

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

No. 39229-1

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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TERESA E.L. BIENICK, a single individual, and KATHERINE  
SHIPMAN-THOMPSON, a single individual,

Appellants,

v.

STATE OF WASHINGTON, and DEPARTMENT  
OF SOCIAL AND HEALTH SERVICES,

Respondents

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APPELLANTS' OPENING BRIEF

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## TABLE OF CONTENTS

A.	INTRODUCTION.....	1
B.	ASSIGNMENTS OF ERROR.....	2
C.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	2
D.	SUMMARY OF THE CASE.....	3
E.	ARGUMENT.....	11
1.	Standard of Review.....	11
2.	The Summary Judgment Standard In Employment Cases Is Necessarily High.....	12
3.	Washington’s Law Against Discrimination Prohibits Retaliation. ....	13
4.	Both Ms. Bienick And Ms. Shipman-Thompson Were Whistleblowers Upon Making The First Oral Report To The State Auditor Or Designee. ....	15
5.	Mr. Pelkey Retaliated Against Ms. Shipman-Thompson Because She Opposed the Illegal Treatment of Her Co-Worker, Ms. Bienick.....	20
6.	Appellants Both Suffered Adverse Employment Actions. ....	21
7.	Ms. Bienick And Ms. Shipman-Thompson Have A Prima Facie Case Of Retaliation. ....	23
8.	The State Did Not Produce A Legitimate Non-Discriminatory Reason For The Adverse Actions In Its Motion For Summary Judgment.....	24
9.	On A Motion For Summary Judgment, The Moving Party Cannot Create A Claimed Non-Discriminatory Reason For The First Time With A	

Declaration Filed In Reply As The Non-Moving  
Party Does Not Have An Opportunity To Respond  
With Additional Declarations.....26

10. The Trial Court Erred In Considering the Unsworn  
Statement of John Pelkey.....27

F. CONCLUSION.....28

APPENDIX .....29

## TABLE OF AUTHORITIES

### Cases

<i>Campbell v. State</i> , 129 Wn. App. 10, 118 P.3d 888 (2005).....	24
<i>Commodore v. Univ. Mech. Contractors, Inc.</i> , 120 Wn.2d 120, 839 P.2d 314 (1992).....	12
<i>DeLisle v. FMC Corp.</i> , 57 Wn. App. 79, 786 P.2d 839 (1990).....	13
<i>Estevez v. Faculty Club of University of Washington</i> , 129 Wn. App. 774, 120 P.3d 579 (2005).....	14, 23
<i>Keenan v. Allan</i> , 889 F. Supp. 1320 (E.D. Wash. 1995) .....	14, 19
<i>Lam v. Univ. of Hawaii</i> , 40 F.3d 1551 (9th Cir. 1994).....	12
<i>Marable v. Nitchman</i> , 262 Fed.Appx. 17 (9th Cir. 2007) .....	18, 19
<i>Owen v. Burlington Northern and Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005).....	11
<i>Renz v. Spokane Eye Clinic, P.S.</i> , 114 Wn. App. 611, 60 P.3d 106 (2002).....	20, 23
<i>Sangster v. Albertson's, Inc.</i> , 99 Wn. App. 156, 991 P.3d 674 (2000).....	13
<i>Stegall v. Citadel Broadcasting Co.</i> , 350 F.3d 1061 (9th Cir. 2003).....	24
<i>Vasquez v. State, Dep't of Soc. &amp; Health Serv.</i> , 94 Wn. App. 976, 974 P.2d 348 (1999).....	23
<i>Xieng v. Peoples Nat'l Bank</i> , 120 Wn.2d 512, 844 P.2d 389 (1993).....	12

**Statutes and Other Authorities**

Civil Rule 56(c) .....26

RCW 42.40 ..... 13, 15, 29

RCW 42.40.010 ..... 11

RCW 42.40.020 ..... passim

RCW 42.40.040 ..... 15

RCW 42.40.050(b).....22

RCW 49.60 ..... 15

RCW 49.60.210 ..... 13, 21

16A Washington Practice § 24.16 ..... 20

Laws of 2008, ch. 266, § 2..... 16

## A. INTRODUCTION

Appellants, Teresa Bienick and Katherine Shipman-Thompson, respectfully request that this Court reverse the decision below granting the State of Washington's motion for summary judgment. In the fall of 2004, Ms. Bienick was intimidated and forced to sign an illegal contract granting a state gratuity to Fairfax Hospital in Kirkland, Washington. Both Ms. Bienick and Ms. Shipman-Thompson complained orally to upper management and to Washington State Auditor employees about the contract. A few weeks later, Ms. Bienick became aware of another illegal contract, this time avoiding competitive bidding. At that point, she confronted her supervisor, John Pelkey, stating that she would go to the Auditor about this additional contract unless he stopped the action. He refused to remedy the problems and instead he ran her out of the building, placing her on home assignment for approximately a month. Because Ms. Shipman-Thompson supported Ms. Bienick, she also became the focus of retaliation. She was ostracized and her work schedule was change such that she could no longer care for her mother who was dying of cancer and grandson with a developmental disability. Numerous acts of retaliation against these two employees continued. Finally, Mr. Pelkey was eventually removed from his position, and immediately thereafter, Ms. Bienick filed a written complaint with the State

Auditor's . Ultimately, in August of 2006, the State Auditor completed its investigation corroborating Appellants' objections.

Ms. Bienick and Ms. Shipman-Thompson filed suit for Whistleblower retaliation. Upon the State of Washington's motion for summary judgment, the trial court dismissed the case, ruling that Appellants' oral complaints were not sufficient to bring them into the statutory definition of a Whistleblower. Because a complaint to the State Auditor does not need to be in writing and both Ms. Bienick and Ms. Shipman-Thompson presented sufficient evidence of discrimination and retaliation, this Court should reverse the decision below and remand this matter for trial.

#### **B. ASSIGNMENTS OF ERROR**

1. The trial court erred by granting the State of Washington's motion for summary judgment. CP 754-755.
2. The trial court erred by denying Appellants' motion to strike the declaration of John Pelkey. CP 754-755.

#### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred by disregarding Appellants' oral complaints to the State Auditor and DSHS auditor designee in deciding whether they qualified as Whistleblowers?

2. Whether the trial court erred by considering the hearsay statement of John Pelkey?
3. Whether the trial court erred in dismissing Appellants' claim for Whistleblower retaliation and discrimination?

#### D. SUMMARY OF THE CASE

Ms. Bienick began working for the State of Washington, Department of Social and Health Services ("DSHS") Mental Health Division in August of 2003, initially as a Fiscal Program Manager, then as a Contracts Administrator. CP 334. Prior to this position, she worked in other capacities and positions with the State since 1976. *Id.* She received favorable performance evaluations as well as cost of living and merit raises throughout her employment, prior to the times relevant to this lawsuit. *Id.* Ms. Shipman-Thompson worked as the Chief Financial Officer for DSHS, Mental Health Division during all times relevant to this lawsuit. CP 355.

In August 2004, John Pelkey was hired as Chief of Finance and became Ms. Bienick and Ms. Shipman-Thompson's supervisor. CP 334. Just after Mr. Pelkey began, September 2004, the Mental Health Division started processing a State contract with FairFax Hospital. CP 334-35, 442-43, 445-47, 453. Ms. Bienick was given the assignment of drafting the FairFax contract, and at that time, she raised objections to John Pelkey about the contract because it

provided an illegal gratuity to the hospital. CP 335. On September 24, 2004, John Pelkey advised Ms. Bienick to put the contract in final form and, once received back from FairFax with their signature, she was ordered to sign and fully execute the contract. *Id.* She again protested signing the document because the contract provided FairFax Hospital with \$310,000 of State funds with no consideration in return. *Id.* In essence, the FairFax contract was a gratuity from the State of Washington. *Id.* Nevertheless, Mr. Pelkey ordered Ms. Bienick to sign the contract and she did because she needed her job. *Id.*; CP 460.

Later, in the early fall of 2004 (late September early October), Ms. Shipman-Thompson and Ms. Bienick met with Kathleen Brockman about the FairFax hospital contract. CP 356, 355. Ms. Brockman is the Chief Administrative Officer for DSHS and was also the Whistleblower contact for DSHS. CP 351. At that time, they explained to Ms. Brockman that the Mental Health Division had pushed through an illegal contract with FairFax Hospital, which essentially gave away State money as a gift. CP 335. Several weeks later, they again spoke with Ms. Brockman about the contract. CP 336.

Shortly thereafter, in early October 2004, Marie Steffan from the State Auditor's Office was at the Mental Health Division conducting an audit regarding mental health block grant funds. CP 336. While Ms. Steffan was performing this audit, Ms. Bienick went to her and told

her about the FairFax contract and how it was an illegal expenditure of State funds. *Id.* Around this same time, there was a second meeting with Ms. Steffan where both Ms. Shipman-Thompson and Ms. Bienick complained about the FairFax contract. *Id.*; CP 356. Ms. Shipman-Thompson gave Ms. Steffan a copy of the FairFax contract and explained why it was illegal. CP 356. Ms. Steffan gave Ms. Bienick the contact information for State Auditor employee Sandra Miller. CP 336. Shortly thereafter, Ms. Bienick contacted Ms. Miller and explained about how the FairFax contract was illegal and should not have occurred. *Id.* She also explained to Ms. Miller that she was scared and feared retaliation while still under the supervision of Mr. Pelkey. Ms. Miller explained that the investigation could occur at any time within a year of the illegal activity. *Id.*

After the meetings discussed above, in October 2004, Ms. Bienick participated in out-of-office training. CP 336. Upon her return, she learned that the division was pushing through a contract between the Mental Health Division and the National Association of Mental Illness (“NAMI”). As soon as she learned about the contract, she knew that the division must rescind it because there were prior issues with NAMI involving embezzlement which resulted in a promise by DSHS to the Office of Financial Management, State Auditor’s Office and the Governor’s Office that no new contracts would be written for

NAMI unless competitively procured. *Id.* On October 25, 2004, Ms. Bienick asked Mr. Pelkey about this new NAMI contract and when he confirmed her understanding, she told him that they needed to pull it back until all proper procedures were followed. CP 336-37. Mr. Pelkey refused to rescind the contract. *Id.* Ms. Bienick responded by saying that she would be required to go to the Governor's and the State Auditor to report this contract. *Id.*

After this exchange, Mr. Pelkey became extremely angry. *Id.* He raised his hand at Ms. Bienick, as if to strike her, and she backed away. *Id.* Mr. Pelkey then started yelling at her and ordered her to leave the building. *Id.* He then chased her down the hall and eventually out of the workplace. *Id.* Later, Ms. Bienick called Ms. Shipman-Thompson to explain what had happened. Ms. Shipman-Thompson escorted Ms. Bienick back into the building so that she could get her personal effects from the office. *Id.*

The day after Ms. Bienick retrieved her personal items, she received a letter from Mr. Pelkey indicated that she was under investigation and could not return to work until further notice. *Id.* That same day, Mr. Pelkey was looking at Ms. Bienick's work area, noticed that she had come in to get her personal items and was furious. CP 356. It was also clear from Mr. Pelkey's body language that he knew Ms. Shipman-Thompson had gone with Ms. Bienick to get her

personal items. *Id.* From that point on, Mr. Pelkey began retaliating against Ms. Shipman-Thompson for protecting Ms. Bienick. *Id.*

After she was removed from the office, Ms. Bienick received a letter dated October 27, 2004, where Mr. Pelkey stated that he was taking over her contract responsibilities. CP 337. Then, by a third letter dated November 2, 2004, Mr. Pelkey wrote Ms. Bienick indicated that she was under investigation for undefined "Alleged Employee Misconduct." *Id.* This investigation created by Mr. Pelkey was simply retaliation for Ms. Bienick's opposition to the illegal contracts Mr. Pelkey was pushing through the agency. By a letter dated November 17, 2004, Ms. Bienick was directed to return to work. The "investigation" did not reveal any misconduct by Ms. Bienick. *Id.*

When Ms. Bienick returned to work, she did not have the same job responsibilities that she had before she confronted Mr. Pelkey. *Id.* Specifically, her contracting responsibilities, that were previously removed, were not returned. *Id.* Aside from the reduction in job responsibilities, Mr. Pelkey began a practice of consistently isolated Ms. Bienick in the office. *Id.* He would say things to his assistant about the contracts for the purpose of having Ms. Bienick hear his comments and become upset. *Id.* He called her derogatory names such as "digger" and "catch bucket," even after she asked him repeatedly to stop. CP 337-38. He also became increasingly angry

with her during meetings and day-to-day interactions. CP 338. He alienated her, directing staff members not to deal with her, and thereby creating an illusion that she was a “problem employee.” *Id.*

In February of 2005, Ms. Shipman-Thompson and Ms. Bienick had a conversation with Mr. Pelkey behind closed doors. CP 338. During this discussion, Mr. Pelkey became outraged and raised his hand again to Ms. Bienick’s face. *Id.* He then left the room, slamming the door behind him. *Id.* They both complained to DSHS employee Jack Morris, who was the Assistant Director of the Mental Health Division, about this conduct. *Id.* Starting in February 2005 and continuing through the end of May 2005, Ms. Shipman-Thompson regularly complained to Jack Morris about how Mr. Pelkey was treating Ms. Bienick. CP 357. Mr. Pelkey knew that she was doing this and was angry about it. *Id.*

In April 2005, Ms. Shipman-Thompson noticed that Mr. Pelkey changed the division organizational chart to remove Ms. Bienick from her position and replace her with Sheila Anderson. *Id.* She immediately knew it was just another example of how Mr. Pelkey was continuously retaliating against Ms. Bienick. She contacted Jack Morris and showed him how the organizational chart was changed. *Id.* Mr. Morris then confronted Mr. Pelkey about this and a short time later Ms. Shipman-Thompson’s work schedule was changed by Mr. Pelkey.

*Id.* When Ms. Shipman-Thompson began working at the Mental Health Division, she explained that she would need a 4/10 work schedule. The reason was that Ms. Shipman-Thompson was caring for her mother who was dying of cancer and her grandson who has a developmental disability. *Id.* Mr. Pelkey knew that by changing her schedule to 5 days a week, he would make it impossible for her to take family members to the doctor and provide the in-home care for her mother. She explained these facts to DSHS management, but it fell on deaf ears. CP 361-63.<sup>1</sup>

On July 29, 2005, Ms. Bienick's reporting relationship was changed from Mr. Pelkey, to the Assistant Division Director. CP 338. On August 1, 2005, within a year of the conduct, Ms. Bienick submitted a written report to the State Auditor's Office. CP 339. Ms. Bienick waited until Mr. Pelkey was no longer her supervisor to file the written report because she feared for her personal safety. *Id.*

On August 11, 2005, Ms. Bienick was moved to the position of Washington Management Services, assigned to Health and Recovery

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<sup>1</sup> Aside from the events described above, Mr. Pelkey also ostracized Ms. Shipman-Thompson in the office once he knew she was standing up for Ms. Bienick. CP 358. He took away her appreciable work assignments and would not speak with her in the office, making it impossible to work. *Id.* He also promised both Ms. Shipman-Thomson and Ms. Bienick that they would receive pay raises of 5 percent when he first came on as supervisor. CP 338. However, once Mr. Pelkey began retaliating against these women for opposing the contracts, their raises were held. *Id.* Meanwhile, other employees in the department received their raises. *Id.* Indeed, for over a year, Mr. Pelkey refused to complete Ms. Shipman-Thompson's evaluation in order to have the raise affected. CP 357-58.

Services Administration, Division of Business and Finance. CP 339. She objected to this change. *Id.* It made no sense for management to move her, while Mr. Pelkey was still able to remain in the same office. *Id.*

By a letter dated August 3, 2006, the State Auditor completed its investigation. Specifically, the State Auditor found “reasonable cause to believe an improper governmental action occurred when the previous Director of the Mental Health Division directed that money be paid to a contractor without documentation that services had been performed.” CP 496.

Appellants later filed suit and on February 13, 2009, the State moved for summary judgment. CP 19.<sup>2</sup> The State’s materials included a 19-page, unsworn, statement made by Mr. Pelkey, drafted after his removal as supervisor. CP 37-55. The allegations in this statement were not made under oath. *Id.* Appellants responded substantively to the State’s motion and asked that the trial court strike Mr. Pelkey’s statement as hearsay. CP 368. On March 31, 2009, the trial court granted the State’s motion. CP 754. As a threshold and determinative issue, the Court seemed to have found that Appellants were not Whistleblowers within the meaning of RCW 42.40.020 because the

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<sup>2</sup> The State later substituted its initial brief with an Amended Motion on February 27, 2009. CP 307.

*written* complaint came after the majority of the actions at issue. RP at 23-24. The Court did not consider the *oral* complaints sufficient. *Id.*

After reaching this threshold decision, the Court determined that there was insufficient evidence to proceed to a trial. RP 24-25. The trial court also denied Appellants' motion to strike. CP 755. This appeal follows.

## E. ARGUMENT

The Washington Legislature has declared that “[i]t is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures.” RCW 42.40.010. In this case, DSHS supervisors retaliated because longtime state employees Teresa Bienick and Katherine Shipman-Thompson opposed illegal state conduct. Viewing the evidence in the light most favorable to Appellants, there is more than sufficient evidence to require a trial. The court below erred in granting summary judgment.

### 1. Standard of Review.

This Court reviews decisions on summary judgment *de novo*. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (“We review summary judgment orders *de novo* and perform the same inquiry as the trial court.”).

2. The Summary Judgment Standard In Employment Cases Is Necessarily High.

“A summary judgment motion can be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must consider the facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 123, 839 P.2d 314 (1992). Our Supreme Court has declared that Washington’s Law Against Discrimination “embodies a public-policy of the ‘highest priority.’” *Xieng v. Peoples Nat’l Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993) (quoting *Allison v. Housing Auth.*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991)). With that public policy objective in mind, the Ninth Circuit has also set a high standard for the granting of summary judgment in employment discrimination cases – “We require very little evidence to survive summary judgment’ in a discrimination case, ‘because the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by the factfinder, upon a full record.’” *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1563 (9th Cir. 1994) (internal citation omitted).

Because employment cases are by their very nature fact intensive, courts have consistently found “summary judgment in favor

of employers is seldom appropriate in employment discrimination cases.” *DeLisle v. FMC Corp.*, 57 Wn. App. 79, 84, 786 P.2d 839 (1990)(citation omitted); *see also Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160, 991 P.3d 674 (2000) (“Summary judgment should rarely be granted in employment discrimination cases.”). Because the State has not established that it is entitled to summary judgment, this Court should reverse the decision below and allow Appellants to present their case to a jury.

**3. Washington’s Law Against Discrimination Prohibits Retaliation.**

Washington’s Law Against Discrimination (“WLAD”) provides that “(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter. (2) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW.” RCW 49.60.210 (emphasis added). Both of these provisions are at issue in this case.

To establish a prima facie case of whistleblower retaliation, the plaintiff must show “(1) that the plaintiff exercised a statutory right *or communicated to the employer an intent to do so*, (2) that she was

thereafter discharged [or experienced and adverse employment action], and (3) that a causal link exists between the exercise of the legal right and the discharge [or adverse employment action].” *Keenan v. Allan*, 889 F. Supp. 1320, 1367 (E.D. Wash. 1995) (emphasis added). See also, *Estevez v. Faculty Club of University of Washington*, 129 Wn. App. 774, 797, 120 P.3d 579, 589 (2005) (holding under RCW 49.60 “an employee must show that (1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there was a causal link between the employee's activity and the employer's adverse action.”). If the employee establishes a prima facie case, then the employer “may attempt to rebut the case by presenting evidence of a legitimate non-discriminatory reason for the employment decision.” *Estevez*, 129 Wn. App. at 797-98. “The burden then shifts back to [the employee], who can attempt to prove that the employer's reason is pretextual.” *Id.* “Once evidence supporting a prima facie case, a non-discriminatory explanation, and pretext has been presented and ‘the record contains *reasonable but competing* inferences of *both* discrimination *and* nondiscrimination, it is the jury's task to choose between such inferences.’” *Id.* (quoting *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186, 23 P.3d 440 (2001) (emphasis in original)).

Here, both Ms. Bienick and Ms. Shipman-Thompson were whistleblowers within the meaning of RCW chapter 42.40. Moreover, Ms. Shipman-Thompson was retaliated against because she opposed the manner in which Mr. Pelkey was retaliating against Ms. Bienick.

**4. Both Ms. Bienick And Ms. Shipman-Thompson Were Whistleblowers Upon Making The First Oral Report To The State Auditor Or Designee.**

In relevant part, RCW 42.40.050 provides that “[a]ny person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW.” The pre-2008 statutory definition of “Whistleblower” is as follows:

[a]n employee who in good faith reports alleged improper governmental action to the auditor, initiating and investigation under RCW 42.40.040. For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term “whistleblower” also means: (a) An employee who in good faith provides information to the auditor in connection with an investigation under RCW 42.40.040 and an employee who is believed to have reported asserted improper governmental action to the auditor or to have provided information to the auditor in connection with an investigation under RCW 42.40.040 but who, in fact, has not reported such action or provided such information . . . .

former RCW 42.40.020(8) (2007).<sup>3</sup>

Here, Ms. Bienick and Ms. Shipman-Thompson are both Whistleblowers because: (1) they reported the illegal FairFax contract to the State Auditor's in October of 2004; (2) they reported the illegal actions to Kathleen Brockman, the DSHS Whistleblower designee, in September/October of 2004; (3) Ms. Bienick told John Pelkey on October 25, 2004 that she would report the contracts to the State Auditor; and (4) Ms. Bienick filed a written Whistleblower complaint. During her deposition, Ms. Bienick testified as follows:

Q Okay.

A But, unfortunately, I didn't get to be that, because he did not like what I did. You know, very early on in September, the state auditor was auditing us, and I informed her of that contract, and she told me who I needed to call. Also very early on in September, the person that I would have contacted would have been Kathy Brockman, and I contacted her not only in September but in November, and once those contacts were made, I was treated very different.

Q And who is Kathy Brockman again?

A She would have been the person for anybody to go to if there was any wrongdoing in contracts. She oversaw all the contracts for DSHS, so she would have been the whistleblower supposedly, in quotes, contact person.

Q Okay. And you went to her when again?

A In September and again in November.

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<sup>3</sup> Washington's Whistleblower Statute was amended in 2008. Laws of 2008, ch. 266, § 2. Although Appellants contend that these amendments were remedial and therefore apply retrospectively, the state and trial court disagree. Because this is not an issue of actual significance to this appeal, the pre-2008 definitions are discussed in this brief.

Q Of which year, Ms. Bienick?

A Pardon me?

Q Of which year?

A Of '04. Shortly after John was hired.

Q September and November of '04?

A Yes.

CP 514. On this point, Ms. Shipman-Thompson testified as follows: “In the fall of 2004, when the Fairfax contract was done, it was real obvious that no one within our administration was going to call a halt to it. I told Kathy Brockman about it, and she is over – one of her responsibilities within her organization is the central contracts management office within DSHS, and she didn't even do anything about it. But I did tell her about it.” CP 626-27.

In its motion for summary judgment, the State ignored all but the August 2005 written Whistleblower complaint arguing that only a written complaint to the State Auditor is sufficient to trigger Whistleblower protection. The State's position is wrong for many reasons. *First*, RCW 42.40.020 gives protection to an employee who “provides information to the auditor,” and the statute does not state that the “information” must be in writing to comply. *Second*, employees are protected even if they do not provide information, but the supervisor thinks that they provided information as “an employee who is believed to have reported asserted improper governmental

action to the auditor” is also a Whistleblower. *Third*, the State Auditor’s Office in fact requests and receives verbal whistleblower complaints. CP 351.

The trial court based its decision to only consider the written request, in large part, on an unpublished decision from the Ninth Circuit Court of Appeals holding that where an individual did not contact the Auditor, he is not a Whistleblower. RP at 24. See, *Marable v. Nitchman*, 262 Fed.Appx. 17, 22 (9th Cir. 2007). Appellants do not challenge the reasoning of the *Marable* case. However, the *Marable* case does not stand for the proposition that an oral contact with the auditor is insufficient. It also does not address the fact that Ms. Bienick told Mr. Pelkey she was going to the Auditor at the time he ran her out of the building.

In *Marable*, a Washington State Ferries employee filed suit against various state officials alleging that they retaliated against him after he spoke out about corruption and wasteful practices. One of his causes of action was for Whistleblower retaliation. 262 Fed. Appx. at 21-22. The State moved for summary judgment on this claim, arguing that the employee was not a Whistleblower within the meaning of the statute because he did not contact the Washington State Auditor’s . *Id.* The District Court granted summary judgment and the Ninth Circuit

affirmed in an unpublished decision. *Id.* In most relevant part, the Ninth Circuit reasoned as follows:

Marable has presented no evidence to suggest that he meets this definition. Marable admits that he did not contact the office of the Washington State Auditor, and he presents no evidence to suggest that the defendants believed him to have done so. Similarly, Marable presents no evidence that he identified any particular “rules warranting review,” provided information to the rules review committee, or was perceived to have done either. Marable's tender of evidence tending to show that he was a generally vocal employee does not cure his inability to meet Washington's statutory whistleblower definition. The district court properly dismissed Marable's whistleblower cause of action.

*Id.* at 22.

*Marable* does not state or imply that a contact with the State Auditor must be written. In contrast to the situation in *Marable*, both Ms. Bienick and Ms. Shipman-Thompson contacted Auditor Office employees and the designee for DSHS Mental Health division prior to the retaliation experienced. *Marable* is not analogous to this case and it does not support the trial court's decision to grant summary judgment.

Aside from the oral reports, there is also sufficient evidence to allow a jury to believe that Mr. Pelkey thought Ms. Bienick had made or would make a report to the auditor. *See Keenan*, 889 F. Supp. at 1367 (holding that it is sufficient if an employee “communicated to the

employer an intent” to report to the Auditor’s Office). In fact, Ms. Bienick said this directly to Mr. Pelkey just before he ejected her from the building on October 25, 2004. CP 336-37. Under former RCW 42.40.020(8) (2007), this is also sufficient to bring Ms. Bienick within the meaning of “Whistleblower.”

There is no authority that supports the trial court’s decision to ignore the verbal reports made by Appellants. Even if there was such authority, there is still sufficient evidence, viewed in the non-moving parties’ favor, to support a conclusion that Mr. Pelkey believed Ms. Bienick had and/or would go to the Auditor. For these reasons, this Court should reverse the decision below.

**5. Mr. Pelkey Retaliated Against Ms. Shipman-Thompson Because She Opposed the Illegal Treatment of Her Co-Worker, Ms. Bienick.**

As explained in Washington Practice, “[i]t is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be unlawful discrimination or for providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred.” 16A Washington Practice § 24.16. Whether or not the action was in fact unlawful discrimination is not relevant; the question is whether the individual had a reasonable belief that it was unlawful. See WPI 330.05; *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 60 P.3d 106 (2002) (employee alleging

retaliatory discharge for complaining of sexual harassment was only required to establish that her belief in the validity of the harassment claim was reasonable, not that the employer actually engaged in unlawful conduct; and plaintiff had a good faith basis to consider separate incidents of supervisor's sexually inappropriate comments as amounting to sexual harassment where incidents escalated in severity).

Ms. Shipman-Thompson opposed the retaliation experienced by Ms. Bienick. CP 356-58. As a result, Mr. Pelkey began retaliating against her as well. *Id.* These actions are also in violation of Washington law, which prohibits "discriminate[ion] against any person because he or she has opposed any practices forbidden by this chapter . . . ." RCW 49.60.210. Therefore, irrespective of whether or not Ms. Shipman-Thompson and Ms. Bienick are "Whistleblowers," the retaliation experienced by Ms. Shipman-Thompson is still actionable. The trial court's grant of summary judgment was in error.

**6. Appellants Both Suffered Adverse Employment Actions.**

Washington's Whistleblower protection act provides that "'reprisal or retaliatory action' means but is not limited to any of the following: (a) Denial of adequate staff to perform duties; (b) Frequent staff changes; (c) Frequent and undesirable office changes; (d) Refusal to assign meaningful work; (e) Unwarranted and unsubstantiated

letters of reprimand or unsatisfactory performance evaluations; (f) Demotion; (g) Reduction in pay; (h) Denial of promotion; (i) Suspension; (j) Dismissal; (k) Denial of employment; (l) A supervisor or superior behaving in or encouraging coworkers to behave in a hostile manner toward the whistleblower; and (m) A change in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish.", RCW 42.40.050(b) (2007) (emphasis added).

Here, a number of retaliatory actions were taken against Appellants including the following:

- Mr. Pelkey removing Ms. Bienick from the office. CP 336-37;
- Mr. Pelkey raising his hand at Ms. Bienick in October 2004. CP 336-37;
- Mr. Pelkey instituting a retaliatory investigation against Ms. Bienick. CP 337;
- Mr. Pelkey removing Ms. Bienick's contracting authority. CP 337;
- Mr. Pelkey isolating Ms. Bienick in the office. CP 337-38;
- Mr. Pelkey calling Ms. Bienick "digger." CP 337;
- Mr. Pelkey calling Ms. Bienick "Catch bucket." CP 338;
- Mr. Pelkey raising his hand at Ms. Bienick in February 2005. CP 338;
- Mr. Pelkey refusing to give 5% raise as promised to both Appellants. CP 338;

- Management transferring Ms. Bienick out of her office in August 2005. CP 339;
- Mr. Pelkey changing Ms. Bienick's job title in April 2005. CP 357;
- Mr. Pelkey significantly altering Ms. Shipman-Thompson's work schedule in April 2005. CP 357;
- Mr. Pelkey taking away Ms. Shipman-Thompson's work assignments. CP 358; and
- Mr. Pelkey ostracizing Ms. Shipman-Thompson at work. CP 358.

The trial court failed to analyze each of these adverse employment actions as the law requires. There was no basis for granting summary judgment.

**7. Ms. Bienick And Ms. Shipman-Thompson Have A Prima Facie Case Of Retaliation.**

Employees are not required to present direct evidence of discrimination. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 623, 60 P.3d 106 (2002). The policy behind the use of circumstantial evidence is a necessity “[b]ecause employers rarely will reveal they are motivated by retaliation, [and] plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose.” *Vasquez v. State, Dep't of Soc. & Health Serv.*, 94 Wn. App. 976, 985, 974 P.2d 348 (1999). However, in cases such as this, when direct evidence of discrimination is presented, “a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial.” *Estevez*, 129 Wn. App. at 801 (quoting *Godwin v. Hunt Wesson, Inc.*,

150 F.3d 1217, 1221 (9th Cir.1998)). See also, *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003) (accord). When considering the evidence presented, “[p]roximity in time between the adverse action and the protected activity, along with evidence of satisfactory work performance, suggests an improper motive.” *Campbell v. State*, 129 Wn. App. 10, 23, 118 P.3d 888 (2005).

Here, Appellants have both direct and circumstantial evidence of retaliation. They both engaged in protective activity by opposing the illegal contracts issued by DSHS, reporting these contracts to management and the State Auditor, and in Ms. Shipman-Thompson’s case, opposing how her co-worker was treated as a result. CP 335-38, 355-58. When Ms. Bienick challenged Mr. Pelkey on these issues, he responded by throwing her out of the office. CP 336-37. The rest of the retaliation flowed from these events and continued up and through the State Auditor’s investigation. Contrary to the trial court’s ruling, a prima facie case is made.

**8. The State Did Not Produce A Legitimate Non-Discriminatory Reason For The Adverse Actions In Its Motion For Summary Judgment.**

In its motion for summary judgment, the State argues that it had “legitimate reasons for its decisions.” CP 326. However, the State did not explain these purported reasons with any particularity. In fact,

the only justification cited was a claimed need to remove “Bienick’s contracting authority” “to meet the needs of the Department and due to concerns raised by the Department’s Central Contract Service unit about Ms. Bienick’s negative interactions with CCS staff.” CP 328. This is the only claimed legitimate reason cited by the State in its initial brief.<sup>4</sup>

Focusing on the evidence and argument actually presented by the State in its motion for summary judgment, the claim of a legitimate non-discriminatory reason for the actions fails for multiple reasons. The State did not present any performance reviews that cite a justification for these adverse actions. The State did not provide any explanation of what the vague reference to “the needs of the Department” means. *Id.* The State did not acknowledge that Ms. Bienick was the subject of a bogus investigation that resolved in her favor. The State ignores Ms. Bienick’s testimony that she brought up the contract, spoke about the State Auditor, and was then immediately run out of the office by Mr. Pelkey. Simply put, there is no legitimate basis offered by the State for these actions. The fact alone

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<sup>4</sup> The State did file another declaration, the declaration of Linda Tullis, in support of its reply brief asserting various interoffice personal issues, but because this was submitted after Appellants’ response brief was due and filed, it cannot raise a new issue for the Court to grant summary judgment. Perhaps more importantly, the declaration cannot raise a non-discriminatory reason for the actions because it only relates to events prior to Mr. Pelkey becoming the manager. Ms. Tullis’ declaration is discussed in more detail below.

that the October/November 2004 investigation resolved in Ms. Bienick's favor is sufficient to undermine any claim of legitimate basis. Summary judgment was not appropriate.

**9. On A Motion For Summary Judgment, The Moving Party Cannot Create A Claimed Non-Discriminatory Reason For The First Time With A Declaration Filed In Reply As The Non-Moving Party Does Not Have An Opportunity To Respond With Additional Declarations.**

On March 16, 2009, Appellants filed their opposition to the State's motion for summary judgment. CP 368. Eight days later, the State filed the declaration of Linda Tullis. CP 737. While Ms. Tullis' declaration does not discuss the specific adverse actions that Appellants challenge in this lawsuit, it does purport to cast both Ms. Bienick and Ms. Shipman-Thompson in a bad light. To the extent, Ms. Tullis' declaration purports to provide a legitimate non-discriminatory reason to justify the adverse employment actions at issue in this case, it is not properly before the Court.

Civil Rule 56(c) explains, regarding motions for summary judgment, that "[t]he motion and *any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing.*" (emphasis added). Here, Tullis' declaration was not provided "28 calendar days before the hearing." Instead, it was submitted after Appellants responded to the State's claimed basis for summary judgment.

Assuming, *arguendo*, that this Court does consider the Tullis declaration, it still does not provide a legitimate non-discriminatory reason for the actions of Mr. Pelkey. Ms. Tullis retired “in August 2004” and does not have any information on what occurred within the office after that point, which is the timeframe at issue in this lawsuit. CP 737.

10. The Trial Court Erred In Considering the Unsworn Statement of John Pelkey.

Over Appellants’ objection, the trial court considered John Pelkey’s unsworn statement of August 12, 2005. CP 33; RP 28 (holding “[i]t’s been considered in part.”). Appellants argued that the statement was hearsay and the Court should strike the document. CP 376. In denying Appellants’ motion, the trial court did not explain why the document was not hearsay. RP 28-29. ER 802 explains that “[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute.” ER 801(c) defines “[h]earsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

Here, Mr. Pelkey’s statement certainly falls within the definition of hearsay. There is no applicable exception. Moreover, there are several fundamental and commonsense problems with considering the

statement. First, the statement is from August 12, 2005, which is after Mr. Pelkey was confronted and removed from a supervisory position with respect to Ms. Bienick. CP 33, 338. Second, this is not even a *sworn* statement made under oath. Contrary to the trial court's ruling, this statement is not admissible and the court below erred in considering the statement.

F. CONCLUSION

For the reasons set forth above, Appellants request that this Court reverse the decision below granting the State's motion for summary judgment and remand this matter for trial.

Dated this 3<sup>rd</sup> day of August, 2009.

Respectfully submitted,

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## APPENDIX

Former Chapter 42.40 RCW (2007)

Declaration of Teresa Bienick, CP 334-354

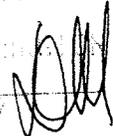
Declaration of Katherine Shipman-Thompson, CP 355-367

COURT OF APPEALS  
DIVISION II

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

BY 

I, Becky J. Niesen, certify that I served a copy of this document

by U.S. Mail on all parties or their counsel of record on the date below

as follows:

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

SIGNED this 3rd day of August, 2009 at Tacoma.

  
Becky J. Niesen