Case No. 43975-1-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

Paula Jones (Appellant/Plaintiff)

v.

Grays Harbor County, et al. (Respondents/Defendants)

On Appeal from Grays Harbor Superior Court
The Honorable Michael J. Sullivan
(Visiting Judge from Pacific County Superior Court)

APPELLANT'S REPLY BRIEF

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WASHINGTON STATE STATUTES

Revised Cod e of Washington 9a.36

INTRODUCTION

In this brief, Appellant substantially narrows their appeal to a single claim, wrongful discharge in violation of public policy. Although Appellant believes multiple errors may have been made by the trial Court, Appellant wishes to focus this Court on its strongest claim rather than wade through every argument brought in Appellant's opening brief.

The reason the trial court's decision is being appealed is because Appellant's claim was dismissed without explanation despite a great deal of powerful evidence. The strength of this evidence should have propelled this case to trial through overcoming Respondents' motion for summary judgment. In particular, the smoking gun-like concessions from decision maker, Commissioner Carter, that the only example of poor performance or unprofessionalism that Carter can think of to justify Appellant's termination was how she responded to being assaulted on the job. Counsel on both sides of this case have agreed that Appellant responded to being assaulted on the job by filing a police report against the perpetrator and reporting the assault to her superiors at work. Appellant prays this Court will find that she should be protected from a retaliatory discharge for reporting being the victim of an assault.

ARGUMENT

Retaliatory Discharge in Violation of Public Policy

To prevail on a wrongful discharge claim, a plaintiff must show:

> (1) Washington has a clear public policy (the *Clarity* element), (2) discouraging the conduct would jeopardize the public policy (the *jeopardy* element), and (3) that policy-protected conduct cause the dismissal (the *causation* element). If these three elements are met, an employer will still prevail if it is able to offer an overriding justification for the termination decision (the *absence of justification* element).

Briggs v. Nova Servcs., 166 Wn.2d 794, 802, 213 P.3d 910 (2009) (emphasis in original; internal citations omitted). Appellant has shown each of these three elements as explained below.

Respondents' make five main arguments against a finding that Defendants Discharged Plaintiff in Violation of Public Policy. These are that (1) this claim was not in the Notice of Appeal, (2) that an overriding justification exists, (3) that no clear public policy element exists, (4) that no Jeopardy element exists, and (5) that no causation element exists. Each of Respondent's five arguments have substantial flaws.

1. Appellant's Retaliatory Discharge in Violation of Public Policy Claim Was Sufficiently Identified in the Notice of Appeal

Plaintiff's lawsuit included four claims, two of which involved retaliation. Both the Wrongful Termination in Violation of WLAD

(Washington Law Against Discrimination) and the Wrongful Discharge in Violation of Public Policy are claims that Plaintiff was retaliated against. Appellant's Notice of Appeal specifically references the "Judgment entered on August 17, 2012." (CP 0852) This judgment dismissed Plaintiff's Discharge in Violation of Public Policy Claim and did NOT discharge Plaintiff's Termination in Violation of the WLAD. (CP0680-CP0682) Despite this, Respondent's brief suggests that their interpretation of the Notice of Appeal was that Plaintiff ONLY wanted to appeal the claim of Wrongful Termination in Violation of WLAD, even though this claim was not dismissed in the judgment on August 17, 2012. (CP0680-CP0682) Respondents are either confused or trying to confuse this court. Of the two claims of retaliation, ONLY the Discharge in Violation of Public Policy was dismissed on August 17, 2012, which makes the intention of Appellants clear.

If any confusion still existed after the reading of the Notice of Appeal, it should have been put to rest by Appellant's opening brief. The opening brief's first argument section is titled "The Court's Dismissal of Plaintiff's Retaliation Claim was not supported by the record." The very first sentence of the legal analysis in that section states that "A three part test exists to determine if Jones was wrongfully discharged in violation of public policy." Appellants clearly identify to Respondents and this Court

that their intention from the beginning of this appeal has been based on a claim of wrongful discharge in violation of public policy.

2. No Overriding Justification Exists

Respondents attempt to make a second causation argument out of the analysis of the Court in *Briggs v. Nova Servcs.*, 166 Wn.2d 794, 802, 213 P.3d 910 (2009). Without any authority or analysis, Respondent's assert that Jones' alleged "poor performance" and the County's alleged budgetary concerns are overriding justifications for the decision to terminate Jones. The Court in Briggs does not go into much detail about this burden, although it does make it clear that the burden of proof is on the employer to prove an overriding justification. Additionally, the Court in *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wash.2d 46, 821 P.2d 18 (1991), reinforces the burden shift to the employer and requires the employer to "articulate legitimate nonpretextual nonretaliatory reason for discharge." As outlined in the Causation Section 5 below, thus far, the employer has provided very little evidence to support an overriding justification of budgetary concerns or poor performance. Additionally, the employer's "justifications" mainly stemming from the County's Pre-Termination Notice is full of pretextual reasons to terminate Jones for reporting being assaulted. This pretext was clearly flushed out in the analysis of Deposition of Commissioner Carter in the causation section

below. Respondents' attempts to assert barely evidenced pretextual reasons as an overriding justification fail under the analysis of the Wilmot Court.

3. A Clear Public Policy Exists to Protect People Against Assault

Respondents' rely on the Court's analysis of a clear public policy in *Thompson v. St. Regis Paper Co.,* 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). The Court in Thompson held that Court looks to whether the employer violates "letter or purpose of a constitutional, statutory, or regulatory provision or scheme." *Id.* In this case, the statute implicated is RCW 9a.36 which exists to protect the citizens of State of Washington from Assault. Plaintiff's claim was that the employer assaulted her and then retaliated against her by firing her after she filed a police report and went to the Board of Directors (up the chain of command). If victims of assault (Plaintiff) are not protected in reporting allegations of assault in the workplace, the entire regulatory scheme that made assault illegal becomes meaningless as no convictions will ever occur if victims live in fear of reprisal for coming forward.

Respondent's then go on to rely on *Gardner v. Loomis Armored, Inc.,* 128 Wn.2d 931, 936, 913 P.2d 377 (1996). The Court in Gardner specifically states that generally "courts find a wrongful discharge in violation of public policy where an employee is terminated because he or

she … reports employer misconduct and is terminated in retaliation for doing so". *Id.* This is exactly the case at hand. Appellant reported employer misconduct (assault by Persell) and was terminated in retaliation for it. The Court in Gardner supports a finding that Respondents' Discharge of Appellant violated public policy.

Finally, Respondents argue with no citation or evidence that no assault occurred. The people who were present at the time all conclude that Appellant was, in fact, assaulted. This includes Debbie Adolphsen, Juanita Adolphsen, and James Borden. Mr. Borden, an elderly man on an oxygen tank apologized for not intervening and that he feared Persell would punch him. (CP0191-CP0192) Additionally, there is no dispute that Jones filed a police report documenting the assault or that Jones reported the Assault to the Board of Directors of the Fairgrounds. Furthermore, Respondents have not even presented a denial by Persell, the perpetrator of the assault. The extent of Respondents evidence that no assault occurred is from people who were not present. All of those who were present at the time of the assault concluded that Jones was assaulted, in fact, by Persell.

4. The Jeopardy Element Exists

The Jeopardy element, in this case, is satisfied on its face. If people generally are not protected in reporting being assaulted by their

employer, than many people will not report assaults out of a rightful fear of retaliation thereby undermining the entire regulatory scheme surrounding preventing assault and convicting perpetrators of assault under RCW 9a.36. As explained above, if people are fearful of losing their job for reporting being the victim of assault, many will not report such assaults. If people do not report the assaults, there is no way for law enforcement or other authorities to take action to prevent future assaults and/or convict perpetrators of assault. Furthermore, the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) held a showing that a "chilling effect" would result from not allowing petitioner's case to move forward was enough to overcome summary judgment. In this case, a clear chilling effect would result. If the acting-director can be fired for reporting being assaulted, the rest of the staff at the Fairgrounds are reasonably fearful of coming forward with similar complaints. It is hard to imagine that a chilling effect would not set in after such an abrupt retaliatory discharge for reporting an assault on the job. Any reasonable person would be chilled from exercising the right to report an assault after Appellant was terminated.

Respondents falsely rely on *Cudney v. ALSCO, Inc.,* 172 Wn.2d 524, 536, 259 P.3d 244 (2011). The Court in Cudney held that a Plaintiff who has an administrative agency framework to access needs to attempt to

access that framework before bringing a civil lawsuit. In Cudney, the Plaintiffs were unionized and failed to bring their claim through the administrative agency overseeing collective bargaining as the agency had a specific remedy for retaliation. This is terribly distinct from our case. Appellant was not unionized and there is no administrative agency that oversees retaliatory discharges for reporting employer assaulting one of their employees. The very fact that Respondents fail to come up with even one such agency suggests that this lawsuit was the "only available adequate means" as outlined by the Court in Cudney.

5. The Causation Element Exists

During her entire career of over twenty-two (22) years of service with the County Fairgrounds, Appellant did not have ANY negative evaluations or ANY written disciplinary actions in her supervisory and personnel files with the County, other than her abrupt termination. (CP0182)(CP0185) In fact, her personnel file is filled with nothing but positive written statements from her multiple supervisors over the years and letters from the public and her staff, ALL in support of her. (CP0182)(CP0185)(CP0193)(CP0793-CP0807)(CP 0811-CP0813) (CP0816-CP0824) There is literally not one thing negative, other than her termination paperwork, in her entire supervisory and personnel files. (CP0182)(CP0185)(CP0793-CP0824) Respondents' attempts to claim

that the termination of Appellant was based upon "poor performance, unprofessional conduct, and budgetary concerns" are simply untrue and pretextual in nature.

As for the supposed budgetary concerns of the County, Commissioner Carter wrote that the decision to terminate Jones was "not just a question of needing to make cuts in the fair's budget" in the pre-termination letter to Jones. Additionally, Respondents thus far have provided zero evidence that terminating Jones actually saved the County even once cent. There is not even evidence that the commissioners did some kind of study or other inquiry that suggested to THEM that a new management team would save money. In fact, Respondents have provided no evidence to support that the two men who took over for Jones and Adolphsen were paid less. To deny the causation element based on an alternative cause, Respondents need to provide some evidence of their alternative cause, not simply state that it exists. Here, evidence is substantially lacking to suggest Jones was abruptly terminated and replaced in an attempt to save money. The evidence much more strongly supports a finding that Jones was retaliated against for reporting being assaulted.

Respondents also make the argument that Jones was terminated due poor performance and unprofessional conduct. As noted above, there

is ZERO documentation of poor performance or unprofessional conduct in her personnel and supervisory files. On the other hand, tremendous documentation of Jones "superior" and "outstanding" performance and her professional conduct exists in her personnel and supervisory file. (CP0793-CP0824) The real damning evidence of this claim of unprofessionalism and poor performance being a pretext for retaliation came during the deposition of Commission Carter.

Although Respondents' Counsel has come up with a variety of alleged examples of poor performance or unprofessionalism, Appellants counsel specifically asked Commissioner Carter for some of those examples. Counsel asked Carter for any examples of Jones' poor performance and the ONLY example that Carter could think of was the conflict with Dave Persell. (CP0228-CP0232) This proves that when Carter writes in his Pre-Termination notice that he is terminating Jones for her poor performance, what he means by "poor performance" is that Jones reported Persell's assault to the Police and to the Fair Board. Counselor went on to ask for any examples of mismanagement of staff and again the ONLY example Commissioner Carter could come up with was "the Dave Persell incident." (CP0228-CP0232) This means that when Carter writes in his Pre-Termination Notice that he is terminating Jones for poor staff management, what he means by "poor staff management" is that Jones

reported Persell's assault to the Police and to the Fair Board. When asked for ANY examples of Jones failing to manage conflict effectively, the only example Carter gave was again, the conflict with Dave Persell. (CP0228-CP0232) This means that when Carter writes in his Pre-Termination Notice that he is terminating Jones for an inability to manage conflict effectively, what he means by "inability to manage conflict effectively" is that Jones reported Persell's assault to the Police and to the Fair Board. This is both the employee and employer saying the same event led to the employee's termination, that being "the conflict with Persell." This is very powerful evidence that the stated reasons in Jones' Pre-Termination Notice for terminating Jones were pretext for retaliating against Jones for reporting Persell to the police and the fair board after he assaulted her.

Respondents make the argument that Jones was not retaliated against for making the reports to the Police and the Fair Board about Persell's assault, but rather how she dealt with it. That said, there is no allegation of screaming in the hallways or some other unprofessional outburst surrounding how Jones dealt with being assaulted. In fact, Respondents' concede that the Chair and Vice Chair of the Fair Board were upset and angry at Jones for reporting Persell's assault because it led Persell's resignation from the Board. (CP0070-CP0072) They said Jones was "being whiny and just making too much of it." (CP0070-CP0072)

Simply put, the employer conceded they were mad at Jones for reporting Persell's assault because they liked him.

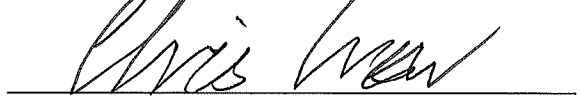
Respondents' final argument on the Causation Element is a question of temporal proximity. Respondents argue that because 15 months passed between Persell's assault of Jones and the termination of Jones, a causal connection cannot be found. Respondents rely on a litany of cases that all simply state that proximity between the events is "a factor" in a finding of causation. Not a single case says fifteen (15) months of time in between the two events is dispositive in proving that no causation exists. In fact, Courts have stated quite the opposite. The Court in *Gibson v. Shelly Co.,*314 Fed.Appx. 760 (6th Cir. 2008), held that the court has "never suggested that a lack of temporal proximity dooms a retaliation claim." *Id.* In fact, in *Harrison v. Metro. Gov't of Nashville*, 80 F.3d 1107, 1119 (6th Cir. 1996) the Court found that 15 months of proximity was not too long to find causation. Much like the petitioner in Harrison, due to the strong evidence of causation stemming from Commissioner Carter's deposition, 15 months of time passing between Jones being assaulted and terminated is close enough in proximity to find causation.

CONCLUSION

Appellant prays that she has successfully articulated a seemingly simple case of a wrongful discharge in violation of public policy. Appellant was assaulted at work and reported that assault. Her report led the perpetrator of the assault to resign from the Board. In retaliation for causing him to resign through reporting this assault, Appellant was terminated based on pretextual reasons. Appellant's sole available remedy is to pray for Justice through this Appeal.

For all of the reasons stated above, the Appellant, Paula Jones respectfully requests this Court find that the August 17, 2012 Order of Dismissal on Summary Judgment should be reversed, that Judge Sullivan should be removed from the case on remand, that this case be remanded to the neighboring jurisdiction of Thurston County Superior Court, that the Order awarding Defendants sanctions and fees be vacated, and that Ms. Jones should be awarded all costs and fees allowed under the law.

DATED this 28th day of February, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2013:

I delivered an electronic version of the foregoing reply brief, using the Court's online electronic filing system to Respondents' counsel of record as follows:

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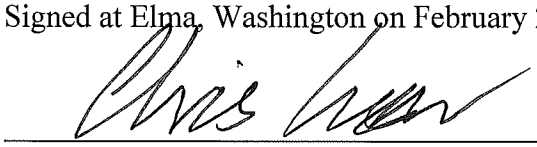
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online electronic filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Elma, Washington on February 28, 2013.



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