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Court of Appeals
Division III
State of Washington

No. 309941 III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

OSCAR J. BROWNFIELD, Appellant

v.

CITY OF YAKIMA, Respondent

APPELLANT'S REPLY BRIEF

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A. ASSIGNMENTS OF ERROR

1. Whistleblower Claim. The trial court erred in granting the City of Yakima's (Respondent) motion for summary judgment on this issue. Unfortunately, due to a problem with the Yakima Superior Court recording system, there is no transcript of the summary judgment hearing. There was however clearly a misunderstanding on the part of the trial court as to Officer Oscar "Jeff" Brownfield's (Appellant) position regarding his whistleblower claim.

The Appellant alleged a violation of the whistleblower laws: in his complaint; in his brief in response to the Respondent's motion for summary judgment; at the trial court hearing below; in his motion for reconsideration; and now on appeal. He alleged that the Respondent violated both its own whistleblower policy and also violated public policy and the intent of the legislature to protect employee whistleblowers from retaliation. To the extent this is not clear from the statute, it is abundantly clear from the case law, as elaborated on below. There are outstanding issues of both fact and law and this issue should be remanded for a jury determination.

2. Wrongful Discharge. The trial court erred in failing to find that the Respondent unlawfully terminated Appellant pursuant to state law when it granted the Respondent's motion for summary judgment.

The trial court, relying on its expansive reading of Federal District Court Robert Whaley's decision in an earlier federal court case, dismissed this claim based on what it called "collateral estoppel." However, Judge Whaley had specifically declined to exercise supplemental jurisdiction over state law claims. [CP 445].

There are outstanding issues of both fact and law and this issue should be remanded for a jury trial.

3. Washington Law Against Discrimination (WLAD). The trial court erred in failing to find that there were acts of discrimination toward Appellant in granting the City's motion for summary judgment. The trial court misread the evidence before it. Appellant's discharge was pretextual and not based on the findings of a Fitness for Duty Examination. The Appellant was specifically told by City Manager Zais that he was being discharged because of insubordination for his failure to attend a fourth fitness for duty examination. [CP 210, 252-253].

Appellant had raised questions regarding legal issues that he asked to have answered before returning for a second evaluation by a third psychologist.¹ He had already met with several other mental

¹ Appellant attended an evaluation by Dr. Ekemo but was then asked to attend a second evaluation by him. Dr. Ekemo's evaluation would have been the fourth fitness for duty evaluation the City had obtained and the third psychometric test result. As outlined in

health professionals. His treating doctors had determined he could safely go back to work and his union's doctor said he should continue with therapy, which he was doing, but he was safe to return to work. [CP 204, 567-568].

Not only were the multiple examinations under the guise of Fitness for Duty examinations, allegedly illegal, a second visit to a psychologist who wanted him to retake psychometric tests that he had taken previously was certainly questionable. There are outstanding issues of both fact and law and the case should be remanded for a jury trial.²

4. Negligent Supervision. The trial court erred in failing to find that there were acts of commission and omission regarding the supervision of the city manager and granting the Respondent's motion for summary judgment. There are outstanding issues of both fact and law and the case should be remanded for a jury trial.

Appellant's email, he had questions about the legality of the request for him to continue attending fitness for duty evaluations. [CP 253].

² A jury should decide whether or not the City was ordering Appellant to attend multiple evaluations so they could find a psychologist who would confirm Dr. Decker's opinion. Dr. Mar noted that "I am also struck by the finality of Dr. Decker's opinion while Dr. Andrea (sic) and Dr. Drew do not characterize Officer Brownfield's symptoms as untreatable." [CP 203].

B. STATEMENT OF CASE

Procedural Background. In its Procedural Statement of the Case on page 1 of its Response, the Respondent makes certain assertions that are neither supported by the facts nor the law, each of which the trial court apparently adopted. Respondent offers its subjective opinion that the trial judge “carefully reviewed” the Appellant’s claims and, without relying on a federal court decision, “made his own independent review” before dismissing all of Appellant’s state law claims except for negligent hire and retention claims. Respondent then alleges that the remainder of Appellant’s claims “are barred as a result of the rulings made by Judge Whaley related to similar claims.” The Respondent’s hypothesis of a “bar” regarding “similar” claims is not a concept for which the Respondent has provided any statutory or case law authority. As noted above, Judge Whaley, in his order granting the City of Yakima summary judgment in a federal court case ruled in part that he “decline[d] to exercise supplemental jurisdiction over Appellant’s state law claims.”

As noted above, the trial court is in error when it states, “The elements of collateral estoppel are met as to this issue” [wrongful discharge]. In fact, the Federal court only dismissed Appellant’s claims related to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1983, et seq.; Americans with Disabilities Act (ADA), 42 U.S.C. §§12111 et seq.

and 12203; and Family Medical Leave Act (FMLA), 42 U.S.C. § 2601, et seq. and the Health Insurance Portability and Accountability Act (HIPAA) 42 U.S.C. § 300gg, et seq. Again, Judge Whaley specifically “declined to exercise supplemental jurisdiction over Appellant’s state law claims.” He dismissed those claims “without prejudice.” Appellant respectfully submits that the trial court could not have considered the significance of some of the relevant facts and law in making its ruling and that there are unresolved issues of law and fact.³

Factual Background. As noted in his opening brief, the Plaintiff was hired on November 15, 1999. [CP 2]. He was a decorated police officer with the City of Yakima Police Department [CP 594-595, CP 624-626, CP 637-642, CP 644-650] before he was unlawfully terminated on April 10, 2007 by the City of Yakima, acting by and through its agents, City Manager Richard Zais.

The record shows that Appellant excelled as a police officer following his accident in 2000, when he returned to full duty. Only after he made his whistleblower complaint did the Department begin to allege

³ Respondent then turns to a quote by Thomas Jefferson and opines that Jefferson had a preference for juries to determine what is just. Perhaps some would prefer Alexander Hamilton, a co-author of the Federalist Papers, who wrote: “The friends and adversaries of the plan of the [Constitutional] convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; if there is any difference between them it consists of this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.”

performance issues.⁴ Yet at no time before or during the examination process was the Department able to provide any objective basis for its referral for fitness for duty exams. Accordingly, it is a genuine issue of material fact whether the Department's termination of Appellant was driven by his whistleblower complaint, and whether he is the victim of discrimination, retaliation, and unlawful termination by the Respondent City of Yakima.

C. ARGUMENT

The Respondent makes certain assertions that are neither supported by the facts or the law, each of which the trial court apparently adopted. Respondent offers its subjective opinion that the trial judge "after careful review" dismissed all of Appellant's state claims except for negligent hire and retention claims. It then alleges that the remainder of Appellant's claims "are barred as a result of the rulings made by Judge Whaley related to similar claims." The Respondent's hypothesis of a "bar" regarding "similar" claims is not a concept for which the Respondent has provided any statutory or case law to support.

As noted above, Judge Whaley, in his order granting the City of Yakima summary judgment in a federal court case ruled in part that he

⁴ A complaint about the mishandling of Yakima Police Athletic League (YPAL) funds (i.e. potential unlawful misappropriation) of federal and private funds from YPAL is of public interest.

“decline[d] to exercise supplemental jurisdiction over Appellant’s state law claims.”

1. Whistleblower Claim:

At page 13 of the Respondent’s brief in response to this appeal, the Respondent erroneously states: “Mr. Brownfield has not offered any argument at all that the Yakima policy does not meet the intent of RCW 42.41. In fact, his counsel conceded at oral argument that Yakima had its own policy and the statute does not apply to it. ... The arguments raised under this section of his brief were not raised before the trial court and should not be considered by this court. RAP 2.5(a).” Respondent’s statements regarding Appellant’s arguments are both factually and legally incorrect. [See CP 483-492]. Unfortunately, because of problem with the Yakima Superior Court’s recording of the hearing, there is no transcript to clarify what was said by John Bergmann, the Appellant’s attorney at the hearing.

The Respondent’s motion at the trial court level for Summary Judgment argued that RCW 42.41.040, the whistleblower statute, does not apply to the Respondent. The Appellant responded by stating the issues he had alleged. The first issue in Appellant’s response was: “1. Retaliation for Whistle Blowing Activities in violation of RCW 42.41.040 or defendant’s

own policies which defendant claims meet the intent of this statute?” [CP 483-492][Emphasis added]⁵

Appellant acknowledged in his Responsive brief that 42.41 does in fact provide : “that any local government that has adopted or adopts a program for reporting alleged improper governmental actions in adjudicating retaliation resulting in such a reporting shall be exempt from this chapter if the program meets the intent of the chapter.” However, what was apparently misunderstood by the trial court was Mr. Bergmann’s argument that despite the Respondent’s claim that the whistleblower statute does not apply because the defendant adopted its own policy, protection against retaliation for whistleblowing activities is a right in the State of Washington.

Appellant argued that there does exist a wrongful discharge tort claim and cited case law to support it. The fact that the statute itself may not apply is not the point the Appellant was making. He did not base his argument solely on the statute. Rather than repeat the Appellant’s Response to Defendant’s Motion for Summary Judgment, we would ask the court to read what was said at that time. [CP 480-510].

⁵ In response to the Respondent’s request for this court to ignore his argument pursuant to RAP 2.5(a), the Appellant would point to RAP 1.2, which states in part “These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.”

The Appellant argued that public policy protected Appellant from wrongful discharge. The cases that were relied upon are cited in the brief. If the statute does not apply to Respondent because it had its own policy that does not mean that the Respondent is exempt from scrutiny to determine whether it followed its own policy in this case. Neither does it mean there is not a separate tort for wrongful discharge in contravention of public policy, as was established in Thompson v. St. Regis, 102 Wn.2d 219, 231,-233, 685 P.2d 1081 (1984). [CP 485]. The language of the statute is clear. The trial court may have misunderstood or even disagreed with Appellant's argument, but that does not mean the Appellant's argument was incorrect. Appellant's argument, as articulated in his Responsive brief to the Respondent's summary judgment motion is still sound and it is still the Appellant's position.

There is a public policy against discharge for whistleblowing activities. Washington recognizes that employees may not be discharged for reasons that contravene public policy. This is the so called "public policy exception." These public policy exceptions in Washington have generally been allowed in four different situations including, "4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing..." Dicomes v. State, 113 Wn.2d 612-618; 72 P.2d 1002 (1989).

Once the employee shows the violation of public policy, the burden shifts to the employer, in this case the Respondent, to prove the dismissal was for reason other than those alleged by the Appellant. See the cases cited in Appellant's opening brief. The trial court did not understand this argument. There is at least a question of fact as to whether the Respondent met this burden. [CP 485-492].

The Appellant first articulated his argument in paragraph 4.2 of his complaint, arguing his wrongful discharge for whistleblowing was in violation of public policy. He states: "4.2 Because Appellant filed the report alleging unlawful conduct by fellow police officers, Defendant and its employees and/or agents retaliated against Appellant by wrongfully discharging him in violation of public policy and based upon his protected whistle-blowing activities."

Washington case law makes clear that firing in retaliation for whistleblowing is in violation of public policy, regardless of the applicability of the whistleblowing statute to the Respondent. Washington case law is clear that firing for whistleblowing is grounds for a finding of wrongful discharge. In Smith v. Bates Technical College, 139 Wash.2d 793991 P. 2d 1135 the Supreme Court revisited Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 685 P.2d 1081 (1984) in stating: "[W]e joined a growing number of jurisdictions when we recognized a cause of action in

tort for wrongful discharge in violation of public policy.” As noted in Appellant’s opening brief, the mishandling (i.e. potential unlawful misappropriation) of federal and private funds from YPAL is of public interest and cannot be characterized as Appellant’s private interest.

Therefore, when the Respondent argues at page 13 of its Responsive brief that the arguments raised under this section of Appellant’s brief were not raised before the trial court and should not be considered by this court, it is simply wrong. This argument was raised before the trial court. It was raised in the Appellant’s Complaint and it was raised in the Brief in response to the Respondent’s motion. [CP 1-8, 484-492]. That is what was reargued by the Appellant in his motion to the trial court for reconsideration at page 3-4 when he quoted his Response “at page 5, ‘Appellant’s claims based upon the whistleblowing activities are supported in law and fact. ‘The Appellant has not abandoned that position.’ [CP 729-730] Again, what Mr. Bergmann argued was that, even if the trial court found that RCW 42.41 did not apply, Washington case law establishes that firing in retaliation for whistleblowing is grounds for finding a violation of the public policy against wrongful discharge.

Because it is so important, revisiting the 2009 edition of the City of Yakima Employee Handbook, found at CP 399-403,⁶ and comparing the

⁶ Which is the same regarding these quotes to the 2000 Employee Handbook

words to the actions of the Respondent's employees, will help inform the court regarding how the facts of the case should be interpreted. The preamble states: "It is the policy of the City of Yakima (1) to require reporting by its employees of improper governmental action taken by City of Yakima officers or employees and (2) to protect City of Yakima employees who have reported improper governmental actions in accordance with the City of Yakima's policy and procedure." [CP 399-403].

The Definitions section, which is also the same in the two Handbooks, states in part:

1. "Improper governmental action" means any action by a City officer or employee:
 - a. That is undertaken in the performance of the officer's or employee's official duties, whether or not the action is within the scope of the employee's employment; and
 - b. That (i) is in violation of any federal, state, or local law or rule, (ii) is an abuse of authority.
...Such actions include, but are not limited to ... violations of criminal law ...
2. "Retaliatory action" means any adverse change in the terms and conditions of a City employee's employment.

The "Procedures for Reporting" in the Employee Handbook state in part: "The supervisor, the City Manager, or the City manager's designee ... shall take prompt action to assist the City in properly investigating the report of improper governmental action." The Respondent has not shown that it acted in compliance with the applicable policy. In contrast, based on

the evidence in the Clerk's Papers, the Appellant at all times tried to do abide by the policy articulated in the Employee Handbook. His written entreaties to his superiors in the chain of command were ignored.⁷

As noted in Appellant's opening brief, the Appellant had been one of the founders and grant writers for the Yakima Police Athletic League (YPAL), a program to keep kids active and out of gangs. In 2004, he became concerned that fellow officers might be mishandling money and tried to tell this to the Chief of Police. Instead, when he thought he was going to meet with the Chief, he was taken to meet with his lieutenant, who was one of the individuals he feared was misappropriating moneys from YPAL. Then, he was subjected to: harassment with internal investigations for matters that typically did not prompt investigations; a requirement that he attend multiple Fitness for Duty examinations; and ultimately he was fired. This decorated officer's problems all began with his whistleblowing concerning a superior officer.

The Appellant did not respond well to how his superiors in the chain of command handled his reporting of improper conduct by YPD employees. He was fearful, confused and angry. [CP 519]. The resulting actions by city officials resulted in the Appellant initially being put on paid administrative

⁷ See Ofc. Brownfield's Inter-Office Memo to Sgt. Amos dated June 17, 2004 [CP 82-87]

leave on September 28, 2005 and then extended FMLA leave without pay on January 5, 2006. [CP 483].

Appellant was then sent to a fitness for duty exam with a psychiatrist of the Respondent's choosing (Kathleen Decker).⁸ Dr. Decker was given information from respondent's agent, which typically she would be expected to get from a patient, if it were true. [CP 159-161]. Dr. Decker sent Appellant to a neurologist (Dr. DeAndrea) for confirmation of the physical problem she had diagnosed. Dr. DeAndrea found no evidence of Dr. Decker's diagnosis. [CP 03-04]. Appellant was then referred by his union to a psychologist, (Norman Mar) [CP 202-204]. As noted below, Dr. Decker took it upon herself to gratuitously write "reports" to rebut Appellant's treating doctors and psychologists as well as Dr. DeAndrea and Dr. Mar. [CP 142-146, 184-186, 262, 288-289].

Dr. Decker only saw Appellant in October 2005, prior to her first report. Only Dr. Decker was of the opinion that Appellant would never again be fit for active police work. However, following favorable reports from his treating doctors and Dr. DeAndrea and Dr. Mar, the Respondent

⁸ Dr. Decker has testified she saw the Appellant on only one occasion for 11/2 hours on October 19, 2005 [CP 207]. After her initial report on November 11, 2005, which did not reach any conclusion regarding Appellant's fitness for duty, she sent Respondent 5 more written opinions (12/12/05 her "Final Report"[CP 184-186], 3/15/06, 3/30/06 [CP 288-289], 4/7/06 and 8/14/06), some solicited by Respondent and some unsolicited. [CPs at Exhibits F and G] Following this series of communications, Chief Granato sent Appellant a message which stated "As I stated in my previous letter and has been discussed with you upon your receipt of Dr. Decker's report, you have been determined to be unfit for duty as a police officer." [CP 262, See also CP 142-146]

wanted to send Appellant to yet another psychologist of the Respondent's choosing (William Ekemo), apparently to buttress Dr. Decker's opinion. [CP 150-151]. Appellant saw Dr. Ekemo on one occasion, but when he wanted him to return to take tests that he had already been given by treating doctors and Dr. Mar, all of which Dr. Ekemo had access to, [CP 249] Appellant raised legal concerns. [CP 252-253]. He asked for the legal justification based on his reading of Equal Employment Opportunity Commission (EEOC) guidelines and discussions with Department of Labor (DOL) personnel. [CP 252-253].

At that point, Respondent's agent, Dick Zais, ignoring the fact that Dr. Decker was still claiming Appellant had physical impairments, ignored the opinion of the other treaters, including Appellant's general practitioner, Roy Gondo, MD, and declared Appellant medically unfit for duty solely based on Dr. Decker's say so. [CP 210-219, 246]

There are issues of fact that must be determined by a jury.

2. Wrongful Discharge

Again, for reasons discussed above, the trial court was wrong in finding that "no reasonable trier of fact could find that the second (jeopardy element) and third (causal element) are present. Based on the facts outlined above, which are based largely on exhibits provided by the Respondent, both elements are in fact present.

While denying the state trial judge tried to clone the federal court ruling, Respondent seems confused when, at page 15, it opines, “the [trial] court concluded that Mr. Brownfield was bound by the federal court ruling.” Of course this is not so, based on the federal judge’s admonition noted above that he was not ruling on the pendant state law claims. In addition, as stated in Appellant’s opening brief, the decision of the trial court appears to ignore the case law that states there is a common law tort for wrongful discharge.

Wilson v. City of Monroe, 88 Wash.App.113, 115, 943 P.2d 1134

(Div. I, 1997) as noted in Appellant’s opening brief states:

We also hold that the tort cause of action for termination in contravention of public policy is not confined to at-will employment situations, but is available to all employees because the tort embodies a strong state interest in protecting against violations of public policy.

Gardner v. Loomis Armored, Inc., 128 Wash.2d 931, 913 P.2d 379

(1996)⁹, is a case relied upon by the Respondent. To paraphrase from 936:

This court first allowed a wrongful discharge claim on public policy grounds in Thompson v. St. Regis Paper Co., supra. Thompson involved a situation where a divisional controller had instituted an accurate accounting program required by the Foreign Corrupt Practices Act of 1977. The employee [as in the instant case] claimed he was terminated in retaliation for complying with the law [and city policy],

⁹ The Gardner court at 128 Wn.2d 935 stated, “In recent years, courts have created certain exceptions to the terminable-at-will doctrine. One of these exceptions says employees may not be discharged for reasons that contravene public policy. Almost every state has recognized this public policy exception.”

and his discharge was intended to serve as a warning to other divisional controllers [or in retaliation for whistleblowing]. The court ruled a plaintiff [such as Appellant] could satisfy the elements of a wrongful discharge claim by showing the discharge may have contravened a clearly stated public policy. Thompson, at 232. Once a plaintiff, [such as Appellant] shows the violation of a public policy, the burden shifts to the employer to prove the dismissal was for reasons other than those alleged by the employee.

To restate the core of the Appellant's claim, he raised the issue of mishandled funds that had been granted or donated for use by YPAL.¹⁰ When he attempted to raise the issue with his superiors in the city, he was rebuffed and then he was pretextually found, after the previous four years of exemplary service as a police officer, to be unfit for duty based on the alleged sequela of an accident from four years before. In addition, when he raised a new issue about the legality of the Respondent's procedure in ordering him to serial fitness for duty examinations, his concerns about the process were ignored and he was labeled as insubordinate. [CP 252-253]. In

¹⁰ It is interesting that the Respondent spends as much time as it does citing Gardner in its Brief. At page 933, the court ruled that "an employer contravenes a public policy when it terminates an at-will employee who violates a company rule in order to go to the assistance of a citizen who was in danger of serious physical injury or death." In the instant case there is a city policy about reporting perceived wrongdoing, in this case misappropriation of federal and private moneys for personal use by members of the YPD, including a lieutenant.

each case the letter and the spirit of the Respondent's own whistleblower policy was contravened by its conduct. This was a wrongful discharge.¹¹¹²

If the whistleblower policy is to be honored throughout the city, it must be honored by the Respondent's officials. Although Appellant adhered to the whistleblower policy procedures, the city manager did not. Appellant was attempting to honor the whistleblower policy and was terminated by the Respondent as a result. In the end, the city manager did not have a legal rationale for his bottom line demand, but apparently he was not going to let a police officer thwart his authority. This resulted in a lack of trust and respect for the Respondent's leadership among those in the police department who knew what was happening to Appellant.¹³

¹¹ Respondent claims at page 27 that Appellant was terminated because he was insubordinate and that an employer's right to fire an insubordinate employee should trump the fact that that employee is an whistleblower.

¹² Respondent has cited to the three elements the Appellant must show, as laid out in the Gardner case at page 941. Appellant must show that there is a clear public policy, whistleblower protection. Appellant must show that discouraging whistleblowers would jeopardize the public policy, i.e. encourage would be bad actors. And Appellant must show that the public policy (whistle blowing regarding possible misappropriation of funds)conduct caused the dismissal. Appellant argues that but for the whistleblowing, his 4 years of excellent work would not have been dismissed out of hand, he would not have had a plethora of internal investigations, leading to orders to attend fitness for duty exams with the consequence that he was ultimately fired as allegedly unfit.

¹³ At page 23 of its Brief, Respondent attempts to invoke collateral estoppel or issue preclusion. "Collateral estoppel may be applied to preclude only those issue that have actually been litigated and necessarily and finally determined in the earlier proceeding." Christensen v. Grant County Hospital District No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). The court continued: "Further, the party against whom the doctrine is asserted must have had an full and fair opportunity to litigate the issue in the earlier proceeding." This leads to the obligation of the Respondent in this case. "For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding. (This will be

There are factual questions which should be decided by a jury.

3. Washington Law Against Discrimination (WLAD)^{14 15}

The Respondent discriminated against Appellant in violation of Washington's Law Against Discrimination, RCW 49.60.180 and its own policy.¹⁶ The alleged basis for sending Appellant for multiple fitness for duty examinations was the Respondent's alleged perception that Appellant was disabled and unable to safely perform the stressful duties of a patrol officer. Appellant had excelled in the Community Services division. If the Respondent perceived Appellant as unable to function in the most stressful police work, the Respondent owed an affirmative duty to Appellant to

impossible for the Respondent to do in light of Judge Whaley's ruling on state law claims.) (2) the earlier proceeding was identical to the issue presented in the later proceeding. (Clearly not in light of Judge Whaley's ruling.) (3) the party against whom collateral estoppel is asserted was a party to, or in privity to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party whom it is applied. (There will be a grave injustice if a whistleblower is afforded no protection). The Appellant has not had an opportunity to litigate the state law claims. The Respondent has not met its burden pursuant to Christensen.

¹⁴ RCW 49.60.180 states in part: It is an unfair practice for any employer: (2) To discharge ... any person from employment because of the presence of any sensory, mental, or physical disability ..."

¹⁵ "While employers deserve protection from frivolous lawsuits and from jury verdicts not reasonably supported by evidence, courts must carefully consider all allegations of unlawful discrimination, since the WLAD "embodies a public policy of 'the highest priority.'" Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 183, 23 P.3d 440 (2001).

¹⁶ City of Yakima Department of Human Resources Equal Employment Opportunity Policy, states in part "It is the policy of the City of Yakima to provide equal employment opportunity to employees and applicants for employment without regard to ... disability and any other classification protected under federal, state, or local law. Equal employment opportunity applies to all terms, conditions, and privileges of employment, including ... discipline, and discharge. This policy impacts all Departments of the City of Yakima.

accommodate him.¹⁷¹⁸ There was absolutely no explanation for why Respondent put an officer the City Manager allegedly believed was disabled back into the most stressful job on the force, unless he was hoping the Appellant would fail in that position.¹⁹ There was absolutely no attempt to make reasonable accommodations in the police department for the disability.²⁰

¹⁷ This court can take judicial notice of official publications of the Washington State Government. The following is instructive in understanding the meaning of “reasonable accommodation.” Washington Office of Financial Management bulletin, *State Policy Guidelines on Reasonable Accommodation of Persons with Disabilities Related to State Employment* IV. DEFINITIONS -A. “Reasonable accommodation” means modification or adjustment to a job, work environment, policies, practices, or procedures that enables a qualified individual with a disability to enjoy equal employment opportunity.”

¹⁸ In the case of Easley v. Sea-Land Service, Inc., 99 Wn.App. 459, 464, 994 P.2d 271 (Div. I, 2000) the court approved two Pattern Jury Instructions stating the Washington law requires that the employer provide reasonable accommodation to an employee with a disability. WPI 330.34 “provides in part: “[T]he employer must provide reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer.” WPI 330.36 provides in part: “An employer is not required to accommodate an employee’s disability if it would impose an undue hardship on the operation of the employer’s business. [Respondent in the instant case] has the burden of proving that an accommodation would impose an undue burden on it.” The Respondent has never tried to show that putting the Appellant in a less stressful job would impose any sort of burden on it, much less an “undue” burden.

¹⁹ Respondent confuses a case under the federal ADA with the fact of this case pursuant to the WLAD by referencing Kaplan v. City of North Las Vegas, 323F.3d 1226, (9th Cir. 2003). The Kaplan court at 1127 stated. “On this appeal we consider (1) whether Kaplan could perform the essential functions of a peace officer position without an accommodation and (2) whether Kaplan was entitled to reasonable accommodation when the City regarded him as having a disability even though he did not have an actual disability.” Here the Respondent cannot have it both ways. It terminated him based on Dr. Decker’s recommendation. There was no second guessing of her conclusion that he was permanently disabled from performing as a police office and there was never an attempt to accommodate him within the non-patrol ranks of the department.

²⁰ It is interesting that Respondent draws the attention of the court to Easley v. Sea-Land at page 34 of its brief. In that case the onus is on the employee to show he is disabled, able to perform a job with reasonable accommodation and that he was not accommodated. Here,

When all the health care providers who examined the Appellant, with the exception of Kathleen Decker, agreed that Appellant would be able to go back to work in all areas of work performed by YPD officers, the Respondent, through its agent City Manager Zais, chose to rely solely on Kathleen Decker. When the Appellant and his union raised the question of possible violation of federal regulations relating to Mr. Zais order that he attend yet another fitness for duty exam and Appellant's then refusal to see William Ekemo without some legally supportable reason, the Respondent, through its agent Mr. Zais, fired Appellant for alleged insubordination.²¹

The Respondent's city council was on notice of the situation, but failed to supervise or rein in its city manager. The Respondent, through Mr. Zais, discriminated against Appellant, who was allegedly disabled, by adversely affecting his terms and conditions of employment and unlawfully discharging him.

There are questions of fact that must go to a jury.

4. Negligent Supervision

As noted in the Appellant's opening brief, there has been a fundamental misunderstanding about this claim by Respondent. Appellant

the Respondent employer insisted the Appellant was disabled, did not even attempt to provide Appellant an opportunity to do any job in the police department and clearly was not reasonably accommodated.

²¹ It is clear from Appellant's email to the City that he was willing to attend the second evaluation by Dr. Ekemo after the City answered some of his concerns. [CP 252-253].

is not alleging he was fired by Chief Granato. City manager Zais makes it abundantly clear in the Clerk's Papers filed by the Respondent that he was acting on behalf of the Respondent when he ignored city policies and failed to accommodate a city employee he labeled disabled. As a result of his actions and the failure of the city council to step in to exercise any supervision or discipline of city manager Zais's management of the police department, the Appellant was harassed and mistreated, up to and including being fired.²²

Mr. Zais, with the acquiescence of and lack of oversight by the City Council, exercised ultimate authority over the firing of all city employees. Mr. Zais fired Appellant with little or no justification. Using the accident in 2000 as the excuse, he ordered Appellant to submit to multiple fitness for duty exams within a short period of time. This was despite the fact that the Appellant had performed his duties in an exemplary fashion for four years following the motor vehicle accident.

In addition to the policy and procedural short-comings by Mr. Zais noted in the sections above, there were concerns expressed by the YPPA and the Appellant about how much the police department officials had pre-

²² The Appellant's Complaint, filed with this court as part of the Clerk's Papers states in part: "1.2 City of Yakima (City) is a Washington Municipal Corporation under Washington law and operates in Yakima County, Washington." The city operates with a city manager who serves at the pleasure of an elected city council. [CP 1-8].

prejudiced the opinions of Dr. Decker, and why, after seeing Appellant only once, she felt the need to write four “rebuttal” reports.²³ Mr. Zais, on behalf of the Respondent, relied solely on Kathleen Decker’s reports, rather than balancing them against the reports of Dr. Gondo, Dr. Drew, Dr. Mar, Dr. Hewlett and Dr. DeAndrea. The bottom line is that the Respondent had given city manager Zais unfettered power over city employees, including the Appellant, without any supervision, oversight or review.

As noted in Appellant’s opening brief, it is not possible to simply say, Mr. Zais acted, however ill-advised or reckless, “within the scope of his employment” when he terminated Appellant. If, as alleged, he acted in contravention of the law and/or City of Yakima policies, he was acting outside the bounds of his lawful authority. The failure of the city council to exercise some control when he exceeded his lawful authority puts the onus directly on the Respondent. There are questions of fact for the jury.

D. CONCLUSION

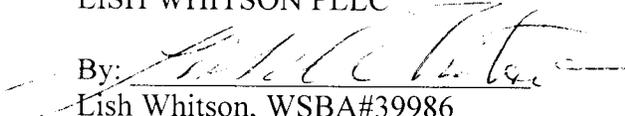
For the reasons articulated above and in the Appellant’s opening brief, Appellant has shown there are issues of both fact and law as to each of his four claims and he should therefore prevail in this appeal on each.

²³ The City provided incorrect and misleading information to Kathleen Decker which she dutifully accepted as the absolute truth and which colored her opinions from the start. [CP 236, 159-161, 266-268]. Subsequently, when Dr. Decker was confronted with HIPAA concerns for improperly turning over Appellant’s medical records to the City without proper authorization, she left town. She is no longer licensed to practice in Washington State.

This matter should be remanded to the trial court for a trial before a jury of Appellant's peers so that justice may be done.

SUBMITTED ON February 26, 2013.

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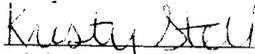
CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

On February 26, 2013, I served APPELLANT'S REPLY BRIEF in the manner noted, on the following person(s):

PARTY/COUNSEL	DELIVERY
Gerald J. Moberg WSBA #5282 Jerry J. Moberg & Associates 451 Diamond Drive Ephrata, WA 98823 Phone: (509) 754-2356 Fax: (509) 754-4202 Email: jmoberg@canfieldsolutions.com	<input checked="" type="checkbox"/> VIA US MAIL <input type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail <input checked="" type="checkbox"/> Via Email
John Bergmann Helsell Fetterman jbergmann@helsell.com	<input type="checkbox"/> VIA US MAIL <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail <input checked="" type="checkbox"/> Via Email

Dated this 26th day of February, 2013.


Lish Whitson, WSBA #5400
Kristy L. Stell, WSBA #39986