operated by the Department of Social and Health Services. CP at 68, lines 7-10. She did not speak with Superintendent Kirk about her intent to resign. CP at 52. She did not seek

resolution of her disagreement with management. After the 20-hour suspension was over and Plaintiff was scheduled to return to work, Plaintiff failed to return to work. Instead, she left a voice mail message with an administrative assistant indicating she was quitting. CP at 51. She just quit. She did not stand pat and fight.

Plaintiff argues in her brief that the trial court erred because it applied the holding of Molsness that resignations are presumed to be voluntary, rather than applying Christensen v. Grant County Hospital Dist. No. 1, 152 Wn.2d 299, 96 P.3d 957 (2004). Appellant Br. at 6. Plaintiff's arguments fail.

First, Plaintiff's reliance on Christensen is misplaced. In Christensen, the primary issue was whether collateral estoppel bars relitigation of the issue of whether plaintiff had been discharged in retaliation for union activities when that question had already been heard by the Public Employment Relations Commission. The question of whether a resignation was voluntary or involuntary was not considered. There was no resignation in Christensen. Christensen is simply not on point.

Second, Plaintiff's conclusory assertion that Molsness does not control is incorrect. Plaintiff offers no clear argument why Molsness is purportedly inapplicable. Despite her argumentative assertion, it cannot

be refuted that both Travis and Molsness are still good law. The law still places upon Plaintiff the burden of demonstrating that her resignation was involuntary. Plaintiff had an obligation to stand pat and fight. She did not do so.

While Plaintiff implicitly argues that she had no other option but to resign, her claim must fail as a matter of law. As recognized in Molsness, duress is not measured by a subjective evaluation, but, rather, an objective test. As in Travis and Molsness, the Plaintiff in this case had a choice – she could stand pat and fight. But, she chose not to. Moreover, Plaintiff had the right to make her employer prove both the legitimacy of the disciplinary action and the level of discipline imposed by pursuing her appeal to the Personnel Appeals Board. She abandoned that right. She withdrew her case before her appeal was heard on the merits. She offers no explanation for why she withdrew her appeal. After Plaintiff withdrew her appeal, the disciplinary action became final. If the plaintiffs' resignations in Travis and Molsness were voluntary, the Court in this case should be logically compelled to conclude that the Plaintiff's resignation was voluntary. Plaintiff fails to show that management forced her to quit or deliberately made her working conditions intolerable.

b. Plaintiff Fails To Show That She Resigned Because Of Objectively Intolerable Working Conditions

To prevail on her claim of constructive discharge, Plaintiff must establish that she resigned because of intolerable working conditions and not for some other reason. Washington v. Boeing, 105 Wn. App. 1, 15, 19 P.3d 1041 (2000). Here, however, Plaintiff admitted in her deposition that she told her new employer that she was leaving "because it was time to move on." CP at 66, lines 10-16. This statement says nothing about leaving because of intolerable working conditions. A plaintiff cannot create an issue of fact by submitting materials that contradict her own deposition. Selvig v. Caryl, 97 Wn. App. 220, 225, 983 P.2d 1141 (1999).

C. Plaintiff Fails To Establish The Prima Facie Elements Of A Claim Of Wrongful Termination

Even if Plaintiff could demonstrate constructive discharge (which she has not), her claim still fails because she fails to present evidence establishing the elements of wrongful discharge, as she must do to survive summary judgment. Snyder, 145 Wn.2d at 238, 35 P.3d at 1161. Notably, wrongful termination in violation of public policy is an intentional tort. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 177, 876 P.2d 435, 445 (1994). A plaintiff must establish the wrongful intent to discharge in contravention of public policy. Id.; Hibbert v. Centennial Villas, Inc., 56 Wn. App. 889, 894-95, 786 P.2d 309 (1990).

A claim for wrongful termination in violation of public policy requires a plaintiff to prove four elements:

- The existence of a clear public policy (*clarity* element).
- That discouraging the conduct would jeopardize the public policy (*jeopardy* element).
- That plaintiff's public-policy-linked conduct caused the termination (*causation* element).
- That the employer's justification for the termination was pre-textual (*absence of justification* element).

Hubbard v. Spokane County, 146 Wn.2d 699, 707, 50 P.3d 602 (2002); see also Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 941, 913 P.2d 377 (1996). A plaintiff must prove all four elements of the wrongful discharge claim. Ellis v. City of Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2000).

Here, Plaintiff asserts in a conclusory manner that she has established a prima facie case. Appellant Br. at 16. However, her briefing provides no element-by-element analysis regarding how each of the four elements are satisfied. She leaves the court with the task of culling through the record to find evidence to support her conclusory assertions. Plaintiff's failure to provide an adequate analysis prejudices the Defendant and unnecessarily burdens the Court. On summary judgment, it remains the plaintiff's burden to designate the specific facts showing there is a genuine issue for trial. Hill v. BCTI Income Fund-I, 144 Wn.2d 172,

185-86, 23 P.3d 440 (2001). The Seventh Circuit has held that judges need not paw over the files without assistance from the parties. Huey v. UPS, Inc., 165 F.3d 1084, 1085 (7th Cir. 1999). Similarly, the Fifth Circuit has held that parties must designate specific facts and their location in the record. Nissho-Iwai Corp. v. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988). Washington courts should not be treated less favorably.

Despite her argumentative legal assertion to the contrary, Plaintiff fails to establish the four elements of a wrongful discharge claim.

1. Plaintiff Fails To Establish The Clarity Element

An employee's claims based on vague public policy mandates are not sufficient to establish a clear public policy. See Vargas v. State, 116 Wn. App. 30, 36, 65 P.3d 330 (2003). Here, Plaintiff has failed to identify a clear public policy implicated in this case. Nowhere in her brief to this court does Appellant/Plaintiff provide a clear statement of what public policy her claim is based upon, nor does she cite a specific statute. Plaintiff does argue in her brief that the holding of Christensen should be followed. Appellant Br. at 6, 12-14 (citing Christensen v. Grant County Hospital Dist. No. 1, 152 Wn.2d 299, 311, 96 P.3d 957 (2004)). In that case, plaintiff Christensen was asserting a public policy violation under RCW 49.32.020. Christensen, 152 Wn.2d at 304. However, the Washington Supreme Court expressly held long ago that RCW 49.32 is

not applicable to public employment. Port of Seattle v. International Longshoremen's & Warehousemen's Union, 52 Wn.2d 317, 321 324 P.2d 1099 (1958).⁶

Although Plaintiff's complaint referenced the National Labor Relations Act, that statute is also not applicable to state government employment. At summary judgment, Plaintiff abandoned her claim for violation of the National Labor Relations Act.

Although Plaintiff makes amorphous assertions about "union activity," the actual events to which Plaintiff refers were merely her efforts to protect her own personal interests under the terms of a collective bargaining agreement's grievance procedure. Plaintiff does not point to any noble efforts on her part to further the public good.

The question of what constitutes a clear mandate of public policy is one of law, and the employee bears the burden of establishing the existence of a clear mandate of public policy and that her discharge contravenes or jeopardizes that public policy. Vargas v. State, 116 Wn. App. 30, 35, 65 P.3d 330, 333 (2003); Gardner, 128 Wn.2d at 941, 913 P.2d 377. The policy must affect or protect the interest of the public collectively, not the purely private or personal interests of the

⁶ The rights and privileges of public employees are governed by statute. Yantsin v. City of Aberdeen, 54 Wn.2d 787, 788-789, 345 P.2d 178 (1959). The specific statute controlling the right of state government employees to engage in collecting bargaining is RCW 41.56, not RCW 49.32.

individual employee. "In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively." Dicomes v. State, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989). "[W]rongful discharge is not designed to protect an employee's purely private interest in his or her continued employment" Smith v. Bates Technical College, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000); see also Farnam v. CRISTA Ministries, 116 Wn.2d 659, 671-72, 807 P.2d 830 (1991) (plaintiff must be seeking to "further the public good, and not merely private or proprietary interests").

Plaintiff fails to establish the clarity element. Plaintiff's failure to establish the clarity element (and to identify the specific statute upon which she relies as a basis for the public policy that is arguably implicated) leaves the state defendant and this court guessing.⁷

2. Plaintiff Fails To Establish The Jeopardy Element

Assuming *arguendo* that Plaintiff's amorphous assertions about the filing of grievances to protect her own interests under a collective bargaining agreement (union activity?) establish the clarity element, Plaintiff's claim must nevertheless fail because she fails to establish the jeopardy element.

⁷ Plaintiff's failure to identify a clear public policy leaves analysis of the remaining elements difficult.

If a public policy exists, but is not jeopardized by the discharge, the wrongful discharge claim must fail. Plaintiff must show that she "engaged in particular conduct and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy." Gardner, 128 Wn.2d at 945. This burden requires plaintiff to "argue that other means for promoting the policy . . . are inadequate." 128 Wn.2d at 945. Plaintiff must also "show how the threat of dismissal will discourage others from engaging in the desirable conduct." Gardner, 128 Wn.2d at 945. Plaintiff here fails to make these required showings.

In her brief, Plaintiff makes reference to the court of appeals decision in Korslund v. DynCorp. See Appellant Br. at 14. Specifically, Plaintiff cites the court of appeals finding that two of the plaintiffs had not made a prima facie showing but that one plaintiff, Korslund, did. Appellant Br. at 14. Plaintiff then analogizes her situation to that of Korslund. Appellant Br. at 15. Plaintiff neglects to mention, however, that, upon review, the Supreme Court held that the lower court's decision "confused two distinct legal issues," and conflicted with its earlier decision in Hubbard, 146 Wn.2d at 717. Korslund v. DynCorp Tri-Cities Services, Inc., 156 Wn.2d 168, 183, 125 P.3d 119 (2005). The Supreme Court explicitly ruled that, as a matter of law, the plaintiffs (including Korslund) had not satisfied the jeopardy element of the tort of wrongful

discharge in violation of public policy because there was an adequate alternative means of promoting the public policy on which the plaintiffs were relying. Korslund, 156 Wn.2d at 181.

(It should also be noted that the Korslund decision is not on point. The primary issue in that case was "whether a claim of wrongful constructive discharge in violation of public policy can be brought where the employee 'permanently leaves' the job on medical leave but does not quit or resign." Korslund, 156 Wn.2d at 177. Here, it is undisputed that the plaintiff quit her job.)

In this case, Plaintiff fails to establish that other means for promoting her claimed policy interests are inadequate. Specifically, it is undisputed that Plaintiff had a right to appeal to the Personnel Appeals Board. WAC 356-34. She was reminded of this right by Superintendent Kirk in her suspension letter. CP at 51. She undoubtedly recognized her right because she did file an appeal. However, she inexplicably withdrew her case before a hearing on the merits occurred. It is also undisputed that Plaintiff had a right under Article 25 of the Collective Bargaining Agreement (CBA) with the Washington Federation of State Employees to file a grievance. She was also reminded of this right by Superintendent Kirk in her suspension letter. CP at 51. Ironically, it cannot be disputed that Plaintiff was aware of her right to file grievances. She had done so

19 months prior to her suspension and she asserted in her complaint that this "union activity" was the basis for her constructive discharge. Plaintiff fails to make any argument, let alone a showing, that these other means of protecting her claimed policy interests are inadequate.

Also somewhat ironic is Plaintiff's insistence that Christensen applies, and was not properly followed, by the trial court in this case. The primary issue in Christensen was whether collateral estoppel barred relitigation of a case that had already been litigated as a union Unfair Labor Practice charge before the Public Employment Relations Commission. Here, however, nothing in the record demonstrates that Plaintiff, through her union, ever filed an unfair labor practice charge. If plaintiff had been mistreated for her union activity, she would have had a right to file an unfair labor practice charge just as plaintiff Christensen did. RCW 41.56.140. Plaintiff, however, fails to make any argument, or showing, that her right to file an unfair labor practice charge was inadequate to protect a public policy right to engage in union activity. Because Plaintiff fails to makes this required showing, she fails to establish the jeopardy element. Gardner, 128 Wn.2d at 945.

Plaintiff contends in her brief that "the Personnel Appeals Board did not have the authority to hear claims of violation of the collective bargaining agreement." Appellant Br. at 5. She is incorrect. This

Division ruled 13 years ago that the Personnel Appeals Board has authority to consider all defenses raised by an employee in an appeal of a disciplinary matter. Goodman v. Employment Security, 69 Wn. App. 98, 102, 104, 847 P.2d 29 (1993). Plaintiff had a right to appeal her suspension-without-pay to the Personnel Appeals Board. She had the right to argue that the suspension was retaliation for her union activity, or raise any other argument or legal theory she deemed appropriate. She did not pursue that right.

Plaintiff makes no showing that these other means of protecting her right to engage in union activity (if indeed, that public policy is implicated) are inadequate, as required by Gardner, 128 Wn.2d at 945. Plaintiff abandoned her rights under the CBA and the state civil service law. She did not pursue a union grievance. She did not pursue a Personnel Appeals Board appeal. She did not, through her union, pursue an unfair labor practice charge. She fails to establish the jeopardy element. She makes no showing that any inability on her part to bring a wrongful termination action to protect her personal interests jeopardizes the ability of other citizens from vigorously defending legitimate public policy interests.

3. Plaintiff Fails To Establish The Causation Element

To prove causation, a plaintiff must prove that her public-policy-linked conduct actually caused her termination. Gardner, 128 Wn.2d at 941. It is not enough to merely allege causation; the plaintiff must set forth specific facts that demonstrate causation. See Smith v. Employment Sec. Dep't, 100 Wn. App. 561, 569, 997 P.2d 1013 (2000). The plaintiff must establish facts showing "the wrongful intent to discharge in contravention of public policy." Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 177, 876 P.2d 435 (1994). Further, a plaintiff must "present sufficient evidence of a nexus between his discharge and alleged policy violation." Havens, 124 Wn.2d at 177-79 (Supreme Court affirming trial court's determination that plaintiff failed to present sufficient evidence of such a nexus).

Here, Plaintiff fails to provide any factual evidence of wrongful intent on the part of Department management to discharge her in contravention of public policy. Nor does she show a nexus between her discharge and the alleged policy violation. The reasons stated by Plaintiff in her deposition as to why she felt that she was "forced to quit" fail to establish causation or wrongful intent on the part of management. When asked on several occasions about *why* the Superintendent allegedly wanted to terminate Plaintiff, the best that Plaintiff could articulate was that "she

did not like me." While Plaintiff's assertion is wholly unsupported by evidence, even if it is true it does not establish a nexus with a public policy issue.

Plaintiff asserts that she was forced to quit because she exercised rights under the union collective bargaining agreement. Appellant Br. at 5, 12, 15-16. However, in her briefing before the trial court, she conceded that there may be an issue as to whether she could establish the "causal connection" element. CP at 106, line 19.

Plaintiff offers no direct evidence that she was forced to quit because she filed grievances under the collective bargaining agreement. Plaintiff fails to point to any admission of retaliatory anti-union animus made in the multiple depositions or written interrogatories that occurred during discovery. The declarations of Vi Schaaf and Gloria Tyler offered by Plaintiff provide no evidence of retaliatory anti-union animus. Other than her own conclusory assertions (which should be stricken), Plaintiff offers no evidence of a nexus or causal link between her resignation in 2000 and her filing of a grievance under the collective bargaining agreement in 1998 (or any other amorphous "union activity"). Speculation, argumentative assertions, or conclusory statements, even if set forth in affidavits or declarations, are insufficient to ward off summary

judgment and may not be considered. Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

Finally, the long period of time between Plaintiff's grievance and her resignation suggests that there was no causal link. Plaintiff's grievance was filed on August 28, 1998. CP at 131-32. However, Plaintiff's one-week suspension did not occur until March 2000 – 19 months later. CP at 54. She resigned a short time later. This 19 month passage of time dispels any inference of causation.

A significant passage of time between a complaint and an alleged adverse action is less likely to suggest retaliation, whereas a close proximity, coupled with evidence of satisfactory supervisory evaluations and work performance, would suggest a causal connection. Wilmot v. Kaiser Aluminum and Chemical Corp., 118 Wn.2d 46, 69, 821 P.2d 18, 29 (1991). To support an inference of retaliatory motive or causation, the adverse action must have occurred fairly soon after the protected activity. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002). The United States Supreme Court, citing cases holding that three-month and four-month time lapses were insufficient to infer causation, held that a 20-month lapse, by itself, suggests no causation at all. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-274, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001). See also Francom v. Costco Wholesale Corp., 98 Wn. App. 845,

862-63, 991 P.2d 1182 (2000) (passage of 15 months between complaint and adverse action shows no proximity in time nexus between the two). Here, the 19-month passage of time dispels any inference of causation.

4. The Employer Has Articulated Legitimate Reasons For Imposing A One Week (20 Hour) Suspension Without Pay, And Plaintiff Fails To Show That Those Reasons Were Pretext, i.e., Plaintiff Fails To Establish The Absence Of Justification Element

When a defendant articulates a legitimate non-discriminatory reason, or justification, for its action, the burden shifts to plaintiff to prove absence of justification. Korslund v. DynCorp Tri-Cities Services, Inc., 121 Wn. App. 295, 322, 88 P.3d 966 (2004), aff'd, 156 Wn.2d 168, 125 P.3d 119 (2005) (Supreme Court holding that, as a matter of law, plaintiffs had failed to establish the jeopardy element). This analysis is somewhat akin to the McDonnell Douglas Corp. v. Green evidentiary burden-shifting procedure. See Wilmot v. Kaiser Aluminum & Chem. Co., 118 Wn.2d 46, 68, 821 P.2d 18 (1991); Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232-33, 685 P.2d 1081 (1984).

Defendant has asserted a legitimate justification for Plaintiff's one week (20 hour) suspension without pay. Specifically, that Plaintiff failed in her duty as an Attendant Counselor to adequately care for a

developmentally-disabled client, Johnny H.⁸ The burden shifts to Plaintiff to prove absence of justification. Korslund, 121 Wn. App. at 322. It is the Plaintiff's burden to show that the reasons articulated by the Department are pretext. Id.

Pretext is not shown by evidence that the employer's reason was incorrect or foolish. Rather, a plaintiff must show that an employer's stated reasons are unworthy of belief. Griffith v. Schnitzer Steel Indus., 128 Wn. App. 438, 447, 115 P.3d 1065 (2005). An employee's speculation or subjective belief does not raise an issue of fact concerning whether the employer's reason was pretext. Kuyper v. Department of Wildlife, 79 Wn. App. 732, 738-39, 904 P.2d 793 (1995) (plaintiff must produce "specific substantiated evidence of pretext"); Manatt v. Bank of America, NA, 339 F.3d 792, 801 (9th Cir. 2003) (summary judgment for employer must be affirmed where plaintiff failed to introduce direct evidence, or specific and substantial circumstantial evidence, of pretext); Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 663-64 (9th Cir. 2002) (employee's subjective beliefs do not prove pretext nor are they sufficient to defeat a legitimate, nondiscriminatory reason).

⁸ Superintendent Kirk would have been remiss in her responsibilities if she had not taken some form of disciplinary action.

Admissions made by the Plaintiff during discovery preclude her from establishing that the employer's stated reasons are pretext. Plaintiff admitted in her deposition:

- When she came to work on the morning of August 26, 1999, she read the written directive that Johnny was to wear a hard helmet. (CP at 67, lines 16-20.)
- She understood Johnny was to wear his hard helmet. (CP at 70, lines 12-25.)

Plaintiff admitted in her declaration:

- Johnny and three other clients were assigned to her care during her shifts. (CP at 112, lines 1-2.)
- Johnny had been hitting himself. (CP at 110, line 14.) Johnny repeatedly removed his helmet. (CP at 111, line 8; 112, lines 9-10; 113, lines 15-16.)

Taken together, these admissions establish the simple truth that Plaintiff was responsible to care for Johnny during her shift, Johnny needed a helmet on his head, Plaintiff was aware that Johnny needed the helmet on his head, and that Plaintiff failed to keep the helmet on his head.

None of Plaintiff's arguments establish pretext. Plaintiff offers no evidence of pretext, only her own conclusory and speculative assertions. Plaintiff fails to show that Superintendent Kirk's reasons for imposing discipline were phony, deceitful, or unworthy of belief.

Moreover, Plaintiff's failure to pursue her appeal to the Personnel Appeals Board undermines any argument that her one week (20 hour)

suspension without pay was not motivated by legitimate reasons. Plaintiff withdrew her appeal prior to the time it was heard, thus eliminating any possibility the legitimacy of the discipline could have been addressed administratively prior to this litigation. Plaintiff's failure to exhaust discounts the viability of any pretext theory she offers to this Court. See Binkley v. City of Tacoma, 114 Wn.2d 373, 388-89, 787 P.2d 1366 (1990) (failure to exhaust grievance procedure through the Civil Service Board relevant to claim of constructive discharge); see also Washington Federation of State Emp. v. State Personnel Bd., 29 Wn. App. 818, 820, 630 P.2d 951 (1981) (noting that "the courts of this state are ill equipped to act as super personnel agencies").

D. There Is No Cause Of Action For Wrongful Change Of Days Off

Plaintiff states in her Complaint it was "clear" to her that her change in schedule was designed to inconvenience her and force her to quit. CP at 6, Fact ¶ 10. Thus, Plaintiff attempts to convert her change of days off into a tort. However, Plaintiff's schedule change does not provide the basis for an actionable tort. No reported case in Washington recognizes a cause of action for "wrongful change of days off."

First, a plaintiff may not rely on conclusory allegations or speculation to ward off summary judgment. Grimwood v. University of

Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Superintendent Kirk changed Plaintiff's schedule so that Plaintiff would no longer be responsible for the daily care of Johnny. CP at 51. Plaintiff has not shown that this explanation for the change in her schedule was pretext, *i.e.*, phony or a lie. Summary judgment for an employer must be affirmed where plaintiff fails to introduce direct evidence, or specific and substantial circumstantial evidence, of pretext. Manatt v. Bank of America, NA, 339 F.3d 792, 801 (9th Cir. 2003).

Second, the assignment of work is a traditional right of management. The principle that not every affront that occurs in the workplace is actionable was recognized by the Washington Supreme Court in White v. State, 131 Wn.2d 1, 20, 929 P.2d 396 (1997). In White, the court refused to recognize an unwanted job transfer as the basis for an actionable tort, recognizing the danger of creating a cause of action for every affront in the workplace. The analysis in White is instructive:

[B]y recognizing a cause of action for employer actions short of an actual discharge, the court would be opening a floodgate to frivolous litigation and substantially interfering with an employer's discretion to make personnel decisions. The Court of Appeals noted that "the courts are ill-equipped to act as super personnel agencies." We agree with the reasoning and the decision of the Court of Appeals.

Subjecting each disciplinary decision of an employer to the scrutiny of the judiciary would not strike the proper balance between the employer's right to run his business as he sees fit

and the employee's right to job security. This is particularly true in instances like this one where an employee's rights are already protected by civil service rule, by a collective bargaining agreement, and by civil rights statutes.

White, 131 Wn.2d at 19-20 (citations omitted). Here, there was no actual discharge action taken against Plaintiff. Rather, concurrent with the one week suspension, management exercised its prerogative (and its duty) to assign Plaintiff to a work unit and schedule which would remove her from the daily care of Johnny.

Following the instruction of the White court, this Court should refrain from interfering with the employer's personnel decision to change Plaintiff's work schedule. No cause of action exists for a wrongful change of days off.

E. Primary Jurisdiction For Review Of Plaintiff's Suspension Was With The Personnel Appeals Board

Primary jurisdiction for review of Plaintiff's one week suspension was with the Personnel Appeals Board, not superior court.

"Primary jurisdiction" is a doctrine utilized by the judiciary in determining whether it should refrain from exercising its jurisdiction in deference to an administrative agency with special competence in a particular area and which has been charged by the Legislature with the authority to resolve, within a pervasive regulatory scheme, the issues that would be referred to it. Kringel v. Department of Social & Health

Services, 47 Wn. App. 51, 53, 733 P.2d 592 (1987). Kringel expressly applied the doctrine of primary jurisdiction in a case involving state employees protected under the statutory scheme of the civil service law. 47 Wn. App. 51, 53, 733 P.2d 592 (1987). Ruling that the superior court should not have addressed the merits of the case because the Personnel Appeals Board had primary jurisdiction, the order of the superior court was vacated. Id. at 54.

Stating its reasoning, Division II held in Kringel:

Here, respondents had a right, conferred by RCW 41.06.170 (1981), to present their state personnel matter issues to the State Personnel Appeals Board, the forum created precisely for that purpose. We note that the members of the Personnel Appeals Board are trained and experienced in the administrative procedures and merit principles that relate to these matters. RCW 41.64.010(1). As such, they are singularly qualified to carry out the intent of the Legislature. See RCW 41.06.010 (1980) (declaring that the purpose of the state civil service law is to establish a system of personnel administration based on merit principles and scientific methods governing the *incidents of state employment*). See also Kerr v. Department of Game, 14 Wn. App. at 429, 542 P.2d 467. Moreover, the Board has the power to issue final orders, subject to review by the court of appeal, on the construction of the rules, regulations and statutes that form the substance of the respondent's case. RCW 41.64.120(1). We conclude therefore that to require administrative resolution of the personnel matters here at issue prior to court action would not be an empty ritual. On the contrary, such a determination would facilitate meaningful court review, should that be sought.

We thus hold that the Board should be accorded primary jurisdiction and that the superior court should not have proceeded to the merits.

Kringel, 47 Wn. App. at 53-54. As noted by the Court of Appeals in Kringel, RCW 41.06.170 provides:

Any employee who is reduced, dismissed, suspended, or demoted, after completing his or her probationary period of service as provided by the rules of the board, or any employee who is adversely affected by a violation of the state civil service law, chapter 41.06 RCW, or rules adopted under it, shall have the right to appeal to the personnel appeals board

RCW 41.06.170(2).

Citing Kringel, this Division again recognized in 1995 the comprehensive nature of the state civil service system. Reninger v. Department of Corrections, 79 Wn. App. 623, 630-31, 901 P.2d 325 (1995), affd, 134 Wn.2d 437, 951 P.2d 782 (1998). The court held that "This elaborate system of rules, procedures, and remedies provides a vehicle and forum created specifically to resolve civil service employment relations claims." Id. In Reninger, the plaintiffs had been reassigned to allegedly hazardous duty, and then claimed constructive discharge. The Department described plaintiff's claims as "simply employee relations disputes dressed up as torts." Reninger, 79 Wn. App. at 632. The court agreed. Id. Concluding, the court held that because plaintiffs failed to use the process available to them under the civil service law, they could not

re-label their grievance as a constructive discharge action in superior court. Reninger, 79 Wn. App. at 630-31.

Here, as in Reninger, Plaintiff had a right to appeal to the Personnel Appeals Board. RCW 41.06.170(2). She was reminded of that right by Superintendent Kirk, and did appeal. However, for unknown reasons, she abandoned her right.

The Personnel Appeals Board was created by the legislature for precisely the types of issues presented in this case. Kringel at 593. The members of the Board were experienced in the administrative procedures and merit principles that related to the precise types of matters of which Plaintiff complains. Kringel at 594. Her dispute should have been brought before the Personnel Appeals Board, not the judiciary.

Plaintiff contends that "the Personnel Appeals Board did not have the authority to hear claims of violation of the collective bargaining agreement." Appellant Br. at 5. As mentioned above, she is incorrect. This Division held in Goodman, 69 Wn. App. at 102-104, that the Personnel Appeals Board has authority to consider all defenses raised by an employee in an appeal of a disciplinary matter. Plaintiff had a right to appeal her suspension-without-pay to the Personnel Appeals Board.

Plaintiff argues that she has a right to have her case tried by a jury. However, the principle that not every affront that occurs in the workplace is actionable was recognized by the Washington Supreme Court in White v. State, 131 Wn.2d 1, 20, 929 P.2d 396 (1997). In White, the court refused to recognize an unwanted job transfer as the basis for an actionable tort, recognizing the danger of creating a cause of action for every affront in the workplace. The court also observed that "recognizing a cause of action for wrongful disciplinary actions less than discharge has the potential to expand and to generate frivolous claims." Id. The court held that if it recognized a cause of action for employer actions short of actual discharge, it would be opening a floodgate to frivolous litigation and substantially interfering with an employer's discretion to make personnel decisions. Id. at 19 (citing White v. State, 78 Wn. App. 824, 839-40, 898 P.2d 331 (1995)). Finally, the court noted, "the courts are ill-equipped to act as super personnel agencies." Id. at 19-20 (quoting White, 78 Wn. App. at 840). Following the principles inherent in White, our supreme court last year refused to recognize a cause of action for wrongful retaliation in violation of public policy. Korslund v. DynCorp Tri-Cities Services, Inc., 156 Wn.2d 168, 184, 125 P.3d 119 (2005).

Plaintiff's disagreement with management involved a minor personnel dispute which culminated in a 20-hour suspension. Following

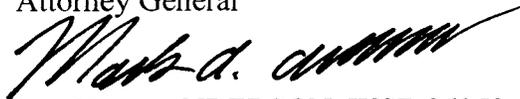
the principles of White, this is not the type of case that should be litigated in superior court. Rather, Plaintiff's arguments should have been heard before the Personnel Appeals Board. Defendant respectfully requests that this Court exercise judicial restraint and refuse to entertain arguments that more properly should have been brought before the Personnel Appeals Board.

VII. CONCLUSION

Based on the foregoing reasons, the Defendant Department of Social and Health Services respectfully requests that the Court of Appeals affirm the summary judgment dismissal of Plaintiff's claim of constructive wrongful discharge in violation of public policy.

RESPECTFULLY SUBMITTED this 31 day of August, 2006.

ROB MCKENNA
Attorney General



MARK A. ANDERSON, WSB 26352
Assistant Attorney General
Attorneys for Defendant

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NO. 34458-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY Chm
DEPUTY

SUSAN BLACK and DAVID
WALKER,

Appellants,

v.

DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

PROOF OF SERVICE

I, Lisa Shannon, certify that on September 1, 2006, the original and one copy of the **Brief of Respondent** was filed by placing it in the United States Mail, postage prepaid, to the Washington State Court of Appeals, Division II.

On this same day, a copy of the **Brief of Respondent** was served on counsel of record, by placing it in the United States Mail, postage prepaid, and addressed as follows:

WM. MICHAEL HANBEY
P.O. BOX 2575
OLYMPIA, WA 98507

I certify under the penalty of perjury, according to the laws of the state of Washington, that the foregoing is true and correct.

DATED this 1st day of September, 2006.


LISA SHANNON, Legal Assistant