

FILED

DEC 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 309941 III

COUR OF APPELAS OF THE STATE OF WASHINGTON
DIVISION III

OSCAR J. BROWNFIELD, Appellant

v.

CITY OF YAKIMA, Respondent

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Whistleblower Claim. The trial court erred in failing to find that the City of Yakima (City) violated its own policy and the intent of the whistleblower legislation in granting the City's motion for summary judgment. There are outstanding issues of both fact and law and the case should be remanded for a jury trial.
2. Wrongful Discharge. The trial court erred in failing to find that the City unlawfully terminated Officer Oscar "Jeff" Brownfield (Ofc. Brownfield) pursuant to state law and granting the City's motion for summary judgment. There are outstanding issues of both fact and law and the case 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 Officer Brownfield and granting the City's motion for summary judgment. There are outstanding issues of both fact and law and the case should be remanded for a jury trial .
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 City's motion

for summary judgment. There are outstanding issues of both fact and law and the case should be remanded for a jury trial.

B. PROCEDURAL BACKGROUND

This is an appeal from a ruling granting the City's summary judgment motion. When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990). Summary judgment is appropriate if the pleadings, depositions, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* CR 56(c). "A material fact is one upon which the outcome of the litigation depends." *Clements v. Travelers Indem. Co.*, 121 Wash.2d 243, 249, 850 P.2d 1298 (1993). We must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Clements*, 121 Wash.2d at 249, 850 P.2d 1298. Summary judgment is proper only if, from all the evidence, reasonable persons could reach but one conclusion. *Stenger v. State*, 104 Wash.App. 393, 398, 16 P.3d 655 (2001).

In its motion, the City made certain assertions to the trial court that are neither supported by the facts or the law. The trial court appears to have accepted the assertions without critically examining them. The City offered

its subjective opinion that the Federal trial judge “after careful review” dismissed all of Ofc. Brownfield’s state claims except for negligent hire and retention claims. It then alleged that the remainder of Ofc. Brownfield’s claims “are barred as a result of the rulings made by Judge Whaley related to similar claims.” The City’s concept of a “bar” regarding “similar” claims is not a concept for which the City has provided any statutory or case law to support.

The trial court was in error when it stated, “The elements of collateral estoppel are met as to this issue” [wrongful discharge].” In fact, the Federal court only dismissed Ofc. Brownfield’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. Judge Robert Whaley specifically “declined to exercise supplemental jurisdiction over Ofc. Brownfield’s state law claims.” He dismissed those claims “without prejudice.”

Ofc. Brownfield then filed this action in state court, against the City of Yakima, for the wrongful and tortious conduct of its speaking agents, the then City Manager Dick Zais (Mr. Zais), and the then Yakima Chief of Police, Sam Granato (Chief Granato). This court can take judicial notice

that Mr. Zais acted as City Manager at all times relevant to this matter and that Mr. Zais served at the pleasure of the City Council.

To quote Thomas Jefferson in a letter to Thomas Paine:

"I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." Ofc. Brownfield respectfully submits that the trial court did not consider the significance of relevant facts and law in making its ruling. There are unresolved issues of law and genuine issues of material fact. For these reasons, this case should be remanded for a trial by jury before Ofc. Brownfield's peers.

C. STATEMENT OF THE CASE

Ofc. Oscar "Jeff" Brownfield was hired on November 15, 1999. (CP 2). He was a decorated police officer with the City of Yakima Police Department (City) (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, Mr. Zais and Chief Granato.

In 2000, Ofc. Brownfield was involved in an off duty automobile accident. (CP 2-3, CP 26-28). He subsequently returned to light duty in March 2001, and full duty in July 2001. (CP 2-3, CP 26-28). During his recovery, Ofc. Brownfield was examined by Dr. Richard Drew for neuropsychological screening. (CP 28). Dr. Drew reported that "the results of this evaluation indicate [Officer Brownfield] is recovering nicely from

his motor vehicle accident related closed head injury. He has returned to work and by his report is experiencing no problems with light duty." (CP 565).

Following his return to duty, and before his unlawful termination from the City, Ofc. Brownfield was considered an exemplary officer by his superiors for both his work ethic and his successful efforts at launching the Yakima Police Athletic League (YPAL) program, which was designed to keep kids involved in positive endeavors and to keep them out of gangs. (CP 594-595, CP 624-626, CP 637-642, CP 644-650). He received good performance evaluations in addition to commendations for his work. (CP 594-595, CP 637-642). He was a two time recipient of the Department's "Outstanding Service Award." (CP 624-625).

In his Nov 1, 2000 through Oct. 31, 2001 evaluation, his supervisor wrote: "Officer Brownfield constantly leads the squad in statistics . . . [and he] almost without fail projects an upbeat, positive attitude while at work. He gets along very well with his co-workers, and is not one to complain about anything." (CP 594-595). Chief Granato wrote of Ofc. Brownfield on his 2002 through 2003 review: "Officer Brownfield has exemplified extraordinary commitment to the City of Yakima and its youth." (CP 641).

While assigned to the Community Services Division he frequently represented the Department to the general public. He was a Drug Abuse

Resistance Education (D.A.R.E) officer in addition to his work with YPAL. (CP 695, CP 697). In 2004, his superior, Lt. Mike Merryman (Lt. Merryman), wrote:

Ofc. Brownfield has been an asset to the Yakima Police Dept. and the Community Services Division. He is constantly striving to come up with new programs, to include the PAL program. He does not require constant supervision, for he knows the tasks at hand have to be accomplished. He is very well liked by the teachers that have him do the DARE program in their classrooms. [Ofc.] Brownfield is an asset to the police department. (CP 642).

Everything changed for Ofc. Brownfield in 2004 after he began noticing what he thought were irregularities in the handling of funds at YPAL. The irregularities arguably involved Lt. Merryman, who, as noted above, was his supervisor. He attempted, as a whistleblower, to take his concerns about improper governmental activity to the next supervisor in the chain of command, the chief of police. However, Lt. Merryman intervened. (CP 569-576, CP 238, CP 278, CP 521, CP 623).

Despite Ofc. Brownfield's commendations, awards, and his exemplary job performance up to that time, he immediately became a target for the Department administration's wrath.

In his complaint, Ofc. Brownfield reported that Ofc. Dejournette, Brownfield's partner in the PAL program, improperly took "comp time and overtime." (CP 569-576, CP 238, CP 278, CP 521, 153-157). He also

reported irregularities with PAL funds, alleging that he believed public resources were improperly utilized, and that an audit was required. (CP 569-576, CP 238, CP 278, CP 521, CP 153-157). These concerns implicated both Lt. Merryman and Ofc. Dejournette, the two officers responsible for PAL finances at the time. (CP 569-576, CP 238, CP 278, CP 521, CP 153-157).

Following Ofc. Brownfield's complaint, everything he did was scrutinized and criticized by the Department leadership. Instead of ordering an independent investigation into Ofc. Brownfield's allegations, the Department investigated Ofc. Brownfield. The Department attempted to justify its initial order to Ofc. Brownfield, that he submit to a fitness for duty exam, by attacking Ofc. Brownfield's whistleblower complaint as symptomatic of his "difficulties" with his family and work life. (CP 159-161, CP 599-601).

Beginning in 2004, Ofc. Brownfield's marriage to his wife had begun to deteriorate and they later divorced. The Department went so far as to cite several personal matters that occurred during Ofc. Brownfield's divorce, which were unrelated to his performance while on duty, as a basis for the order to submit to a fitness for duty exam. (CP 159-161, CP 599-601). The Department's focus on Ofc. Brownfield's divorce and his personal life, as opposed to his actual job performance, is important because

it underscores the lack of any objective basis justifying a fitness for duty referral by the Department.

The record clearly shows that, after his return to full duty following his accident in 2000, Ofc. Brownfield excelled as a police officer. (CP 594-595, CP 624-626, CP 637-642, CP 644-650). Only after he made his whistleblower complaint did the Department begin to allege performance issues. Yet at no time was the Department able to provide any objective basis for its referral for a fitness for duty exam.

There are genuine issues of material fact as to whether the Department's termination of Ofc. Brownfield was justified or instead was driven by his whistleblower complaint. There remain genuine issues of material fact as to whether he is the victim of discrimination, retaliation, and unlawful termination by the City of Yakima.

D. ARGUMENT

1. Whistleblower Claim:

The first issue the trial court addressed was related to Ofc. Brownfield's whistleblower claim. However, because there are common facts interwoven with all the claims, much of what is covered in response to this first issue will inform the subsequent claims as well. Ofc. Brownfield's Response to the City's motion states at page 5, "[Ofc. Brownfield's] claims

based upon the whistle blowing activities are supported in law and in fact.” (CP 484). Ofc. Brownfield has not abandoned that argument.

Ofc. Brownfield agreed that the trial court should look to the Yakima City whistleblower policy, but it should be the one that is applicable to the incidents in question. The Yakima whistleblower policy is incorporated in the Yakima City Employee’s Handbook. (CP 631-635). The City provided the trial court with a version of the city’s whistleblower policy that was not adopted until January 26, 2009, a year after Ofc. Brownfield filed his initial complaint. (CP 399-403). Ofc. Brownfield submitted the applicable City of Yakima Employee Handbook (11/5/2000) at Exhibit 8 to the Declaration of John G. Bergmann in Support of Ofc. Brownfield’s Opposition Response. (CP 637-635).¹

Ofc. Brownfield’s pre-termination hearing was on March 19, 2007. He was officially fired by the then City Manager on April 10, 2007. (CP 210-217). In other words, he had been terminated 21 months before the adoption of the 2009 Yakima City Employee Handbook cited by the City.

The 2000 and the 2009 editions of the Employee Handbook are similar in that both begin with the following Policy Statement, “It is the policy of the City of Yakima (1) to require reporting by its employees (emphasis supplied) of improper governmental action taken by City of

¹ The initial Policy Statement is the same in both documents.

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, CP 631-635).

The definition 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.

(CP 399-403, CP 631-635).

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." (CP 399-403, CP 631-635). The City has not shown that it acted in compliance with the applicable policy. To the contrary, based on the evidence previously provided to the trial court by the City and Ofc. Brownfield, Ofc. Brownfield at all times tried to abide

by the policy articulated in the Employee Handbook. His written entries to his superiors in the chain of command were ignored.² (CP 82-87).

As noted above, Ofc. Brownfield had been one of the founders of and grant administrator for the Yakima Police Athletic League (YPAL), a program to keep kids active and out of gangs. (CP 642). In 2004 he became concerned that fellow officers, including Lt. Merryman, might be mishandling money. He tried to tell this to the chief of police. (CP 576). On May 11, 2005, Lt. Merryman heard of his concerns and ordered him to discuss them with him. Ofc. Brownfield refused to meet with Lt. Merryman without union representation, which led to charges that he had been insubordinate.(CP 94-133). Following this incident, he was ordered to attend a series of Fitness for Duty (FFD) exams. (CP 210-217). When he refused to complete what was the third or fourth exam because of his legal concerns and those of his union, the Yakima Police Patrolmans Association (YPPA)³, he was fired by the city manager for “insubordination.” (CP 210-217, CP 252-253, CP 735). Through all of this there never was a truly professional audit to determine the validity of Ofc. Brownfield’s concerns about the mishandling of YPAL funds.

² See Ofc. Brownfield’s Inter-Office Memo to Sgt. Amos dated June 17, 2004 found in Exhibit F to City’s submission in support of its motion. (CP 82-87).

³ These concerns were ignored.

The record before the court was clear. Ofc. Brownfield gave written documentation to his Sergeant concerning possible mishandling of YPAL funds. Because the next officer in the chain of command was a Lieutenant who was implicated in the possible mishandling of funds, he asked the Sergeant to arrange a meeting with the chief of police, who was next in command in his division. (CP 569-576, CP 238, CP 278, CP 521, CP 153-157).

The Sergeant said he would arrange a meeting with the chief. However, when the Sergeant took Ofc. Brownfield to the chief's conference room for the meeting, it was Lt. Merryman, not Chief Granato, who confronted him. (CP 519, CP 94-133).

Ofc. Brownfield did not respond well. He was fearful, confused and angry. (CP 519, CP 94-133). He refused to stay in the meeting with Lt. Merryman, who he was alleging may have committed a crime, without his union representative. (CP 519, CP 94-133). The resulting actions by city officials resulted in Ofc. Brownfield initially being put on paid administrative leave on September 28, 2005 and then extended FMLA leave on January 5, 2006, meaning he was not receiving a paycheck. (CP 298).

As the records attached to City's submission in Exhibit F and G reflect, Ofc. Brownfield was then sent to a fitness for duty exam (FFD) with

a psychiatrist of the City's choosing (Kathleen Decker).⁴ He was then sent to a neurologist (G.A. DeAndrea), and then to a psychologist chosen by the union (Norman Mar). Dr. Decker only saw Ofc. Brownfield once before her first report and never again. Without being asked to do so, Dr. Decker took it upon herself to gratuitously write at least three additional "reports" to rebut Ofc. Brownfield's treating doctors and psychologist, as well as Dr. DeAndrea and Dr. Mar.

Only Dr. Decker was of the opinion that Ofc. Brownfield would never again be fit for active police work.⁵ However, following favorable reports from his treating doctors, the City wanted to send Ofc. Brownfield to yet another psychologist of the City's choosing (William Ekemo). (CP 81-82, CP 143-146, CP 148-152, CP 184-219, CP 236, CP 241-242, CP 245-247, CP 249-251, CP 255-263, CP 278, CP 289, CP 290, CP 561-568, CP 590-591, CP 605-609, CP 627-629, CP 654-655, CP 702-706).

Ofc. Brownfield wrote an email on February 2, 2007 to Mr. Zais and several members of the Yakima City Council. (CP 290-291). In that

⁴ After Decker's initial report, the handwriting was on the wall in terms of how objectively city officials would treat Ofc. Brownfield. In a February 1, 2006 letter from Granato to Ofc. Brownfield, found in City's Exhibit G in support of its motion, Granato wrote, "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).

⁵ Dr. Mar, at the conclusion of his December 22, 2006 letter report to the YPPA attorney wrote: "Given Mr. Brownfield's treatment progress and with continued treatment, it is my opinion that Mr. Brownfield would be able to return to his full and normal range of duties as a Yakima Police Officer." (CP 434, CP 733).

communication, based on what he believed to be the applicable law, he asked the purpose of the examination by Dr. Ekemo and posed several questions. At the end of the email, he stated, "Again, I will not be able to visit Dr. Ekemo until each of the aforementioned requests are adhered to."

As a result of a Department of Health and Human Services Office of Civil Rights investigation, Ofc. Brownfield became aware that Dr. Decker had released his medical records in violation of the Health Insurance Portability and Accountability Act (HIPAA) privacy rules. He therefore continued the email with the following statement:

"Also, in reference to the above statute I am requesting that I be notified of each of the individuals/person that which (sic) representatives working on behalf of the city have already released copies of my medical records. Since this process [FFD examinations] has not been the result or is considered disciplinary in nature, the city should have no issues with the aforementioned requests insuring my medical rights to privacy resulting in an accurate exam process." (CP 290-291).

This communication was followed up by an email addressed to Mr. Zais and Dave Elder, then Mayor of the City. (CP 252-253). As noted above, Ofc. Brownfield was fired following a March 19, 2007 Pre-Termination Employment Hearing for what Mr. Zais called insubordination. Zais did this without any serious investigation into Ofc. Brownfield's concerns about the legality of Mr. Zais's order for yet another FFD. (CP 210-217).⁶

⁶ Apparently, relying solely on Kathleen Decker, Mr. Zais wrote: "In addition to insubordination, you are also unfit to perform the essential duties and functions of your

A letter dated May 7, 2007 from the Yakima Police Patrolmans Association (YPPA) states:

Brownfield stated that the order to attend the appointment with Dr. Ekemo for a fitness for duty evaluation was unlawful. After Brownfield failed to attend the appointment with Dr. Ekemo, there was no internal investigation conducted into the matter. Brownfield was not interviewed to determine why he did not attend and the reasons he felt that the order was unlawful. The only opportunity that Brownfield had to present evidence in this matter was his pre-termination hearing with Mr. Zais.
(CP 393).

In other words the city's own whistleblower policy was neither honored nor followed when Mr. Zais summarily fired Ofc. Brownfield.

In the same letter, the YPPA went on to point out, "The second portion of the grievance addresses Brownfield's fitness for duty. The YPPA provided documentation from Dr. Mar finding [that] Brownfield was fit for duty. Mr. Zais disregards Dr. Mar's findings and relies on Dr. Decker's report." ⁷ (CP 393).

position with or without accommodation. According to the most reliable medical information and all of the other facts and circumstances regarding that matter, I am convinced that you are permanently psychologically unfit for duty and that allowing you to return to active law enforcement duties would create a direct threat to yourself, your co-workers, and the public at large. (CP 217)

⁷ In a February 12, 2007 email from Jeff Brownfield to Dave Elder [Mayor of Yakima] and Dick Zais, found in the City's submission in Exhibit G, Ofc. Brownfield explained his position as follows:

"According to the EEOC, when an employee is order to a FFD and is subsequently placed on FMLA leave then the employer must comply with the FMLA statute being 29 U.S.C. 2601, 2613. Under this statute it allows the employer to seek a second and even a 3rd FFD, but states that the third is binding. Since the DOL does not take action and encourages complainants to seek civil remedies, they will not notify nor will they discuss the findings

A letter from the YPPA Executive Board to Mr. Zais, dated June 4, 2007, also states: "In a pre-termination hearing that Brownfield had with you, you stated that Chief Granato was not part of the decision making process in his termination." The Union asked him to reconsider his action and stated: "After Brownfield failed to attend the appointment with Dr. Ekemo, there was no internal investigation conducted into this matter. Brownfield was not interviewed to determine why he did not attend and what reasons he felt that the order was unlawful. The only opportunity that Brownfield had to present evidence in this matter was his pre-termination hearing with you." (CP 395). During all of this, the concerns about the YPAL funds were lost in the shuffle⁸ and the whistleblower policy was ignored. The policy was also overlooked when Mr. Zais, without considering the legal issues raised by Ofc. Brownfield concerning yet

of their investigation with the representatives of the city. They will prepare a lawful written report based on their investigation detailing any violations, when such need arises. I will inform you that the DOL's stance is that [Dr] Decker stated I was unfit for duty and the city placed me on MFLA (sic) leave beginning January 5, 2006. Dr. Gondo released me from FMLA on Feb. 3rd. Since Decker and Gondo disagreed, Sofia [Mabee, an assistant city attorney] sent Decker chart notes from Dr. Gondo and Decker wrote two follow up reports dated 3-15-06 and 3-30-06. DOL views this as a 2nd FFD even though it was performed by Decker and she didn't see me, she used new information. Since the city allowed me to see [Dr.] Mar and complied with his advice, the city was aware of the 3rd and supported it thus making it binding. Mar's final report as of January 3rd, 2007 states that I am fit for duty and DOL's Wage and hour division's Asst. Director, Mark Wojahn's legal opinion is that I should be back to work as of January 4, 2007." (CP 252-253).

⁸ See Ofc. Brownfield's email exchange dated May 25, 2006 with Captain Rod Light where he states, "After my internal for insubordination, Copeland began one on Merryman and DJ and at his conclusion stated they would be having an audit done and that I would still be involved in that one. The audit has never been done...." (CP 238).

another FFD, ignored those concerns, ignored the policies in the Employee Handbook and summarily fired Ofc. Brownfield.

To quote the City at page 16 of its Memo in Support of Summary Judgment, “Moreover, ‘the tort of wrongful discharge is not designed to protect an employee’s purely private interest in his or her continued employment; rather *the tort operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy.*” *Smith v. Bates Technical College*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000). (CP 461). The mishandling (i.e. potential unlawful misappropriation) of YPAL funds is of *public interest* and is not Ofc. Brownfield’s private interest.

It is the stated policy of the City of Yakima to require good faith reporting by its employees of improper governmental action taken by city employees. Employees, such as Ofc. Brownfield, who have reported alleged improper acts by other government employees in writing, in accordance with policy, are to be protected, not targeted for multiple fitness for duty examinations and then fired. Employees are to raise issues with their supervisors first, unless the supervisor is the alleged bad actor, as here. In this case Ofc. Brownfield attempted to go over the head of his lieutenant to the chief of police, who was the next higher command officer in the YPD Community Services Division. (CP 576). When he vocally objected to

meeting with Lt. Merryman without a union official and failed to follow a direct command by Lt. Merryman to talk to him about his concerns, he was reprimanded for insubordination and ultimately sent for an FFD. (CP 519, CP 94-133, CP 216).

When Mr. Zais tried to send him for an additional FFD examination he refused based on his reading of Equal Employment Opportunity Commission (EEOC) guidelines and discussions with the Department of Labor (DOL), as noted in footnote 6 above. (CP 210-217, CP 238).

Ofc. Brownfield had been terminated as a city employee at the time the City's 2009 Employee Handbook was adopted. (CP 210-217, CP 339-403). The City has failed to show that Ofc. Brownfield failed to comply with the applicable employee handbook policy and, in fact the evidence shows he did exactly what he was required to do. However, the whistleblower policy was ignored by the City when Ofc. Brownfield first brought possible mishandling of YPAL funds to the attention of city officials and it was ignored by the city manager when Mr. Zais terminated Ofc. Brownfield. This cause of action should not have been dismissed by the trial court. There are issues of fact that must be determined by a jury.

2. Wrongful Discharge

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) [of wrongful discharge] are present.”

Based on the facts outlined above, which are based largely on exhibits provided by the City, both elements are in fact present.

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, 943 P.2d 1134 (Div. I, 1997) begins with the admonition:

The right to be free from wrongful termination in contravention of public policy is independent of any underlying contractual agreement between the employee and employer. When an employee brings a claim against an employer based on nonnegotiable, substantive rights that are not dependent on a collective bargaining agreement (CBA), the employee is not first required to exhaust the remedies provided by a CBA arbitration clause.

At 115, the court goes on to elaborate:

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.

In *Smith v. Bates Technical College*, supra at 991 P.2d at 1147, the court held:

[W]e now expressly hold the common law tort [of wrongful discharge] is available to all employees without regard to whether an employee is terminable at-will or may be discharged only for cause. We also hold an employee need not exhaust contractual or administrative

remedies before bringing an independent tort action for wrongful discharge in violation of public claim and remand to the trial court for trial on this issue.

The trial court has adopted the City's reliance on *Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 913 P.2d 377 (1996).⁹ In *Gardner* the court stated at page 936:

This court first allowed a wrongful discharge claim on public policy grounds in *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 685 P.2d 1081 (1984). *Thompson* involved a situation where a divisional controller had instituted an accurate accounting program required by the Foreign Corrupt Practices Act of 1977, Pub.L. No. 95-213, 91 Stat. 1494. The employee claimed he was terminated in retaliation for complying with the law, and his discharge was intended to serve as a warning to other divisional controllers. The court ruled a plaintiff could satisfy the elements of a wrongful discharge claim by showing the discharge may have contravened a clearly stated public policy. *Thompson*, 102 Wash.2d at 232. Once a plaintiff 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. *Thompson*, 102 Wash.2d at 233. *See also Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wash.2d 46, 70, 821 P.2d 18 (1991) ("[E]mployer must articulate a legitimate nonpretextual nonretaliatory reason for the discharge.").

⁹ The *Gardner* court at 913 P.2d 379 stated, "Under the common law, at-will employees could quit or be fired for any reason. *Roberts v. Atlantic Richfield Co.*, 88 Wash.2d 887, 891, 568 P.2d 764 (1977). 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. 1 Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* §§ 1.13-1.63 (3d ed. 1992 & Supp. 1995) These public policy tort actions have generally been allowed ... (4) where employees are fired in retaliation for reporting employer misconduct, *i.e.*, whistleblowing. *Dicomes v. State*, 113 Wash.2d 612, 618, 782 P.2d 1002 (1989)."

In this case, Ofc. Brownfield raised the issue of mishandled funds that had been granted or donated for use by YPAL. (CP 238, 278, 521). When he attempted to raise the issue with his superiors in the city, he was rebuffed. He was then pretextually found, after the previous four years of exemplary service as a police officer, to be unfit for duty based on the alleged sequelae of an accident from four years before. In addition, when he raised a new issue about the legality of the city's procedure in ordering him to serial FFD examinations, his concerns about the process were again ignored. (CP 525). In each case the letter and the spirit of the city's own whistleblower policy was contravened by its conduct. This was a wrongful discharge.

Because the issue of wrongful discharge in this case is so intrinsically tied to the facts outlined above, its proof cannot simply be mechanistically applied to a simple formula, such as the one referenced by the trial court and articulated by the *Gardner* court at page 382. To paraphrase the court:

Ofc. Brownfield "must prove the existence of a clear public policy (the *clarity* element)."

The city's whistleblower policy discussed above is clear.

Ofc. Brownfield “must prove that discouraging the conduct in which the city employees engaged would jeopardize the public policy (the *jeopardy* element).”

If the policy is to be honored throughout the city, it must be honored by the city’s officials. Although Ofc. Brownfield adhered to the City’s whistleblower policy procedures, the city manager did not. This resulted in a lack of trust and respect for the city’s leadership among those in the city’s police department who knew what was going on.

Ofc. Brownfield “must prove that the public-policy-linked conduct caused the dismissal (the *causation* element).”

Ofc. Brownfield was attempting to honor the whistleblower policy and was terminated by the City for his efforts. In the end, the city manager did not have a legal rationale for his bottom line demand that Ofc. Brownfield complete yet another FFD exam, but Mr. Zais was not going to let a mere police officer thwart his authority. The hubris of Mr. Zais is what got Ofc. Brownfield fired. This is a question of fact which should be decided by a jury.

The City “must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).”

The City has failed to show any legitimate reason for ignoring Ofc. Brownfield’s complaint regarding possible misappropriation of YPAL

this duty not only when it first took him out of a non-stressful position at which he excelled, but also when it transferred him to the Patrol Unit, knowing it was a more stressful position both physically and emotionally. (CP 6). Then it allegedly found him unfit for the more stressful job.¹⁵

When all the health care providers who examined Ofc. Brownfield, with the exception of Kathleen Decker, agreed that Ofc. Brownfield would be able to go back to work in all areas of work performed by YPD officers, the City, through its agent Mr. Zais, chose to rely solely on Kathleen Decker's opinion as the rationale for sending Ofc. Brownfield for an additional FFD. (CP 567, CP 559, CP 607, CP 653, CP 702-706). When Ofc. Brownfield and his union raised the question of possible violation of federal regulations relating to Mr. Zais' order that he undergo yet another FFD, and Ofc. Brownfield then refused to see William Ekemo without some legally supportable reason, the City, through its agent Mr. Zais, fired Ofc. Brownfield without even considering the validity of the order. (CP 252-253, CP 210-217, CP 393). It was Mr. Zais' way or the highway. The City, which was on notice of the situation, failed to supervise or rein in its city manager. The City, through Mr Zais, discriminated against Ofc.

adjustment to a job, work environment, policies, practices, or procedures that enables a qualified individual with a disability to enjoy equal employment opportunity.”

¹⁵ Note: Ofc. Brownfield's evaluations note his exceptional performance while in the community services division.

Brownfield 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

There is a fundamental misunderstanding about this claim. The claim is not about then Chief Granato. This claim is about the City's failure, during the years of Granato's tenure and through the conduct of its agent Mr. Zais, to exercise any supervision or discipline of the police department as it may relate to the termination of Ofc. Brownfield.^{16 17} Mr. Zais, with the acquiescence of and lack of oversight by the City Council, exercised responsibility for firing all city employees. Mr. Zais fired Ofc. Brownfield with little or no justification, using the accident in 2000 as the excuse to order Ofc. Brownfield to multiple FFD exams within a short period of time, despite the fact that Ofc. Brownfield had performed his duties in an exemplary fashion during the four years following the accident. (CP 210-217, CP 594-595, CP 624-626, CP 637-642, CP 644-650). As noted before,

¹⁶ Ofc. Brownfield's Complaint, filed with the trial court, is part of this Response. It states in part: "1.2 City City of Yakima (City) is a Washington Municipal Corporation under Washington law and operates in Yakima County, Washington." (CP 1-8).

¹⁷ This court can also take judicial notice of the Yakima City Charter. At Article II, Section 2 the Charter states: The Council shall constitute the legislative branch and authority of the City government and shall have power to adopt rules of order and regulations for the conduct of its business." Section 7 states in part: "The Council shall appoint an officer whose title shall be City Manager and who shall be the chief executive officer and the head of the administrative branch of the City government." Section 8 states in part: "The City Manager shall be appointed for an indefinite term and may be removed by a majority vote of the Council."

during that period Ofc. Brownfield had received numerous commendations and awards for his service to the YPD and the city of Yakima. (CP 594-595, CP 624-626, CP 637-642, CP 644-650).

If Mr. Zais truly thought Ofc. Brownfield should not be in a high stress job, due to injuries from a 2000 accident, he should have made a reasonable accommodation by reassigning Ofc. Brownfield to the Community Service Division of the YPD where, by all measures, he had excelled. However, there was absolutely no attempt by Mr. Zais to accommodate this allegedly disabled decorated officer. When Mr. Zais took it upon himself to ignore the law and city policies regarding disabled employees and terminate Ofc. Brownfield, the city council did nothing to come to its employee's defense.

In addition to the policy and procedural short comings by Mr. Zais noted in the sections above, there were several concerns expressed by the YPPA and Ofc. Brownfield. How much had the police department officials pre-prejudiced the opinions of Kathleen Decker, the person handling the initial FFD? Why, after only seeing Ofc. Brownfield once, did Dr. Decker feel the need to keep writing numerous "rebuttal" reports.¹⁸ (CP 599-601).

¹⁸ The City provided incorrect, misleading and false information to Kathleen Decker. (CP 599-601).

Mr. Zais, on behalf of the city, relied only on Kathleen Decker's reports, rather than balancing them against the reports of Dr. Gondo, Dr. Drew, Dr. Mar, Dr. Hewlett and Dr. DeAndrea. (CP 210-217). The bottom line is that the City had given Mr. Zais the right to fire city employees, including Ofc. Brownfield, but without any supervision, oversight or review. When Mr. Zais terminated Ofc. Brownfield an employee he had defined as disabled, rather than transferring him from patrol to a less stressful position, the City council did nothing to review or remedy the situation. It is not possible to simply say, Mr. Zais acted, however ill-advised or reckless, "within the scope of his employment" when he terminated Ofc. Brownfield. If, in fact, he acted in contravention of the law and/or Yakima City policy, he was acting outside the bounds of his lawful authority. The failure of the city council to rein him in when he exceeded his lawful authority puts the onus directly on the City. There are substantial questions of material fact for the jury on this issue.

E. CONCLUSION

This case should be remanded to the trial court for a jury trial. The trial court should then address the substantial genuine issues of material facts and the disputed legal issues involving Ofc. Brownfield's allegations of violations of the law related to whistleblower protections, wrongful

discharge, discrimination and negligent supervision. A jury of Ofc.

Brownfield's peers will then resolve any facts still in dispute.

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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 December 5, 2012, I served the BRIEF OF THE APPLANT 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 type="checkbox"/> VIA US MAIL <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Via Email

Dated this 5th day of Dec., 2012.


Lish Whitson, WSBA #5400