

FILED

NOV 13 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 309509-III

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

JANETTE WORLEY,

Appellant,

v.

PROVIDENCE PHYSICIAN SERVICES CO.,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Plaintiff Appellant, Janette Worley, was hired by Providence Physician Services Company (“Providence”) as an Advanced Registered Nurse Practitioner (“ARNP”) on June 30, 2008. Ms. Worley worked in the orthopedic clinic of Providence, as well as performing rounds on surgical patients on the orthopedic floor of the hospital. During her tenure of employment with Providence, Ms. Worley was required to provide both clinical and non-clinical services for Providence. Ms. Worley’s clinical supervisor was Dr. Andrew Howlett. Ms. Worley’s non-clinical supervisor was Heidi Brown.

Throughout Ms. Worley’s employment with Providence there were legitimate work-related concerns with her performance which culminated in a final written warning on June 9, 2009.

On June 12, 2009, Ms. Worley was terminated from employment with Providence for legitimate non-retaliatory reasons which violated policy and procedure relating to protected patient health information and insubordination.

Ms. Worley brought a legal action against Providence alleging that she was (1) wrongfully discharged in violation of public policy and (2) that Providence wrongfully discharged her in breach of promise.

Providence brought a motion for summary judgment seeking to dismiss both claims. The trial court agreed with Providence that summary judgment was appropriate and, as a result, dismissed both claims. The trial court held that plaintiff had failed to establish three essential elements of a public policy discharge claim: *jeopardy, causation and overriding justification for dismissal*. Initially, the trial court held that Ms. Worley failed to establish the element of *reliance* on her breach of promise claim, but later clarified in its ruling denying Ms. Worley's motion for reconsideration that she had failed to establish the element of *breach*.

Ms. Worley now appeals and seeks reversal of the trial court order dismissing both of her claims on summary judgment. The record is devoid of any sufficient evidence which raises a material question of fact requiring a trial of this matter. The trial court's order granting Providence's motion for summary judgment and denying Ms. Worley's motion for reconsideration should be affirmed.

II. STATEMENT OF THE CASE

Ms. Worley commenced employment with Providence on June 30, 2008. Ms. Worley was hired to work as an ARNP in the orthopedic clinic of Providence. CP 103. When she was hired, Ms. Worley signed an acknowledgment that she had received the job description for an ARNP. CP 080, CP 240.

Ms. Worley also acknowledged receiving Providence's Confidentiality and Acceptable Use Agreement ("Agreement") as it related to patient protected health information. The Agreement required Ms. Worley to acknowledge that she had access to confidential information and that even information developed by Ms. Worley "alone" may be considered confidential Providence information. And, further, the Agreement required that Ms. Worley would not disclose confidential information unless authorized by Providence within the scope of her employment or in compliance with Providence policies. Confidential information included patient information "whether oral or recorded in any form or medium" and that she "will hold confidential information in strict confidence." Ms. Worley also acknowledged that if she breached the Agreement that Providence "may institute disciplinary action including termination of employment." Exhibit 14, CP 083-089, CP 244-249.

Ms. Worley also acknowledged that she had received a copy of Providence's Code of Conduct Doing the right thing Right ("Code of Conduct") at the time she was employed. Exhibit 10, CP 067, 069, 071-073. This is the only document she is relying upon in support of her breach of promise claim. CP 140, CP 159-160. The Providence Code of Conduct specifically states, in relevant part, under its HIPPA Privacy and Security policy the following:

- Do not take patient data offsite except as necessary and in accordance with Providence and departmental policies.

Exhibit 10, CP O67.

The Code of Conduct also required Ms. Worley to keep information obtained at a Providence organization confidential which included patient information. “Confidentiality” is specifically defined as “keeping information private that should not be shared with anyone else.” The example that is provided under the “Glossary of Terms” “is medical information about a patient.” Exhibit 10, CP 069, CP 072.

The Code of Conduct encouraged employees to contact a compliance officer if the employee had any questions or concerns. Employees are specifically advised that they will not be disciplined for reporting “a possible regulatory violation.” However, employees are specifically advised that they “will not be protected from the results of their misconduct if they are responsible for a violation or any other act that is harmful to Providence.” Exhibit 10, CP 071.

Under the Code of Conduct non-retaliation is specifically defined as follows:

A policy that protects person(s) who report alleged violations of policies, regulations or laws to their supervisor, manager or an Integrity and Compliance resource from negative or adverse actions as a result of having reported a violation.

Exhibit 10, CP 073.

While employed by Providence, Ms. Worley's non-clinical supervisor was Heidi Brown. CP 251. Her clinical supervisor was Dr. Andrew Howlett. CP 251. Ms. Worley was hired by Dr. Howlett. Dr. Howlett made it clear to her when she was hired that he had an "advanced complex orthopedic practice." CP 250.

Ms. Worley had no issues with Dr. Howlett during her employment, although Dr. Howlett was concerned about her work performance. CP 107, CP 132, CP 170, 173-177.

As an ARNP, Ms. Worley was allowed to see patients without the physician being present. She was also allowed as an ARNP to bill under her own name. Ms. Worley was allowed to prescribe medication and to diagnose a patient after consulting with the patient. Exhibit 12, CP 076-079, CP 099-100. Ms. Worley's scope of practice as an ARNP involved ordering, collecting, performing and interpreting diagnostic tests. WAC 246-840-300. A diagnostic test is an x-ray. CP 145.

Ms. Worley was not subject to any type of written employment contract for a definite term and understood, as a result, that the nature of the employment relationship was at will. CP 101-102.

Beginning in October of 2008, Ms. Worley brought concerns to Dr. Howlett over having to provide healthcare to a patient with a cancerous tumor in his leg. CP 103. There were at least ten to fifteen

other patients during her employment that she complained to Dr. Howlett about that she thought were too complex from an orthopedic stand point for her to be seeing. CP 105, CP 109-110.

As a result of her concerns, Dr. Howlett would go over specific patients with Ms. Worley before she went into the examination room to see if there was something from a clinical stand point she needed to be aware of. Dr. Howlett and Ms. Worley would also meet at the hospital before she completed rounds on the orthopedic floor. CP 133-134.

During Ms. Worley's employment with Providence, Dr. Howlett had meetings with her to show her how to review, read and interpret x-rays and to correct any mistakes. CP 125-126. Dr. Howlett personally provided training to Ms. Worley with respect to appropriately reading and interpreting x-rays. CP 171.

On December 16, 2008, Ms. Worley had a documented meeting with her non-clinical supervisor, Heidi Brown, and her clinical supervisor, Dr. Howlett, to address performance concerns. This was considered a verbal warning pursuant to Providence's policies and procedures. The purpose of the meeting was to focus on legitimate concerns from both the staff and her supervisors relating to specific issues which were impacting patient care and impacting the performance of the clinic. At the meeting, Dr. Howlett expressed to Ms. Worley his commitment for her to be

successful and that failure on her part was not an option. Dr. Howlett also expressed to Ms. Worley that he was committed to teaching, coaching and training Ms. Worley. Dr. Howlett also advised that the issues addressed in the meeting needed to be completed or changed as soon as possible with no exceptions. Exhibit 1, CP 034-035, CP 129.

On January 29, 2009, Ms. Worley received a step two written warning pursuant to Providence's policies and procedures. The step two warning outlined three main areas that had not been resolved since the December 16, 2008 meeting: 1) failing to see patients that she was scheduled to see and falling behind patients scheduled time to be seen; 2) not returning patient calls in a timely manner; and 3) not appropriately checking out with nurses at the end of clinic day. Exhibit 4, CP 041-042.

On February 11, 2009, a meeting was held to discuss and resolve issues relating to Ms. Worley's performance. In attendance at the meeting were Senior Human Resource Business Partner, Jennifer Rollins, Director of Clinical Operations, Stacy Herron, Janette Worley and Heidi Brown. The issues discussed at the meeting related to the following: 1) documentation; 2) communication back to patients; 3) training; 4) RN/staff relationships; 5) schedule/timeliness; and 6) prioritization. Ms. Rollins was present at the request of Ms. Worley. Exhibit 5, CP 044-046; Exhibit 7, CP 048-050.

On February 16, 2009, a meeting was held to discuss communication and work flow issues between staff and Ms. Worley. Exhibit 7, CP 052-053.

On May 26, 2009, a Clinical Competency Evaluation Form ("Evaluation") for Ms. Worley was filled out and signed by Dr. Andrew Howlett. The evaluation identified seven areas reflecting that Ms. Worley's performance did not meet expectations. Dr. Howlett signed the evaluation and considered the information relating to his perception of Ms. Worley's performance to be correct. Exhibit 8, CP 054-056, CP 178-181, CP 214-216.

On June 9, 2009, a Corrective Action Notice was prepared and marked as a "final warning" to Ms. Worley. The Corrective Action Notice was issued for the following reasons: 1) excessive tardiness or absenteeism; 2) inferior work performance; 3) work flow impact issues; 4) behavior/conduct; 5) unsatisfactory patient and public relations; and 6) non-cooperation with leadership or fellow employees. The Corrective Action Notice was signed by Heidi Brown and Jennifer Rollins. Ms. Worley was provided the final warning. Exhibit 9, CP 057-059, CP 158, CP 255.

On June 10, 2009, Ms. Worley had a meeting with Kris Fay the Chief Operating Officer for Providence and Jennifer Rollins. At this

meeting, Ms. Worley raised compliance issues about alleged improper Medicare billing and having to read and interpret complex orthopedic x-rays that she asserted was outside the scope of her training and education. CP 255-256.

After this meeting, Ms. Fay contacted a Providence Compliance Specialist, Kari Lidbeck, for the purpose of reporting and triggering an investigation relating to Ms. Worley's allegations. Ms. Fay instructed Ms. Lidbeck to contact Ms. Worley's non-clinical supervisor, Heidi Brown, for the purpose of obtaining more information. CP 465-466.

After Ms. Fay reported Ms. Worley's allegations, Heidi Brown contacted Ms. Fay to advise her that Ms. Worley had returned to Providence's orthopedic clinic and while at the clinic had removed from the clinic a stack of patient face sheets which were on Ms. Worley's desk. The patient face sheets contained protected patient health information: the patient's name, date of birth, patient's condition, patient's diagnosis and treatment provided. CP 148-149, CP 445-446; CP 472-473.

On June 11, 2009, Ms. Worley was instructed to meet with both Kris Fay and Jennifer Rollins. At the meeting, Ms. Worley admitted to taking the documents from the clinic. Ms. Worley failed to respond when she was notified by Ms. Fay and Ms. Rollins that Providence wanted the documents returned. CP 256-257.

Although Ms. Worley alleges that she was instructed by the Compliance Officer, Kari Lidbeck, to fax any documents that were related to her concerns, Ms. Worley never provided the compliance officer with any documents. Instead, she removed the documents from the clinic, and provided the documents to her boyfriend and attorney, at the time, and eventually kept the documents in her home. CP 145-146, CP 256.

On June 12, 2009, Ms. Worley was notified in a meeting with Kris Fay and Jennifer Rollins that she was terminated for taking protected patient health information off the premises of the orthopedic clinic in violation of Providence's policies and for insubordination in refusing to return the documents when initially requested. Exhibit 11, CP 075; CP 447-448.

The ultimate decision makers relating to Ms. Worley's termination was Ms. Fay and Ms. Rollins. Heidi Brown had no input in the decision to terminate Ms. Worley's employment. CP 448.

Ms. Worley never contacted the department of health or any other state or governmental agency relating to her allegations of improper billing practices or alleged issues relating to being required to perform duties that she believed were outside the scope of her practice and medical charting issues either before or after her termination. CP 141-144.

Additionally, the first time Ms. Worley contacted a compliance officer was after she had received the final written warning on June 9, 2009. CP 139.

Ms. Worley subsequently brought a lawsuit against Providence alleging that she was wrongfully terminated in violation of public policy and breach of promise arising out of Providence's Code of Conduct. CP 003-006.

On January 20, 2012, Providence moved for summary judgment seeking dismissal of both claims. CP 012-013.

On March 20, 2012, the trial court issued a letter ruling granting Providence's motion. The trial court ruled that Ms. Worley failed to establish the *jeopardy*, *causation*, and *justification* elements on the wrongful discharge claim and the *reliance* element on the breach of promise claim. CP 479-481. The court entered an order granting Providence's motion for summary judgment dismissing both of Ms. Worley's claims on April 6, 2012. CP 482-484.

Ms. Worley filed a motion for reconsideration on April 16, 2012. CP 485. The trial court denied the motion on May 25, 2012. The court in its written ruling denying the motion for reconsideration clarified as it related to the breach of promise claim that Ms. Worley had failed to

provide sufficient evidence on the element of breach. CP 541-542; CP 543-544.

III. ARGUMENT

1. Summary Judgment Standard of Review.

Rule 56(c) provides the standard for granting a summary judgment motion. A moving party at the summary judgment stage of proceedings in any litigation is entitled to judgment as a matter of law if the record before the trial court establishes that there is no genuine issue of material fact that would warrant a trial of the non-moving party's claims. *CR 56(c)*. The United States Supreme Court has stated the burden on the moving party at time of summary judgment "should not be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the non-moving party bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden on the moving party may be met by simply establishing "that there is an absence of evidence to support the non-moving party's case." *Id.* The summary judgment procedure, as a result, is not a "disfavored procedural shortcut," but a procedure to weed out non-meritorious and frivolous claims that are unsupported by material evidence. *Id.* at 327. While all facts and inferences must be considered in a light most favorable to the non-moving

party, to avoid summary judgment dismissal the non-moving party must offer specific, detailed evidence that raises a genuine issue of material fact. *Charbonneau v. Wilbur Ellis Company*, 9 Wn. App. 474, 477, 512 P.2d 1126 (1973). A plaintiff's mere denials, argumentative assertions, personal opinion or unsupported conclusions will not defeat summary judgment. *Island Air, Inc. v. Labar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). Instead, the non-moving party when faced with a summary judgment motion must submit sufficient evidence setting forth specific material facts which have the effect of disputing the facts of the moving party. *Id.* Such disputing facts must rise to the level of creating a genuine issue of material fact. A material fact is one upon which the outcome of the litigation (or litigation of specific issues) hinges upon. *Id.* Thus summary judgment is proper where the evidence leads to only one conclusion. *Townsend v. Walla Walla School District*, 147 Wn. App. 620, 624, 196 P.3d 748 (2008).

2. The trial court did not commit reversible error in ruling that Ms. Worley failed to satisfy the *jeopardy* element of her public policy wrongful discharge claim.

Absent a definite contract, employment relationships are generally terminable at will. *Sedlacek v. Hillis*, 145 Wn.2d 379, 385, 36 P.3d 1014 (2001). When the nature of the employment relationship is at-will, it is not unlawful for Providence to discharge Ms. Worley, so long as the

decision was not motivated by an improper cause or reason. Providence had the right to terminate Ms. Worley for a good reason, a bad reason or no reason at all, so long as the reason was not based upon an improper cause. *AT & T Technologies*, 995 F.2d 846, 848-50 (8th Cir. 1993); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979).

The Washington Supreme Court has recognized “that the tort of wrongful discharge in violation of public policy is a narrow exception to the Employment at Will Doctrine.” *Id.* To prevail on a wrongful discharge claim, Ms. Worley had to satisfy a four factor test. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). (See also *Henry H. Perritt, Jr. Work Place Torts: Rights and Liabilities Section 3.7 (1991)*). Specifically, Ms. Worley had to establish the following: (1) the existence of a clear public policy (the clarity element); (2) that discouraging the conduct in which she engaged would jeopardize the public policy (the jeopardy element); (3) that the public policy linked conduct caused the dismissal (the causation element); and finally, (4) that Providence has not offered an overriding justification for the dismissal (the absence of justification element). *Gardner*, at 941.

The Washington Supreme Court first recognized the tort of wrongful discharge in *Thompson v. St. Regis Paper Company*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). In *Thompson*, the Washington Supreme

Court emphasized that “Courts should proceed cautiously” in identifying public policy. The admonishment to “proceed cautiously” applies with as much force to the jeopardy element as it does to the clarity element because, when *Thompson* was decided, the Washington Supreme Court treated the two elements together. *Thompson*, at 323 (quoting *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 380, 652 P.2d 625 (1982)); see *Gardner*, 128 Wn.2d at 941. The Washington Supreme Court has since confirmed that the wrongful discharge tort is narrow and should be “applied cautiously.” *Sedlacek*, 145 Wn.2d at 390. It is, in essence, a tort of last resort. *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208, 193 P.3d 128 (2008).

At the summary judgment stage of proceedings, the trial court had to decide whether there was sufficient evidence proffered by Ms. Worley to support the “jeopardy” element; that is, whether current laws or regulations provided an adequate means of promoting the public policies of insuring workplace safety, standard of care in the healthcare field, preventing fraud in billing and protecting against retaliation for such violations, and protecting the public for these reasons. In order to establish the “jeopardy” element, Ms. Worley had to establish at time of summary judgment that other means of promoting the public policy were inadequate and that the actions she took in bringing a tort of last resort, a

wrongful discharge claim in violation of public policy, was the “only available means” to promote the public policy and the narrow exception to the doctrine of at-will employment. *Hubbard v. Spokane County*, 146 Wn.2d 699, 713, 50 P.3d 602 (2002); *Danny*, 165 Wn.2d at 222; *Korslund v. Dyncorp Tri-Cities Servs.*, 156 Wn.2d 168, 181-182.

The Washington Supreme Court has again declined to expand the “wrongful discharge against public policy” tort in its most recent opinion issued last year. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530 (2011). In *Cudney* the discharged employee asked to proceed under a tort of last resort despite the existence of comprehensive statutory remedies that protect the relevant public policies contained within the Washington Industrial Safety and Health Act of 1973 (“WISHA”). In *Cudney*, the Washington Supreme Court concluded, in part, that WISHA provided an adequate means of promoting the public policies of ensuring workplace safety and protecting workers who report safety violations by providing comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs. RCW 49.17.160(2); *Cudney*, 172 Wn.2d at 535-36.

The Washington Supreme Court in *Cudney* relied upon *Korslund*. *Id.* at 532. In *Korslund*, two plaintiffs claimed they were wrongly terminated by the employer for reporting safety violations, fraud, and

mismanagement at the Hanford Nuclear Reservation. The Washington Supreme Court determined that the Federal Energy Reorganization Act of 1974 (“ERA”), 42 U.S.C. Section 5851, provided a clear public policy to protect the health and safety of the public and to protect against waste and fraud in nuclear industry operations. The Washington Supreme Court also concluded that the ERA provided an administrative process for adjudicating whistleblower complaints and also provided comprehensive remedies such as reinstatement, back pay, compensatory damages, and attorney and expert witness fees. As a result, the Washington Supreme Court opined that the ERA provided the comprehensive remedies that serve to adequately promote and vindicate the public policies set forth within the ERA. *Korslund*, 156 Wn.2d at 182.

Washington state law provided comprehensive remedies to Ms. Worley to promote the public policy claim that she pursued in this case. Similar to WISHA and the ERA, the Washington Health Care Act (“WHCA”), RCW 43.70.075, provides employees or healthcare professionals both an administrative process and legal process for adjudicating whistleblower complaints under this particular statute. RCW 43.70.075 also provides to employees or healthcare professionals comprehensive remedies that serve to adequately promote and vindicate the public policies set forth within the statute and its provisions.

Ms. Worley failed to avail herself of the protections contained within RCW 43.70.075. Ms. Worley could have filed a charge or complaint under RCW 43.70.075, but failed to do so. Ms. Worley contends that the WHCA which is designed to protect whistleblowers is inadequate because it does not provide an administrative process similar to WISHA or the ERA. However, that is not the case upon a close examination of the text of the statute and its subparts. RCW 43.70.075(1)-(4); *Broughton Lumber Co. v. BNSF Ry.*, 174 Wn.2d 619, 627, 278 P.3d 173 (2012) (“If a statute’s meaning is plain on its face, the courts must give effect to that plain meaning as an expression of legislative intent.”)

The statute allows a whistleblower to file a complaint with the department of health and also provides for confidentiality in the event the complaint or report is made in “good faith.” RCW 43.70.075(1). The term whistleblower is defined as an “. . . employee, or healthcare professional who in good faith reports alleged quality of care concerns to the department of health.” RCW 43.70.075(2)(c). Furthermore, the statute does in fact compel the department to “adopt rules to implement procedures for filing, investigation, and resolution of whistleblower complaints that are integrated with complaint procedures under Title 18 RCW for health professionals or health care facilities.” RCW 43.70.075(4)

More importantly, the statute is more than adequate to promote and vindicate the public policy of protecting whistleblowers in the healthcare field. The issue is not whether the statute provides the identical administrative process or remedies, but whether it provides comprehensive remedies that are adequate to protect the specific public policies identified by Ms. Worley. *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d at 182. In this case, RCW 43.70.075 provides whistleblowers that are “subjected to workplace reprisal or retaliatory action” the same comprehensive remedies available under Chapter 49.60 RCW. This includes the right to bring a legal action in the Superior Courts of the state of Washington and, in the event of a violation of the statute, the ability to recover comprehensive remedies relating to reinstatement, economic loss, emotional distress and mental anguish, adverse tax consequences and the recovery of attorney fees and costs. RCW 49.60.030(2); *see also Martini v. Boeing Co.*, 137 Wn.2d 357, 971 P. 2d 45 (1999) (economic damages); *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981) (mental anguish and emotional distress); *McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805 (9th Cir. 1994) (attorney fees); and *Blaney v. Int’l Ass’n of Machinists*, 151 Wn.2d 203, 87 P.3d 757 (2004) (adverse tax consequences). These are the same plenary remedies Ms. Worley requested in her complaint for damages.

Similar to WISHA, RCW 49.60.030(2) actually provides more comprehensive remedies than the ERA and which is more than adequate to promote and vindicate the public policies set forth within RCW 43.70.075, since in addition to providing recovery for adverse tax consequences, the statute also provides for “any other appropriate remedy authorized by this chapter or the United States Civil Rights Act as amended.” RCW 49.60.030(2). The statute also provides for the recovery of adverse tax consequences associated with the recovery of economic damages which WISHA does not. *Blaney*, at 212.

Ms. Worley concedes that RCW 43.70.075 “provides whistleblower protection” for her and that she failed to file a complaint or lawsuit under the statute seeking the recovery of comprehensive remedies. But she then accuses the trial court of being “disingenuous” in its ruling because the Providence Code of Conduct required her to file internally and not with the Department of Health. As a result, she contends that the trial court’s ruling should be reversed on this basis alone without providing any legal authority for this argument. This legal argument is clearly *non sequitur* and should be rejected by this court.

It is also noteworthy that Ms. Worley could also have brought a federal lawsuit under the False Claims Act relating to her allegations of Medicare and Medicaid fraud on the part of Providence, but failed to do so

as well. 31 U.S.C. section 3730(h); *Hammond v. Northlund Counseling Center*, 218 F.3d 886 (8th Cir. 2000).

Therefore, the trial court's ruling must be affirmed dismissing Ms. Worley's wrongful discharge claim because she cannot satisfy the *jeopardy* element.

3. The record does not demonstrate any factual questions on the causation element of the public policy wrongful discharge claim.

Ms. Worley contends that the trial court's ruling granting summary judgment on the *causation* element was error because the trial court improperly considered the prior performance deficiencies as the basis for Providence's decision to discharge. Ms. Worley also argues that there were genuine issues of material fact as to whether Ms. Brown's criticisms of Ms. Worley's job performance was in retaliation for raising issues relating to scope of practice and medical charting issues. Ms. Worley finally contends that genuine issues of material fact exist as to whether Ms. Brown improperly influenced the ultimate decision makers, Ms. Fay and Ms. Rollins, who Ms. Worley concedes had no animus towards her, relating to the decision to discharge.

In order to survive summary judgment, Ms. Worley was obligated to come forward with evidence that her public policy linked conduct caused her dismissal. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d at

941. Ms. Worley had to show that she was engaged in statutorily protected activity, Providence discharged her or took some other adverse action against her, and that retaliation was a substantial factor behind the adverse action. However, assuming for argument's sake that Ms. Worley was engaged in protected activity, this does not immunize her from having progressive discipline imposed upon her for legitimate, non-discriminatory and non-retaliatory reasons. *Kahn v. Salerno*, 90 Wn. App. 110, 128, 951 P.2d 321 (1998). Ms. Worley may still be terminated for proper cause even when engaged in protected activity. *Id.*, citing *Colville v. Cobarc Services, Inc.*, 73 Wn. App. 433, 439, 869 P.2d 1103 (1994). (Opposition to an employer's possible discrimination does not enjoy absolute protection or immunity; an employee may still be discharged for proper cause.) The well-documented performance deficiencies of Ms. Worley, while not the reason for her discharge, clearly establish proof that Providence was not motivated by any retaliatory motive. "Proximity in time between the adverse action and the protected activity, coupled with evidence of satisfactory work performance and supervisory evaluations suggests an improper motive." *Kahn v. Salerno*, 90 Wn. App. at 130-31.

The record is clear that Ms. Worley was terminated for taking face sheets which contained patient protected health information outside of the worksite in violation of Providence's policies regarding HIPPA,

confidentiality, and patient data security practices, as well as for insubordination in refusing to respond when Ms. Fay and Ms. Rollins instructed her that they wanted the documents returned. The record is also clear that this was the only reason for their decision to discharge an at-will employee who three days earlier had received a final written warning for unsatisfactory job performance while employed by Providence as an ARNP. Exhibit 9, CP 058-059, Exhibit 11, CP 074-075.

Ms. Worley's assertion that the reasons set forth in the June 12, 2009, Corrective Action Notice is mere pretext and that there were other reasons demonstrating a retaliatory purpose or motive is not supported by the record. In order to establish pretext, Ms. Worley had the burden at time of summary judgment to establish a genuine issue of material fact showing that Providence's stated reasons for her discharge was a pretext for a retaliatory purpose or motivation. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 618, 60 P.3d 106 (2002). Such facts and evidence include that (1) the reasons have no basis in fact, (2) even if based in fact, the employer was not motivated by the reasons, or (3) the reasons are insufficient to motivate an adverse employment decision. *Chen v. State*, 86 Wn. App. 184, 190, 937 P.2d 612 (1997). Summary judgment is appropriate even where the plaintiff rebuts the employer's proffer of a non-discriminatory or non-retaliatory basis for termination with weak

evidence of pretext or if the record contains abundant, uncontroverted evidence of the non-discriminatory reason for the employer's decision. *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418 (2002).

Secondly, the record is devoid of any evidence that Ms. Brown retaliated against Ms. Worley for any issues she raised in the workplace relating to scope of practice and medical charting issues. Exhibit 9, CP 058-059.

Finally, there is no evidence in the record that Ms. Brown improperly influenced Ms. Fay and Ms. Rollins or that they relied upon any input or documentation from Ms. Brown in making the decision to discharge. Exhibit 11, CP 074-075.

Ms. Worley's reliance on the United States Supreme Court decision in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011) is inapposite. In *Proctor Hospital*, the ultimate decision maker, a human resource executive with no animus towards Staub's military leave and obligations, clearly relied upon two supervisors who had demonstrated animus towards Staub's military leave and obligations by relying upon their prior written progressive discipline action, as well as their input in deciding to discharge Staub from employment. *Staub v. Proctor Hospital*, 131 S. Ct. at 1194. The Court in *Staub v. Proctor Hospital*, opined that "if a supervisor performs an act motivated by anti-military animus that is

intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.” *Id.*

In this case, the decision to discharge Ms. Worley did not involve consulting with Ms. Brown or reviewing the plethora of documentation reflecting unsatisfactory work performance, including Dr. Howlett’s unbiased performance evaluation of Ms. Worley which he signed and attested to its accuracy. CP 215-216. The decision was made to discharge Ms. Worley based upon her admitted conduct in taking protected patient health information off the premises of Providence’s orthopedic clinic in violation of Providence policy and for insubordination in refusing to respond when instructed by Ms. Fay and Ms. Rollins to return the documentation. CP 075. In essence, any alleged bias or animus that Ms. Brown demonstrated towards Ms. Worley was not the proximate cause of Ms. Fay and Ms. Rollins decision to discharge. CP 075.

4. The trial court did not commit reversible error in ruling that Ms. Worley failed to establish the absence of an overriding justification element of her public policy claim.

The trial court did not improperly shift the burden of production to Ms. Worley on the fourth and final element of her wrongful discharge claim. The Washington Supreme Court in *Cudney* specifically articulated the four factor test that a plaintiff must satisfy to prevail on a wrongful

discharge claim which includes providing sufficient evidence “that the defendant has not offered an overriding justification for the dismissal (the absence of justification element).” *Cudney*, 172 Wn.2d at 529. “These elements are conjunctive, meaning that all four elements must be proved.” *Id.*, citing *Ellis v. City of Seattle*, 142 Wn.2d 450, 459, 13 P.3d 1065 (2000). The Washington Supreme Court opinions in *Ellis* and *Cudney* were decided after *Hubbard* and specifically articulated the four factor test that Ms. Worley had to satisfy to prevail on a wrongful discharge claim. *Ellis*, at 459; *Cudney*, at 529.

Ms. Worley attempts to assert that Providence’s summary judgment materials which refer to her documented performance deficiencies is evidence of pretext because those were not the legitimate reasons that triggered her discharge and that the trial court improperly relied upon those performance deficiencies in its letter ruling granting summary judgment to Providence on both claims. While Ms. Worley was not terminated for the documented performance deficiencies that triggered a final written warning being issued to her on June 9, 2009, this is not evidence of pretext. Instead, the evidence of unsatisfactory work performance establishes a lack of evidence that Providence was motivated to discharge Ms. Worley because she contacted a compliance officer as she was required to do if she had any questions or concerns. CP 071. *See*

also *Kahn v. Salerno*, at 130-131. Ms. Fay, in fact, took it upon herself to contact the same compliance officer and trigger an investigation after meeting with Ms. Worley to go over the final written warning on June 10, 2009, after learning of her concerns. CP 465-466.

The record is uncontroverted that Ms. Worley was advised by Ms. Fay and Ms. Rollins that she was discharged for the reasons set forth in the June 12, 2009, Corrective Action Notice. Those reasons clearly establish “performance issues” justifying the termination of Ms. Worley’s at-will employment. Ms. Worley has provided no evidence creating a genuine issue of material fact that her discharge was motivated by other reasons not set forth within the final Corrective Action Notice of June 12, 2009, or that suggests that Providence was motivated by a retaliatory reason. Clearly, Providence provided an *overriding justification* for Ms. Worley’s discharge. Exhibit 11.

5. The trial court did not commit reversible error in dismissing Ms. Worley’s breach of promise claim.

Ms. Worley is correct that in order to prevail on a breach of promise claim she had to prove the following elements:

- (1) That the statement in the Providence Code of Conduct amounted to promises of specific treatment in specific situations, and
- (2) That she justifiably relied upon any such promise, and
- (3) That the specific promise was breached.

Bulman v. Safeway, Inc., 144 Wn.2d 335, 344 (2001).

Ms. Worley asserts that the trial court improperly relied upon the *reliance* element which Providence for purposes of summary judgment conceded a question of material fact existed. While this is true, Ms. Worley then completely ignores the fact that the trial court in its letter ruling denying her motion for reconsideration clarified that its ruling was based upon the third element (that the specific promise was breached) and further clarified that there was no sufficient evidence in the record that Providence breached its own Code of Conduct in terminating her at-will employment. CP 541-542.

Based upon the record before the court, summary judgment dismissal of Ms. Worley's breach of promise claim was proper because there is no evidence that she was discharged for contacting a compliance officer about questions or concerns in "good faith". The Code of Conduct specifically provides that employees are not "protected from the results of their misconduct if they are responsible for the violation or any other act that is harmful to Providence." Exhibit 10, CP 071. Ms. Worley's own conduct in taking protected patient health information off the premises of the orthopedic clinic without authorization, and providing it to her boyfriend and attorney, at the time, and later keeping the documents in her house, violated more than one policy set forth in the same Code of Conduct that she relies upon exclusively in support of her breach of

promise claim and thereby justified her discharge. *Kahn v. Salerno*, 90 Wn. App. at 129-130.

IV. CONCLUSION

Based on the foregoing, Providence requests that the Division III Court of Appeals affirm the trial court's ruling and order dismissing Ms. Worley's claims of wrongful discharge and breach of promise because no genuine issue of material fact exists which would warrant a trial of this matter. The original summary judgment order and order denying Ms. Worley's motion for reconsideration should be affirmed.

DATED this 13th day of November, 2012.

WORKLAND & WITHERSPOON, PLLC

By Michael B. Love
MICHAEL B. LOVE
WSBA No. 20529
Attorneys for Respondent

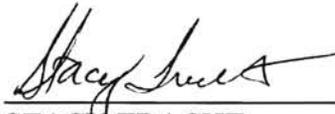
CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury according to the laws of Washington that the following statements are true and correct.

On the 13th day of November, 2012, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

<input type="checkbox"/>	U.S. Mail, postage prepaid	PAUL J. BURNS, P.S. Attorneys at Law One Rock Pointe 1212 N. Washington, Suite 116 Spokane, WA 99201
<input checked="" type="checkbox"/>	Hand Delivery	
<input type="checkbox"/>	Overnight Mail	
<input type="checkbox"/>	Facsimile	
<input checked="" type="checkbox"/>	Electronically	

DATED this 13th day of November, 2012, at Spokane, Washington.



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