

COURT OF APPEALS
DIVISION II

11 DEC-5 AM 10:20

STATE OF WASHINGTON
BY JW
DEPUTY

No. 42321-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TERRY A. TOWNSEND, Appellant,

v.

STATE OF WASHINGTON, Defendant,

and

KERMIT B. WOODEN, Respondent.

BRIEF OF RESPONDENT
KERMIT B. WOODEN

Wm. Michael Hanbey
Attorney for Respondent

PO Box 2575
Olympia, WA 98507
360-570-1636
WSBA # 7829

ORIGINAL

11/2/11
PM

TABLE OF CONTENTS

I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW.....1

 A. Does RCW 4.24.510 confer immunity against Civil liability for intentional torts stemming from the making of false allegations where the party claiming immunity seeks personal relief?.....1

 B. Where a party communicates a complaint to a public agency about an administrative action adverse to the party which is subject to collateral estoppel, the party cannot prevail on a special motion to strike a claim based upon the anti-SLAPP statute, Chapter 4.24 RCW.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT WHY APPEAL SHOULD BE DENIED.....6

 A. Appellant Is Not Within Class Protected By Anti-SLAPP Law.....6

 1. Saldivar v. Momah Is Determinative.....7

 2. Correlation Of Dr. Momah's And Respondent's Actions.....8

 3. Valdez-Zontek v. Eastmont School District Supports Momah.....9

 B. Appellant's Claim Is Based Upon An Adverse Administrative Action Imposed By The Defendant Which She is Estopped To Deny Was Valid.....10

 1. RCW 4.24.525 – Procedure / Analysis.....11

 2. Alleged Basis For Retaliation.....12

3.	Appellant's Basis For Claims of Discrimination / Retaliation Through The Disciplinary Action....	14
a.	Ruling By Personnel Appeals Board Supports Respondent's Burden.....	14
IV.	CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases

Reid v. Dalton,
124 Wn. App. 113, 100 P.3d 349 (2004).....7

Saldivar v. Momah,
145 Wn. App. 365, 186 P.3d 1117 (2008).....5, 7, 8, 9

Segaline v. Labor & Industries,
169 Wn.2d 467, 238 P.3d 1107 (Aug. 2010).....6

Valdez-Zontek v. Eastmont School District,
154 Wn. App. 147, 225 P.3d 339 (2010).....10

Statutes / Regulations

RCW 4.24.510.....5, 6, 7

RCW 4.24.525.....5, 11, 12, 13

I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Does RCW 4.24.510 confer immunity against civil liability for intentional torts stemming from the making of false allegations where the party claiming immunity seeks personal relief?

B. Where a party communicates a complaint to a public agency about an administrative action adverse to the party which is subject to collateral estoppel, the party cannot prevail on a special motion to strike a claim based upon the anti-SLAPP statute, Chapter 4.24 RCW.

II. STATEMENT OF THE CASE

Terry A. Townsend, Appellant, was employed as a Human Resource Consultant in the Human Resource Office at DOT^[1] when she sent an email containing privileged and confidential information to a former employee of the Department of Transportation (DOT) who was the Plaintiff^[2] in a federal civil lawsuit which named the Department of Transportation and Kermit B. Wooden and others, as defendants. CP 28-9.

The Respondent, Kermit B. Wooden, was the Human Resources Director for DOT, stationed at Headquarters in Olympia, Washington. In October 2009, the Respondent learned that the Appellant had conveyed the privileged and confidential information to Ms. McGuire. This information came to him as a part of his involvement as a defendant in the federal civil action filed by the former employee, Ms. McGuire. CP 32.

^[1] CP 4.

^[2] CP 4.

The Appellant was an employee of DOT in October 2009. She alleges that she filed a complaint with the Office of Equal Opportunity of DOT during that month. CP 4. At the time, she was employed in Headquarters, DOT in Olympia, Washington. The Appellant further contends that Respondent "learned that [she] had recently opposed discriminatory treatment in an email to WSDOT's Office of Equal Opportunity." The Appellant further claimed that Respondent retaliated against her when she was "...reassigned and disciplined [with a] cut in pay." CP 4.

The Respondent denies that he "learned" of any "email to WSDOT's Office of Equal Opportunity..." sent by Appellant. CP 28-9. He pointed out that the Office of Equal Opportunity for DOT (OEO/DOT) reports to an Assistant Secretary and not to him. CP 29. He denied knowledge of emails sent to the OEO/DOT. He further declared that he would only become aware of a "complaint" if an investigation was finalized and it involved the Office of Human Resources. CP 29. The Appellant has not rebutted the Respondent's declarations.

The Respondent did engage in a disciplinary action against the Appellant when an investigation of her email disclosure of confidential information to a former employee of DOT was completed and after she was assigned to her home pending the investigation. On the 30th of November 2009, the Appellant was provided a "pre-disciplinary letter" and given the opportunity to respond to the charges of breach of confidentiality and trust. CP 32.

The Appellant responded in writing the same day and admitted sending the email with privileged and confidential information for "non-business" purposes. CP 32-3. Based on the charges and the response admitting the disclosure of confidential and privileged information, the Respondent imposed a three-month five-percent reduction in salary. CP 28. The discipline was set forth in a letter under date of 4 December 2009 to be effective 1 January 2010. The Respondent cited "*...breaches of confidentiality and poor ethical behavior [that] jeopardize relationships between the Human Resources Office and its customer and detracts from its credibility.*" CP 33.

Ms. Townsend appealed to the Personnel Resources Board (PRB) from the disciplinary action. An evidentiary hearing was held before the PRB on 9 June 2010 where the Appellant was represented by Andrew Green.^[3] In the written ruling by the PRB, the Board found that "Although the email was nearly two years old when the investigation began, Respondent initiated the investigation as soon as it became aware of the email and the Appellant's alleged violation of human resource policy and expectations...The investigation was timely." CP 36. The PRB found that the disciplinary sanction of a reduction in salary was appropriate and the appeal filed by Ms. Townsend was denied. The ruling was issued on the 28th day of July 2010. CP 37-8.

^[3] Her legal counsel in this proceeding. CP 30.

This lawsuit was filed six months later on the 11th of January 2011.

CP 3. Among the claims asserted in the underlying action was:

2.6 Beginning in or about November 2009, Defendants retaliated against Plaintiff for assisting Ms. McGuire in her age discrimination claim and/or for opposing discriminatory conduct when they reassigned and disciplined Plaintiff and cut her pay.

2.7 Plaintiff opposed Defendant's retaliatory pay cut by administratively appealing it.

2.8 Defendants further retaliated against Plaintiff by making threatening and/or derogatory comments directed to or about her, making gestures threatening her continued employment, alienating her from her coworkers, removing previous work privilege, increasing undesirable duties, and proposing to remove her from her position into positions with lesser job duties, pay, status and security.

2.9 By their aforementioned conduct, Defendants altered the terms, conditions, and privileges of Plaintiff's employment, subjected her to unequal working conditions, created a hostile work environment, and wrongfully demoted her."^[4]

After the lawsuit was filed and seventeen months after the alleged complaint by Ms. Townsend was filed with the OEO/DOT the Answer and Counter-claim was filed in the civil action in Thurston County on 8 March 2011. CP 8-11. The Answer denied the allegations of discrimination and retaliation. The Counterclaims contended that Ms. Townsend had invaded

^[4] Thus, the claims made by the Appellant in her unverified complaint are based upon the contention that the Defendants "retaliated against Plaintiff" because of her assistance to Ms. McGuire. ¶ 2.6, supra. That initiating claim was tied to the allegations in paragraph 2.8 and 2.9, by the word "further" tying those paragraphs to the paragraph 2.6 through paragraph 2.7. CP 3-4.

the privacy of the Respondent and held him a false light and defamed him. The counterclaims asserted that Ms. Townsend had falsely accused Mr. Wooden of discrimination or retaliation including gender-based harassment and/or a hostile working environment. He claimed she had published the claims to his employers and administrators at DOT.

On the 4th of May 2011, the Appellant filed a Special Motion to Strike the Counterclaim filed by the Respondent pursuant to RCW 4.24.525. CP 17-23. A response was filed by Mr. Wooden. CP 39-44. Thereafter, Ms. Townsend filed a Reply on the 26th of May 2011. CP 45-53. Hearing for the matter was held on 27 May 2011. The Honorable Paula Casey, Judge, Thurston County, filed a Letter Opinion under date of 2 June 2011. CP 56-7. The ruling by Judge Casey denied the Special Motion citing the Saldivar v. Momah^[5] decision by Division II of the Court of Appeals. Judge Casey held that "When private relief is sought, the complaining party ceases to be among the class of persons the anti-SLAPP statute was designed to protect." CP 57. Judge Casey found Ms. Townsend to be outside the anti-SLAPP statute protected class.

An Order Denying Plaintiff's Motion to Dismiss Defendant's Counterclaims and For Relief under RCW 4.24.510 was entered by the Court on 21 June 2011. CP 58-9. This Appeal followed on the 5th of August 2011.

^[5] 145. Wn.App. 365,

III. ARGUMENT WHY APPEAL SHOULD BE DENIED

A. Appellant Is Not Within Class Protected By Anti-SLAPP Law

Initially, the Court must determine whether the Appellant is entitled to claim immunity under the anti-SLAPP statute. Immunity from suit is available to persons who communicate a complaint or information to an agency of the federal, state or local government from civil liability under RCW 4.24.510. The action of the Legislature when the law was first adopted in 1989 was in response to civil actions that were filed to intimidate citizens from exercising their First Amendment rights and their rights under Article I, Section 5 of the Washington State Constitution, particularly when that communication involved reporting of potential wrongdoing to governmental agencies. Segaline v. Labor & Industries, 169 Wn.2d 467, 473, 238 P.3d 1107 (Aug. 2010). The statute adopted by the Legislature became known as the "anti-SLAPP" statute. Segaline, at 473, 479. However, the protections of the law do not operate to immunize persons who after having filed a complaint within the scope of the protection offered by the law, then seek personal relief.

The Appellant has sought to extend the immunity afforded by the anti-SLAPP statute as a bar to the Counter-claim of the Respondent. This is true in spite of the decision made by the Appellant not to allow the governmental agency to act to resolve the alleged wrongdoing; but, to seek personal relief through a lawsuit seeking general and special damages and attorney fees and costs.

1. Saldivar v. Momah Is Determinative

The leading case, Saldivar v. Momah, 145 Wn. App. 365, 387, 186 P.3d 1117 (2008), a Division II ruling, held that "...once the Saldivars became private plaintiffs seeking private relief, they ceased to be among the class of persons who can claim protection from liability under [the anti-SLAPP statute]." The immunity offered by the statute relates to communications made to governmental officials, not to the court. A person who brings a private lawsuit for private relief is not seeking official governmental action but rather redress from the Court. Reid v. Dalton, 124 Wn. App. 113, 126, 100 P.3d 349 (2004).

In Momah, the Defendant, Dennis Momah, had filed a counter-claim against Saldivar and Bharti. Saldivar had filed a complaint with the Medical Quality Assurance Commission (MQAC) of the State of Washington contending that Dr. Dennis Momah had sexually assaulted her during examinations at the clinic where he was employed. After the counter-claim was filed and trial had begun, the Plaintiffs contended that they were immune from the counter-claim because the counter-claim arose from the Saldivar's privileged complaints to the MQAC. Judge Quinn-Brintnall, writing for a unanimous bench, held:

While RCW 4.24.510 protects the Saldivars from liability arising from actions taken by MQAC or police in response to their complaints, it is not applicable to private lawsuits for private relief. . . .

At 386.

This cause of action is the same as that in Saldivar v. Momah. Ms. Townsend alleges that she filed a complaint with the OEO/DOT. She contends the complaint related to discrimination and/or retaliation practiced by the Respondent to impose a disciplinary action against her. In Momah, the Saldivars filed a complaint with the MQAC contending a breach in the standards of practice by Dr. Momah. The Appellant here waited until after the PRB had ruled in favor of the Respondent's disciplinary decision and then filed suit. The suit did not seek injunctive action or any extraordinary writ to force the agency where she was employed to undertake remedial action based upon her complaint. There is no evidence Ms. Townsend filed a claim with the Washington State Human Rights Commission or the Federal Equal Employment Opportunity Commission seeking administrative relief from the actions alleged in her complaint.

2. Correlation Of Dr. Momah's And Respondent's Actions

Instead, as did the Saldivars, the Appellant filed a lawsuit seeking, *inter alia*, special and general damages, costs and attorney fees under the ADEA, Title VII of the Civil Rights Act of 1964, as amended, and the Washington State Law Against Discrimination. This relief was sought for the Appellant and for no other reason. DOT did not request that the Appellant file a civil action against the agency and the Respondent.

Dr. Momah filed a counter-claim against the Saldivars as the Respondent here has done. The Saldivars claimed that Dr. Momah's claims of abuse of process and outrage arose from the Saldivar's privileged

complaints to the MQAC (and police), just as the Appellant here claims that the Respondent's counter-claim for invasion of privacy and defamation arose from her alleged complaint with the OEO/DOT about her disciplinary action.

Setting aside for the moment that the Respondent has denied, without rebuttal, that he was unaware of the Appellant's alleged complaint when he acted to investigate and impose discipline upon the Appellant and that it is unknown from the record which event occurred first, (a) the knowledge that Ms. Townsend had breached confidentiality; or b) her alleged complaint to OEO/DOT), the rule in Saldivar v. Momah, holds that the anti-SLAPP statute protects the complaining party (the Saldivars) from actions taken by the MQAC (or police) but it is inapplicable to private lawsuits for private relief by the same complainant. At 386. Likewise, DOT did not file the counter-claim, it was the Respondent who filed the claim.

The appeal of Ms. Townsend fails as a matter of law. It cannot be gainsaid that Mr. Wooden filed his counter-claim in retaliation for the alleged complaints filed by Ms. Townsend. Instead, as did Dr. Momah, he filed his counter-claim because the claims of Ms. Townsend were false and damaged his reputation and mental health.

3. Valdez-Zontek v. Eastmont School District Supports Momah

This conclusion is supported by the recent decision of Division III of the Court of Appeals in Valdez-Zontek v. Eastmont School District,

154 Wn. App. 147, 152, 225 P.3d 339 (2010). In that case, the Plaintiff, Ms. Valdez-Zontek brought a civil action seeking personal relief from alleged discrimination, retaliation, constructive discharge, defamation and false light invasion of privacy. The defendant school district contended that the anti-SLAPP statute immunized it from claims of defamation and false light invasion of privacy because some of the alleged statements which violated those intentional torts were expressed by a district employee to the Washington State Auditor. Judge Brown, writing for the panel, distinguished the salacious information conveyed by the district employee to the state auditor from those "...communications of reasonable concern to the agency." He noted that the "statute does not provide immunity for other acts that are not based on the communications." At 167.

B. Appellant's Claim Is Based Upon An Adverse Administrative Action Imposed By The Defendant Which She Is Estopped To Deny Was Valid

The counterclaim filed by the Respondent alleged that:

5.2 ... she falsely claimed that he had engaged in discrimination or retaliation including gender-based harassment, and/or engendered a hostile working environment for the [Appellant], causing him mental suffering, shame and humiliation.

5.3 ... [Appellant] unreasonably intruded into the private affairs of the [Respondent] through unwanted publication of the false allegations she made to his employer and administrators at the Defendant DOT.

6.2 *[Appellant] intentionally published and/or disseminated communications to the administrative officers of the Defendant DOT false allegations concerning his conduct and actions in regard to [Respondent] without consent of the [Respondent] or privilege.*

These allegations were propounded in response to the allegations made by the Appellant in her complaint, e.g., Paragraphs 2.6 - 2.9. In those paragraphs the Appellant asserts that the disciplinary action taken by (in this argument) the Respondent was either discriminatory and/or retaliatory.

1. RCW 4.24.525 – Procedure/Analysis

RCW 4.24.525(4)(a) establishes a procedure for the Court to use to determine the application of the anti-SLAPP statute. Sub-part (b) establishes a burden of proof scheme. If the court determines that the Appellant does fall within the scope of the persons for whom a claim of immunity exists under the anti-SLAPP statute, then the Court must view the record to see if the Appellant has met the "*...initial burden of showing by a preponderance of the evidence that the claim is based upon an action involving public participation and petition.*" To do this, the Court must consider whether the unverified complaint of the Appellant is a sufficient basis to meet the evidentiary burden since no affidavit or declaration of facts was submitted by the Appellant. The statute does enable the Court to consider the pleadings and supporting or opposing affidavits "*...stating the facts upon which the liability or defense is based.*" Here there are no

actual facts presented by the moving party, the Appellant, for the court to consider. The Respondent has provided factual information rebutting the claims of the Appellant. CP 27-38.

If the moving party meets its burden then the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. The statute provides: "If the responding party meets this burden, the court shall deny the motion." Thus, although immunity could be available to a moving party, the immunity is not absolute.

When the burden is shifted, the responding party has the obligation to "*...establish by clear and convincing evidence a probability of prevailing on the claim.*" RCW 4.24.525(4)(b). Here, Respondent contends that if the court reaches this element of the procedure, the burden has been met by the Respondent and the motion should be denied. Ibid.

2. Alleged Basis For Retaliation

The Appellant asserted in her Complaint that the basis for the "retaliation" was the Respondents administrative efforts when he "reassigned and disciplined Plaintiff and cut her pay." CP 4. The clear and convincing evidence provided by Respondent in his declaration under oath was a) he had not learned of the complaint made by Appellant to OEO/DOT when he initiated the investigation of misconduct; b) the discipline he imposed was a reduction in pay for three months based upon her breach of confidentiality; c) the Appellant was transferred to a position where she would not have access to confidential records to limit her ability

to misuse information; d) the Personnel Resources Board affirmed his decision to discipline the Appellant after a full and fair hearing where the Appellant was represented by legal counsel; e) the Respondent does not have access to the OEO/DOT emails or records; f) the OEO/DOT does not report to the Respondent but to an Assistant Secretary; and g) the Respondent played no part in the specific assignments made to the Appellant after she was transferred to a new position following the disciplinary decision. CP 27-38.

In this instance, the Appellant did not rebut any of the specific averments of fact made by the Respondent but relied upon the pleadings she had filed in the trial court. The Respondent does not have to demonstrate actual malice, but must show "*...a probability of prevailing on the claim.*"^[6] In short, the question becomes whether it is more probable than not that the Respondent can prevail on the claim made by the Appellant that he "discriminated and/or retaliated" against the Appellant for her breach of confidentiality by imposing discipline and transferring her to a position where she would not have further access to the confidential information which had been wrongfully disclosed. The Appellant is estopped to deny that, at minimum, the Respondent validly engaged in a disciplinary action due to her own misconduct and not for any alternative or illegal motivation. CP 30-39.

^[6] RCW 4.24.525(4)(a).

3. Appellant's Basis For Claims Of Discrimination / Retaliation Through The Disciplinary Action

The Complaint by the Appellant relies upon the initial actions of the Respondent when he undertook an investigation of potential misconduct and then imposed formal discipline after the admission by the Appellant that she had breached confidentiality and disclosed confidential information to a former employee who had filed a lawsuit against the agency and included the Respondent as a party-defendant. At the time Appellant filed her lawsuit, she knew that the PRB had already approved the validity of the determination of misconduct by the Appellant and had sanctioned the punishment imposed as discipline for breaching confidentiality by improper disclosure.^[7]

It appears that the Appellant contends that because her motivation was "pure" the motivation by the Respondent, who was enforcing the restrictions on disclosure of personal information, was not and that his motivation for the discipline was retaliatory.

a. Ruling By Personnel Appeals Board Supports Respondent's Burden

But, an independent, objective body determined that the Respondent was justified in his disciplinary decision and there was no contention or argument by the Appellant before the PRB that Respondent was motivated by "retaliation" or some other form of violation of the Law

^[7] Respondent contends that with this determination, the Appellant was aware that her communications (summarized in her complaint filed after the decision) were false or were in reckless disregard of the falsity of the claim of retaliation and/or discrimination.

Against Discrimination.^[8] Thus, it is clear from the un rebutted evidence that the Respondent properly engaged in discipline of the Appellant. The PRB was convinced that the Respondent's action was appropriate and that the Appellant had engaged in misconduct and that the punishment imposed was appropriate given the offense. There was no evidence of any illegal motivation offered or argued by the Appellant at the very hearing challenging the disciplinary action affecting the working conditions of the Appellant.

As noted in Section II above, at page 4, the "FACTUAL BACKGROUND" alleged by the Appellant in her Complaint, in paragraphs 2.4 - 2.8 are all dependant on the disciplinary process undertaken by the Respondent which was alleged to be "retaliatory". CP 4-5. Since the evidence supports the conclusion that there was no proof of retaliatory motivation in the administrative action by the Respondent, the special motion should be denied because Mr. Wooden has evinced a probability of prevailing on his claim of defamation and invasion of his privacy plead in the counter-claim.

VI. CONCLUSION

The ruling by Judge Casey should be affirmed because the Appellant is not among the class of parties who enjoy immunity under the anti-SLAPP statute because the Appellant has filed a civil action

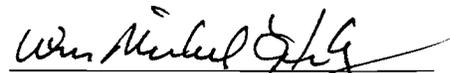
^[8] There was a defense of "disparate punishment" argued by the Appellant before the PRB, but the Board declined to agree with the defense.

requesting personal relief. The ruling by Judge Casey which denied the special motion should be affirmed on separate grounds because the Respondent has been able to demonstrate by clear and convincing evidence that he has a probability of prevailing on his claims because the Personnel Resources Board has affirmed as valid the basis for the discipline he imposed. This independent determination by the PRB thereby establishes that there was no motivation for the discipline that could support the Appellants subsequent claims of "retaliation".

This matter should be remanded back to the trial court for further proceedings after the decision by Judge Casey to deny the special motion is affirmed. There is no basis for attorney fees or costs or imposition of the statutory penalty.

RESPECTFULLY SUBMITTED THIS 2ND DAY OF
DECEMBER 2011.

Wm. Michael Hanbey, P.S.



Michael Hanbey, WSBA # 7829
Attorney for Respondent
Kermit B. Wooden

COURT OF APPEALS
DIVISION II

11 DEC -5 AM 10:20

STATE OF WASHINGTON

DEPUTY

CERTIFICATE OF SERVICE

I, Lisa Shannon, certify that on the 2nd day of December, 2011, I caused the original and one copy of this document to be filed with the Court of Appeals, Division II, via First Class U.S. Mail, and a copy of this document to be served via First Class U.S. Mail to the following parties or counsel of record:

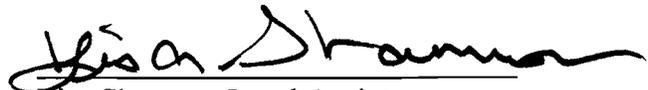
Mr. Andrew P. Green
Attorney for Appellant
1105 Tacoma Avenue South
Tacoma, WA 98402

Mr. Glen A. Anderson
Attorney for Defendant, State of WA
1250 Pacific Avenue, Suite 105
Tacoma, WA 98401-2317

Mr. Kermit B. Wooden, Respondent
3164 Vista Verde Drive SW
Tumwater, WA 98512

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

DATED this 2nd day of December, 2011, at Olympia, WA.


Lisa Shannon, Legal Assistant