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JAN 18 2013

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DIVISION III
STATE OF WASHINGTON
By _____**

COA Cause No. 309941 III

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FOR THE STATE OF WASHINGTON
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OSCAR J. BROWNFIELD

Appellant,

vs.

CITY OF YAKIMA

Respondent,

BRIEF OF RESPONDENT

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Ephrata, WA 98823
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I. ASSIGNMENTS OF ERROR

The Appellant, Oscar Brownfield, claims four assignments of error related to four separate claims, to wit, a “Whistleblower” claim, Wrongful Discharge, a claim related to the Washington Law Against Discrimination (WLAD) and a Negligent Supervision claim. No purpose is served by repeating the assignments of error here.

II. STATEMENT OF THE CASE

A. PROCEDURAL STATEMENT OF THE CASE

Under the heading of Procedural Background, the Appellant recites the standard of review that he suggests should be applied by this court in deciding this appeal. Effectively, this is a “*de novo*” review of the trial court’s ruling granting the Respondent City of Yakima’s Motion for Summary Judgment.

The remainder of the “Procedural Background” is actually argument. Mr. Brownfield argues that the trial court accepted the rulings of the Honorable Judge Robert Whaley in a companion federal case. He is mistaken. The trial court judge made his own independent review of the summary judgment motion. [CP 721-24] (Appendix A at A-1 – A-4). He properly concluded that Mr. Brownfield’s claims lacked any merit, as did the federal judge when ruling on similar claims. The coincidence of the

rulings is not surprising given that each judge carefully reviewed nearly identical claims on the same set of facts.¹

Mr. Brownfield argues that the trial judge erred in ruling that collateral estoppel applied to this case. This argument will be addressed in the body of the brief. Mr. Brownfield then correctly notes that the federal judge only dismissed the federal claims and did not exercise any further jurisdiction over the state law claims. However, it must be remembered that the legal issues in the remaining state law claims were identical to those in the dismissed federal claims and issue estoppel would apply.

Mr. Brownfield correctly asserts that Richard Zais was the City Manager during all relevant times and served at the pleasure of the City Council.²

Mr. Brownfield then quotes Thomas Jefferson in a letter to Thomas Paine regarding the importance of a jury trial. While the quote is historically intriguing it is of no moment in this case. In colonial times, citizens were suspect of judges and juries often were the ultimate arbiters of both fact and law. Mr. Jefferson in a letter to L'Abbe Arnoux, Jul. 19, 1789 noted his distrust of judges when he wrote:

¹ Three judges from the 9th Circuit Court of Appeals also upheld Judge Whaley's ruling on summary judgment. *Brownfield v. City of Yakima*, 612 F.3d 1140 (C.A.9 2010).

² After a long and distinguished career of 38 years with the city and 32 years as City Manager, Mr. Zais retired last year.

[w]e all know that permanent judges acquire an esprit de corps; that, being known, they are liable to be tempted by bribery; that they are misled by favor, by relationship, by a spirit of party, by a devotion to the executive or legislative; that it is better to leave a cause to the decision of cross and pile than to that of a judge biased to one side; and that the opinion of twelve honest jurymen gives still a better hope of right than cross and pile does. It is left therefore, to the juries, if they think the permanent judges are under any bias whatever in any cause, to take on themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges; and by the exercise of this power they have been the firmest bulwarks of English liberty.³

In our modern day jurisprudence our courts have carefully defined the role of the judge and the jury. The judge has the right to determine the law; the jury is given province over facts. The trial judge carried out his constitutional duty in this case.

B. FACTUAL STATEMENT OF THE CASE

Mr. Brownfield was hired on November 15, 1999, and actively served as a police officer for the City of Yakima until he was placed on administrative leave on September 28, 2005. [CP 209] He was terminated on April 10, 2007, by City Manager Dick Zais. Mr. Brownfield was terminated because he was psychologically unfit for duty and as a result of

³ Jefferson's writings on the role of juries are often quoted by modern day jury nullification advocates who believe that the jury should have the ultimate power to decide all issues regardless of the court's instructions. See for example, A History of Jury Nullification. <http://www.isil.org/resources/lit/history-jury-null.html>

his insubordination in refusing to attend a mandated fitness for duty examination. [CP 210-217]

At the time of his termination, Mr. Brownfield was not psychologically fit for duty as a result of complications from a closed head injury. In 2000, while off-duty, Mr. Brownfield had a car accident and suffered from a significant closed head injury. [CP 26-28] Dr. Drew, a psychologist in Yakima, treated him for issues related to his closed head injury. In his July 2001 report, Dr. Drew noted his concern that Mr. Brownfield suffered from a “reduced self-awareness” and recommended that the department monitor his performance after he returned to work. CP 79. He returned to full duty work in July 2001. [CP 26-28]

In December 2003, Mr. Brownfield returned to see Dr. Drew reporting “significant difficulty getting along at work, at home and with himself.” [CP 80] He also reported difficulty focusing, difficulty sleeping, and increased memory problems. He was less assertive, had difficulty accomplishing tasks and “he was so frustrated he experienced some anger reactions he had never felt before.” [CP 80] He went to see Dr. Drew for help getting along with emotional issues. [CP 49] Mr. Brownfield reported, “I’m a space cadet, I forget appointments, I’m tired, can’t focus . . .” [CP 50] He talked of “violence tendency, pulled his wife’s hair on one occasion a month and a half previous [to seeing Dr.

Drew].” *Id.* These were the kind of emotional sequelae that Dr. Drew predicted or expected might reasonably occur because of his closed head injury. [CP 50- 51] Dr. Drew related Mr. Brownfield’s symptoms to his closed head injury and recommended individual and group therapy. [CP 80-81]

A few months after reporting his concerns to Dr. Drew, Mr. Brownfield was involved in a couple of unusual and somewhat alarming events. He accused his partner of unethical work practices. [CP 82-87]⁴ In May of 2005, he was reprimanded for a fairly minor incident. [CP 92-93] However, in the meeting with his supervisors to discuss the reprimand, Mr. Brownfield acted erratically and irrationally. In the meeting, he accused Lt. Merryman, a supervisor, of conducting a secret internal investigation on him even though he had not. [CP 96-9] Shortly after the meeting started, Mr. Brownfield “blew up” and attempted to leave the meeting. [CP 114] He was ordered by his superior to stay at the meeting, but he left anyway. He said that he left because he was getting irritated and needed a time out. He reported:

Saw my agi . . . I was starting to get agitated. Because of my training with DARE and with some of my medical stuff that I’ve gone through ah, after my wreck, I know that I’m agitated

⁴ While he has every right to do so, it is unusual for a police officer to complain to the administration about the conduct of a fellow officer. The complaint was investigated and was determined to be unfounded. [CP 153-58]

and some of the suggestions to me over time has been once you reach this level of agitation, you need to take a break. [CP 116]

Mr. Brownfield left the meeting crying. [CP 117] He wanted someone to “take care of me”. He had talked to a peer counselor a few days before this. *Id.* He left the room and talked with Officer Fowler, his union representative. Mr. Brownfield stated he was “real stressed.” This is despite the fact that the meeting did not involve any discipline, but was simply a personnel matter. [CP 119-21] A few minutes later Sgt. Amos entered the room with Mr. Brownfield and Officer Fowler. Mr. Brownfield yelled at Sgt. Amos. In Mr. Brownfield’s words:

Yeah, exactly like what, you know, he [Sgt Amos] he was confused, you know, and I feel bad for him because he’s kind of in the middle of all this and he and I have a great working relationship an stuff and so he’s a little bit confused cause I’m ticked off. And then he’s like went, like that and I was like you fucked me, you fucked me. And then ah, like I’m pointing my finger at, you know, get out of here, get the fuck out of here, something along those lines. [CP 122]

Mr. Brownfield described his demeanor during that meeting as being “pissed” and that “I was a caged animal.” [CP 125] In the interview regarding this matter, Mr. Brownfield stated that “there’s a lot going on not only in my personal life but in my work life, I need help. And when I need help, I took Monday off because I can’t be here. . . .” [CP 129] The officer assigned to help Mr. Brownfield told his Captain

Greg Copeland that he thought Mr. Brownfield should talk to someone and get professional help. [CP 53-56]

Around this same time, Mr. Brownfield blew up at another female officer during roll call. [CP 230-31] In September of 2005, Mr. Brownfield sought a protective order from his wife. In the declaration for the order he stated, “Because of a severe head injury due to an auto accident, I suffer from emmotional (sic) impulsivity.” [CP 139] In September 2005, Mr. Brownfield responded to a call involving a disturbance. During the call, he encountered a young male and threatened to “flatten” the juvenile. A back-up officer noticed that Mr. Brownfield’s legs and arms were shaking at the time. [CP 235] Around this same time, an officer who worked on the same squad as Mr. Brownfield reported to Captain Copeland that Mr. Brownfield was making statements of “hopelessness”; “I am not sure its worth it”; It doesn’t matter how this ends.” [CP 159-61] At this point, Captain Copeland determined that he would refer Mr. Brownfield to a psychiatrist for a fitness for duty examination (FFDE). On September 28, 2005 Mr. Brownfield was placed on administrative leave and ordered to a FFDE with Dr. Kathleen Decker. [CP 209⁵]

⁵ Mr. Brownfield argued in his federal case that the City did not have a sufficient reason to refer him for a FFDE. The 9th Circuit ruled that the City had sufficient

Mr. Brownfield submitted to the FFDE. On December 12, 2005, Dr. Decker issued a report determining that Mr. Brownfield was psychologically unfit for police duty. [CP 184 -86] (Appendix B at B-1 – B-3). On May 25, 2006, Chief Granato provided Mr. Brownfield with a detailed Notice of Pre-Termination hearing. The termination was necessary because of Mr. Brownfield’s “inability to perform the essential functions” of a police officer. [CP 583-587] The hearing was scheduled for June 2, 2006. *Id.* The hearing was re-scheduled to June 15, 2006, to give Mr. Brownfield time to submit additional medical information. [CP 239]

Mr. Brownfield and his union hired Dr. Norman Mar, a psychologist, to do an independent evaluation of Mr. Brownfield. The pre-termination hearing was continued again to August 3, 2006. [CP 246] At the hearing on August 3, 2006, Mr. Brownfield did not have a report from Dr. Mar. After listening to Mr. Brownfield and his union representative, Chief Granato referred the matter to City Manager Zais. [CP 588-89]

On August 3, 2006, Dr. Mar reported to the union’s attorney that he basically agreed with Dr. Decker’s findings. Dr. Mar recommended

reason to refer him for an FFDE. *Brownfield v. City of Yakima*, 612 F.3d 1140, 1147 (C.A.9 2010). He is bound by this ruling and cannot now challenge his

that Mr. Brownfield get additional counseling and psychotherapy. Dr. Mar did not find Mr. Brownfield fit for duty. [CP 202-04]

Dr. Mar's letter was submitted to the City on August 9th. The City did not take any action on the termination issue at that time. Instead, the City submitted Dr. Mar's report to Dr. Decker. She then filed a "Follow-up" report on August 14, 2006. She reiterated that Mr. Brownfield was still not fit for duty. [CP 187-201] On August 22, 2006, City Manager Richard Zais wrote to Mr. Brownfield and indicated that he was taking over the matter of the termination and offered to meet with him to discuss it. [CP 242]⁶

On December 22, 2006, after some additional psychological treatment with Dr. Newell, Dr. Mar filed another report. This report again did not conclude that Mr. Brownfield was fit for duty, but only indicated that Mr. Brownfield "would" be able to return to police work if he continued to make progress with Dr. Newell. [CP 218-19] The City, Mr. Brownfield and the union agreed that to resolve the situation, Mr. Brownfield would be reevaluated by Dr. Decker. On January 11, 2007, Dr. Decker was notified that she should do a second FFDE on Mr. Brownfield. [CP 247] The parties also agreed that Dr. Ekemo, from

referral. His reason for refusing to attend the ordered FFDE was that the City lacked authority to require it. He cannot maintain that defense any longer.

Bellevue Washington, would perform the neuropsychological portion of the FFDE. [CP 246]

On January 17, 2007, Mr. Brownfield informed the City that he had given “Dr. Decker her 90 day notice of my intent to sue her for medical mal practice (sic).” [CP 248] The City then requested that Dr. Ekemo do the entire FFDE. [CP 249] On January 23, 2007, City Manager Zais formally ordered Mr. Brownfield to attend the FFDE with Dr. Ekemo. He was warned that his failure to comply could result in disciplinary action including termination. [CP 250] On February 1, 2007, Captain Copeland also ordered Mr. Brownfield to attend the examination, providing him with the date, time and location. He also warned Mr. Brownfield that failure to attend could result in disciplinary action including termination. [CP 251] (Appendix D at D-1).

On February 12, 2007, Mr. Brownfield emailed the City Manager indicating that he was willing to submit to the FFDE with Dr. Ekemo. He had researched Dr. Ekemo and felt comfortable with him. He did argue about the order and asked for clarification. [CP 252-53] On February 13, 2007, City Manager Zais responded by letter and advised Mr. Brownfield that, “My order that you attend a fitness for duty evaluation is lawful and

⁶ Inexplicably the second page of this letter is missing from the record. The second page is included in the appendix. (Appendix C at C-1).

if you willfully violate it, at your own peril you face termination of employment.” (Emphasis in original) [CP 254] (Appendix E at E-1).

Mr. Brownfield attended the first phase of the FFDE on February 15, 2007. Dr. Ekemo scheduled the second phase of the evaluation for March 6, 2007. Mr. Brownfield agreed to return on March 6th. [CP 255] On March 1, 2007, City Manager Zais wrote to Mr. Brownfield because Dr. Ekemo had advised him that Mr. Brownfield was apparently unwilling to return to complete his FFDE. In the letter he stated,

“You are hereby ordered to appear on March 6, 2007, for the continuation of Dr. Ekemo’s fitness for duty evaluation and cooperate fully with the evaluation process. If you fail to follow this order, you will be considered insubordinate and the likely penalty of such insubordination is termination of employment.” (Emphasis in the original) [CP 590-91] (Appendix F at F-1 – F-2).

Despite the clear warning, Mr. Brownfield refused to complete the ordered FFDE with Dr. Ekemo. On March 8, 2007, City Manager Zais issued an Amended Notice of Pre-Termination Hearing and scheduled a pre-termination hearing for March 19, 2007. [CP 256]

Following a pre-termination hearing, City Manager Zais issued a Notice of Termination on April 10, 2007. In the letter of termination, Manager Zais noted that Mr. Brownfield’s insubordination was based on his refusal to comply with the City Manager’s direct order that he attend a fitness for duty examination. Mr. Zais wrote:

After considering all of the facts and circumstances, including the statements you made during the pre-termination hearing, I find that the written orders you received to appear for and cooperate with a fitness for duty evaluation by Dr. Ekemo were lawful and that you violated the above-mentioned workplace rules by refusing to obey those orders. There is no question that you were specifically ordered to appear for the evaluation. The orders were very clear. They were issued to you in writing. You were personally served the orders. You were told the potential consequence of failing to comply with the orders. Your failure to comply constitutes a deliberate, willful, and inexcusable defiance of the authority of your superiors and is considered gross misconduct.

[CP 213] (Appendix G at G-1). In addition, City Manager Zais determined that Mr. Brownfield remained psychologically unfit for duty.

[CP 213 – 16] He determined that termination was the appropriate form of discipline for both the willful refusal to follow the order to attend the FFDE and because he could not perform the essential functions of the job of a police officer. [CP 216-17]

III. ARGUMENT

A. WHISTLEBLOWER CLAIM

For the first time on appeal, Mr. Brownfield argues that the City violated its own Reporting Improper Government Action policy.⁷ Prior to filing this brief he had not made a policy violation claim against the City. Mr. Brownfield's only claim in this regard was contained in paragraph 4.3

⁷ This policy is commonly referred to as the "Whistleblower" policy.

of his complaint wherein he alleges that the City violated RCW 42.41.040. [CP 5] RCW 42.41.040 does not apply to actions of the City of Yakima. RCW 42.41.050 specifically exempts the City from liability under this statute by providing:

Any local government that has adopted or adopts a program for reporting alleged improper governmental actions and adjudicating retaliation resulting from such reporting shall be exempt from this chapter if the program meets the intent of this chapter.

See also, *Keenan v. Allan*, 889 F.Supp. 1320, 1365 (E.D.Wash.1995), *aff'd* 91 F.3d 1275 (9th Cir. 1996); *Dewey v. Tacoma School Dist. No. 10*, 95 Wn.App. 18, 29, 974 P.2d 847, 853 (1999); *Wilson v. City of Monroe*, 88 Wn. App. 113, 943 P.2d 1134 (1997), *rev. denied* 134 Wn.2d 1028 (1998). The City adopted its own Reporting Improper Governmental Actions policy in 2000. [CP 631-35] 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 trial court dismissed this claim solely because the City was exempt from any liability under the statute. [CP 721] 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) See also, *Sebek v. City of Seattle*, 2012 WL 6098265, 3 (Wash.App. Div. 1,2012); *Brundridge v. Fluor Fed. Servs., Inc.*, 164

Wash.2d 432, 441, 191 P.3d 879 (2008). This court should uphold the trial court's ruling.⁸

In his argument in this brief, Mr. Brownfield argues that he raised the issue of "mishandling of funds" with Chief Granato, citing to a memo that he wrote to the Chief on May 4, 2006. [CP 576] In fact, the issues that he was raising had nothing to do with mishandling of funds. It was simply a complaint about his partner's failure to do his job properly and allegedly taking too much overtime. [CP 82-91] The 9th Circuit Court of Appeals specifically addressed this issue in its opinion and determined:

Brownfield's communications regarding [Officer] Dejournette and [Lt.] Merryman fail this test [whether his speech concerned matters of public concern]. Nothing in the statements at issue would be of even modest relevance to the public in evaluating the functioning of the YPD. They simply concern the allocation of work between Brownfield and his partner in running a PAL facility. . . . Brownfield frames his complaints as uncovering "irregularities" in PAL bank accounts, but his characterization is inconsistent with the record. At worst, Brownfield's communications show that a PAL check bounced due to Dejournette's failure to transfer funds from a sub-account. However, Brownfield did not claim that Dejournette had committed any type of malfeasance, and the overdraft charge was refunded.^{FN3}

FN3. After he was found to be unfit for duty, and just after he received a pretermination notice, Brownfield alleged that Dejournette may have stolen funds from PAL. Because

⁸ Even if the policy did apply, Mr. Brownfield did not comply with the notice requirements. His only remedy under the policy is to request an administrative hearing. He would not have a private cause of action under the policy. [CP 633-34]

of the timing of the allegation, however, it could not have prompted YPD's actions.

Brownfield v. City of Yakima, 612 F.3d 1140, 1148 -1149 (C.A.9 (2010)). These matters were fully investigated and were determined to be unfounded. [CP 153-58] Even if he had alleged a proper claim, Mr. Brownfield is foreclosed from making any argument that his complaint involved the reporting of improper government action. The court need not reach this issue because Mr. Brownfield's claim was only under RCW 42.41.040. The City is exempt from any claim under this statute.

B. PUBLIC POLICY DISCHARGE TORT

Mr. Brownfield alleged a Public Policy Tort claim. [CP 5] The trial court properly dismissed this claim because Mr. Brownfield could not establish the jeopardy and causal elements of this tort. In addition, the court concluded that Mr. Brownfield was bound by the federal court ruling that "no reasonable jury could find that the adverse employment actions resulted from anything other than Plaintiff's unfitness for duty and his insubordination." [CP 442] (Appendix H at H-1). The court's ruling was correct and should be upheld on appeal.

In order to prevail on a claim of wrongful discharge in violation of public policy, plaintiff must be able to show three things: (1) Washington has a clear public policy related to the protection of whistleblowers (the

clarity element), (2) discouraging the conduct would jeopardize the public policy, including proof that the current means of promoting that policy are inadequate (the *jeopardy* element), and (3) that policy-protected conduct actually caused the dismissal (the *causation* element). *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). If these three elements are met, an employer will still prevail if able to offer an overriding justification for the termination decision (the *absence of justification* element). *Id.*

1. PLAINTIFF CANNOT ESTABLISH THE JEOPARDY ELEMENT

In order to establish jeopardy, a plaintiff must show that he engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy. In other words, he must prove that discouraging the conduct in which he has engaged would jeopardize the public policy. He also must show that other means of promoting the public policy are inadequate. The plaintiff has to prove that discouraging the conduct that he or she engaged in would jeopardize the public policy. *Ellis v. City of Seattle*, 142 Wn.2d 450, 460, 13 P.3d 1065 (2000). The claim of wrongful discharge in violation of public policy is a claim of an intentional tort—the plaintiff must establish wrongful intent to discharge in violation of public policy. *Havens v. C & D Plastics, Inc.*, 124 Wash.2d 158, 177, 876 P.2d 435

(1994); *Cagle v. Burns & Roe, Inc.*, 106 Wash.2d 911, 726 P.2d 434 (1986); *Korlund v. DynCorp Tri-Cities Services, Inc.*, 156 Wash.2d 168, 178, 125 P.3d 119, 124 - 125 (2005)

A matter of particular importance in establishing the jeopardy element is the requirement that the plaintiff show that other means of promoting the public policy are inadequate. *Korlund* at 181-82 The question of whether adequate alternative means for promoting a public policy exist presents a question of law as long as “the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy.” *Korlund* at 82; In accord, *Cudney v. ALSCO, Inc.*, 172 Wash.2d 524, 528-529, 259 P.3d 244, 246 (2011) (holding that WISHA and DUI laws are adequate to protect the public policy of workplace safety and protection of workers who report safety violations). The other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy. *Hubbard v. Spokane County*, 146 Wn.2d 699, 717, 50 P.3d 602 (2002). 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 Coll.*,

139 Wn.2d 793, 801, 991 P.2d 1135 (2000). Since *Gardner*, this court has repeatedly applied this strict adequacy standard, holding that a tort of wrongful discharge in violation of public policy should be precluded unless the public policy is inadequately promoted through other means and thereby maintaining only a narrow exception to the underlying doctrine of at-will employment. See *Gardner*, 128 Wash.2d at 945, 913 P.2d 377; *Hubbard*, 146 Wash.2d at 713, 50 P.3d 602; *Korslund*, 156 Wash.2d at 181–82, 125 P.3d 119; *Cudney* at 530. The court must examine existing laws and remedies to determine whether they provide adequate alternative means of promoting the public policy.

In *Korslund*, three employees brought a public policy tort claim against their employer alleging that they were fired for reporting safety violations. The employees contended that the public policy contained in the Energy Reorganization Act (ERA), 42 U.S.C. 2011 et. seq. protected them from termination. Our Supreme Court acknowledged that the ERA provided a sufficiently clear policy to meet the “clarity” element of their public policy tort claim.⁹ However, the Court then ruled as a matter of law, that the plaintiffs did not satisfy the jeopardy element of the tort of wrongful discharge in violation of public policy because there was an adequate alternative means of promoting the public policy on which they

rely. *Id.* at 181. The *Korslund* court noted that the ERA provided an administrative process for adjudicating whistleblower complaints and provided for orders to the violator to “take affirmative action to abate the violation;” reinstatement of the complainant to his or her former position with the same compensation, terms and conditions of employment; back pay; compensatory damages; and attorney and expert witness fees. 42 U.S.C. § 5851(b)(2)(B). The ERA thus provided comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs. *Id.* at 182. The Supreme Court ruled:

We conclude that the remedies available under the ERA are adequate to protect the public policy on which the plaintiffs rely. Therefore, as a matter of law, Korslund's and Miller's claims of wrongful discharge in violation of public policy fail. (Footnote omitted)

Id. at 183. See also, *Cudney* at 528-529 (Holding that WISHA and DUI laws are adequate to protect the public policy of workplace safety and protection of workers who report safety violations); *Rose v. Anderson Hay and Grain Co.*, 168 Wash.App. 474, 478, 276 P.3d 382, 384 (2012) (Federal law adequately protected employee who refused to operate a vehicle in violation of federal regulations or standards related to commercial vehicle safety. 49 U.S.C. § 31105(a)(1)(B)).

⁹ The clarity element is not in issue in the case before this court.

Mr. Brownfield argues that the public policy issue at stake in this case is the right of a public employee to be free from wrongful termination when reporting alleged governmental misconduct. Assuming, *arguendo*, that this is the public policy in issue, Mr. Brownfield had a number of remedies available to him in order to ensure that he would not be terminated for reporting alleged government misconduct.

He had the protection of the Yakima policy protecting employees against retaliation for reporting improper government actions. [CP 631-35] This policy specifically prohibits retaliation against whistleblowers and provides the employee with any appropriate relief provided by law. [CP 633] The policy also gives the employee the right to appeal any decision made by the City to the State Office of Administrative Hearings. [CP 633-34] The administrative law judge has the authority to reinstate an employee who has been retaliated against, issue out awards for back pay, issue out injunctive relief necessary to return the employee to his or her position held before the retaliation, and to award the employee costs and reasonable attorney fees. RCW 42.41.040(7); *Woodbury v. City of Seattle*, __ P.3d __, 2013 WL 149855 (Wn. App. January 14, 2013).

In addition, Mr. Brownfield is a union public employee protected by the terms of his collective bargaining act (CBA). [CP 405-15] He cannot be terminated without just cause. [CP 411] The CBA provides the

plaintiff with a grievance procedure to challenge any violation of the protections of the CBA. The grievance procedure provides for final and binding arbitration. [CP 407-09]

The plaintiff also has civil service protection. RCW 41.12.010. Pursuant to the Yakima Civil Service Rules (and statute), he cannot be terminated from his job except for specific cause. [CP 419-20] He can elect between his CBA remedies and his Civil Service remedies. *Civil Service Com'n of City of Kelso v. City of Kelso*, 137 Wn.2d 166, 172, 969 P.2d 474, 478 (1999). The protections provided to plaintiff by the Yakima “Whistleblower” Policy, the CBA and Civil Service are certainly adequate to protect the public policy against retaliation of whistleblowers. Therefore, this policy is not in “jeopardy.” The court does not have to provide another specialized tort remedy to the plaintiff in order to protect this public policy. *Korslund*, 156 Wash.2d at 183.

2. PLAINTIFF CANNOT ESTABLISH THE CAUSATION ELEMENT

Under the causation element, a plaintiff must show that his public-policy-linked conduct actually caused termination of his employment. *Gardner* at 128 Wn.2d 941. Wrongful discharge in violation of public policy is an intentional tort; therefore, the plaintiff must establish wrongful intent to discharge. *Korslund*, 156 Wn.2d at 178,. There must be sufficient evidence of a nexus between the discharge and the alleged policy

violation. *Havens at* , 124 Wn.2d 179, A court may determine causation as a matter of law when reasonable minds can reach but one conclusion. *Miller v. Likins*, 109 Wn.App. 140, 144, 34 P.3d 835 (2001).

In this case, Mr. Brownfield is estopped from claiming that alleged “whistleblower” activity actually caused his termination. In his earlier federal case, Judge Whaley concluded:

Even if Plaintiff did speak on a matter of public concern, and could also establish factors two through four [of his First Amendment claim] in his favor, the Court concludes that this claim founders at the causation state (the fifth factor) because no reasonable jury could find that an adverse employment action resulted from anything other than Plaintiff’s unfitness for duty and his insubordination.

The causation question is one of pure fact, and Defendant “may avoid liability by showing that the employee’s protected speech was not a but-for cause of the adverse employment action.” *Eng*, 552 F.3d at 1072. Plaintiff has not identified the precise adverse employment action that he claims is at issue here, instead arguing that “the City bears liability for the department’s disparate treatment of, and adverse action against, Ofc. Brownfield, leading up to and including his termination.”... Based on the undisputed facts, the Court finds no but-for causal link between Plaintiff’s speech and either of these actions, as a matter of law.

. . . .Based on the record the parties have made, no reasonable jury could conclude that the lengthy termination proceedings conducted by Mr. Zais were “a sham or conduit” for any alleged retaliatory motive on the part of Chief Granato. (cite omitted) Third and finally, Plaintiff’s speech cannot constitute a but-for cause because Defendant had two legitimate reasons for termination: unfitness for duty and insubordination. [CP 442-444] (Appendix H at H-1 – H-3).

Mr. Brownfield is bound by this judicial determination under the doctrine of collateral estoppel or issue preclusion. Where a plaintiff brings a second new and distinct lawsuit, it is still possible that an individual issue will be precluded in the second action under the doctrine of collateral estoppel or issue preclusion. In the case of issue preclusion, only those issues actually litigated and necessarily determined in the first action are precluded in the second action. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wash.2d 223, 228, 588 P.2d 725 (1978); *Shoemaker v. City of Bremerton*, 109 Wash.2d 504, 507-508, 745 P.2d 858, 860 (1987).

Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, WASHINGTON PRACTICE, *Civil Procedure* § 35.32, at 475 (1st ed.2003) (hereafter Tegland, *Civil Procedure*). See generally, *Rains v. State*, 100 Wash.2d 660, 665, 674 P.2d 165 (1983)(quoting *Seattle-First Nat'l Bank v. Kawachi*, 91 Wash.2d 223, 225-26, 588 P.2d 725 (1978)); *Kyreacos v. Smith*, 89 Wash.2d 425, 427, 572 P.2d 723 (1977); *Shoemaker* at 109 Wash.2d 507; Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L.REV. 805, 805, 813-14, 829 (1985) (hereafter Trautman, *Claim and Issue Preclusion*); Tegland, *Civil Procedure* § 35.32, at 475. Collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in

previous litigation. *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n*, 72 Wash.2d 887, 894, 435 P.2d 654 (1967); *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wash.2d 299, 306, 96 P.3d 957, 960 - 961 (2004).

A party asserting collateral estoppel as a bar must establish four elements: (1) the issue decided in the first adjudication is identical to that presented in the second; (2) the first adjudication ended in a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party to the first adjudication; and (4) application of the doctrine will not work an injustice. *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wash.2d 255, 262-63, 956 P.2d 312 (1998); *Hanson v. City of Snohomish*, 121 Wash.2d 552, 561-62, 852 P.2d 295 (1993). Mr. Brownfield cannot, and does not in his brief, contest the first, second and third elements of collateral estoppel. Clearly, the issue is identical, the parties are identical and the first adjudication ended in a judgment on the merits.

To establish injustice, the Plaintiff must make an actual showing of injustice beyond arguing that his claims should not have been dismissed. Dissatisfaction with the outcome of the first adjudication is not an “injustice” that prevents application of collateral estoppel. *Nielson*, 135 Wash.2d at 265 n. 3, 956 P.2d 312 (citing *Neff v. Allstate Ins. Co.*, 70 Wash.App. 796, 803, 855 P.2d 1223 (1993), review denied, 123 Wash.2d

1004, 868 P.2d 872 (1994)); *Girtz v. New Hampshire Ins. Co.*, 65 Wash.App. 419, 423, 828 P.2d 90 (1992) (citing *United Pacific Ins. Co. v. Boyd*, 34 Wash.App. 372, 661 P.2d 987 (1983)). Rather, the focus is upon whether the parties to the earlier adjudication were afforded a full and fair opportunity to litigate their claims in a neutral forum. *Nielson*, 135 Wash.2d at 264-65, 956 P.2d 312 (citing *Rains v. State*, 100 Wash.2d 660, 666, 674 P.2d 165 (1983)); *Hanson*, 121 Wn.2d at 563. Here, the plaintiff had a full opportunity to litigate his claims in federal court, including an appeal to the Ninth Circuit Court of Appeals. There is no injustice in precluding relitigation of his claim here.

In addition, the issue is identical. The issue in the federal case was whether the City had a legitimate, non-discriminatory reason to terminate Mr. Brownfield and whether the cause of his termination was some discriminatory bias or Mr. Brownfield's insubordination and lack of fitness for duty. These same issues are present in this state court litigation. Mere substantive differences between two legal schemes does not necessarily preclude the application of collateral estoppel. See *Liberty Bank of Seattle, Inc. v. Henderson*, 75 Wash.App. 546, 548, 559-60, 878 P.2d 1259 (1994) (federal court's order dismissing race-based equal protection and due process claims based upon determination that employer's actions were "eminently reasonable" precludes plaintiff's state

law wrongful interference with business relations claim); see also *Lumpkin v. Jordan*, 49 Cal.App.4th 1223, 1231-32, 57 Cal.Rptr.2d 303 (1996) (despite substantive differences between federal and state anti-discrimination laws, collateral estoppel applies to federal court's determination that plaintiff was discharged for nondiscriminatory reasons). Rather, the central question is whether an issue essential to a claim has been actually litigated and decided in a prior final judgment. See Restatement (Second) of Judgments sec. 27 (1980). The issues (not the claims) must be legally and factually identical. See *Hanson*, 121 Wash.2d at 573-74, 852 P.2d 295 (citing *Standlee v. Smith*, 83 Wash.2d 405, 518 P.2d 721 (1974)). Here, issues essential to Mr. Brownfield's state law claims were considered and decided by the federal court. He presented the same evidence and arguments in both forums, and faces the same burden of proof on the issues in question. See *Standlee*, 83 Wash.2d at 408-09, 518 P.2d 721. Collateral estoppel should be applied to preclude relitigation of the same issue.

The federal court determined that cause of his termination was his insubordination and the fact that he was not fit for duty. Mr. Brownfield is bound by this unfavorable ruling. He cannot now argue that some other discriminatory bias was, in fact, the reason for his termination. The plaintiff cannot meet the causation element of this claim.

3. THE CITY HAD AN OVERRIDING JUSTIFICATION TO TERMINATE

Even if Mr. Brownfield had been able to establish the jeopardy and causation elements of a public policy tort claim, his claim would still fail because the City had an overriding justification for terminating him. This final element of a public policy tort acknowledges that some public policies, even if clearly mandated, are not strong enough to warrant interfering with employers' personnel management. *Gardner v. Loomis Armored Inc.*, 128 Wn.2d at 947. Certainly, the City's right to manage its workforce and to terminate insubordinate employees is an overriding justification for plaintiff's termination that would defeat this claim. The plaintiff argues that the public policy consideration of a whistleblower protection protects him from termination in this case. If this were the case, any employee could avoid discipline in the workplace merely by claiming that he was a whistleblower. The right to discipline and terminate employees for clear acts of subordination would be rendered ineffective if this were the case. Plaintiff's claim at bar is no more compelling than the "good samaritan" argument offered in *Gardner*. As *Gardner* noted:

The broad good samaritan doctrine argued by Plaintiffs is not a policy of sufficient importance to warrant interfering with an employer's workplace and personnel management. If we followed Plaintiff's broad reading of the good samaritan

doctrine, an employer's interests, however legitimate, would be subjugated to a plethora of employee excuses. A delivery person could stop to aid every motorist with car trouble, no matter how severe the consequences to the employer in terms of missed delivery deadlines. Employees could justify tardiness or absence by claiming they drove an ailing friend to the doctor's office. The good samaritan doctrine does not embody a public policy important enough to override an employer's legitimate interest in workplace rules. Holding otherwise would not protect "against frivolous lawsuits," and employers would not be able "to make personnel decisions without fear of incurring civil liability." *Farnam v. CRISTA Ministries*, 116 Wash.2d 659, 668, 807 P.2d 830 (1991) (quoting *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 232-33, 685 P.2d 1081 (1984)).

Gardner v. Loomis Armored Inc., 128 Wn.2d at 949.

The City's right to manage Mr. Brownfield and other members of the police department clearly overrides any public policy he claims is insulted by the City's actions.

As a general principal, local governments are afforded "wide latitude" in the "dispatch of [their] own internal affairs." *Kelley v. Johnson*, 425 U.S. 238, 247, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976). Furthermore, as the United States Supreme Court noted, "[W]e have often recognized that government has significantly greater leeway in its dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Enquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 128 S.Ct. 2146, 2151, 170 L.Ed.2d 975 (2008). The Eighth Circuit Court of Appeals aptly noted, "The police department, as a paramilitary

organization, must be given considerably more latitude in its decisions regarding discipline and personnel regulations than the ordinary government employer.” *Crain v. Bd. of Police Comm'rs of Metro. Police Dep't of St. Louis*, 920 F.2d 1402, 1409 (8th Cir.1990).

Again, as a matter of law, the City has come forward with an overriding justification for terminating Mr. Brownfield, i.e. his insubordination and lack of fitness for duty. Mr. Brownfield is prohibited by the principles of collateral estoppel from challenging these reasons for termination. See brief, *supra*. In addition, the trial court made its own independent review of the record and concluded that the City had an overriding justification to terminate him. [CP 722] The trial judge was correct and his court should uphold the trial court’s ruling in this regard.

C. WASHINGTON LAW AGAINST DISCRIMINATION

Mr. Brownfield claims that the City discriminated against him because of a perceived disability in violation of RCW 49.60 et. seq. commonly referred to as the Washington Law Against Discrimination (WLAD).¹⁰ He also claims that the City failed to accommodate his perceived disability. The trial court correctly ruled that his WLAD claims fail as a matter of law.

¹⁰ It is important to note that the plaintiff does not allege nor claim that he was disabled under the WLAD, nor that he was discriminated against under WLAD

Mr. Brownfield argues at page 24 of his brief that “If the City perceived Ofc. Brownfield as unable to function in the most stressful police work, the City owed an affirmative duty to Ofc. Brownfield to accommodate him.” Here he is mistaken. As a matter of law, plaintiff cannot maintain a claim for failure to accommodate if he claims a regarded as disability. *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232-33 (9th Cir. 2003), *cert. denied* 540 U.S. 1049, 124 S.Ct. 821, 157 L.Ed.2d 697 (2003). Mr. Brownfield has never alleged he was disabled under the WLAD or that he was discriminated against under the WLAD because of disability. His only claim is that the City ‘regarded him as disabled’ and terminated him for that reason.

The Ninth Circuit has held employers have no duty to accommodate employees regarded as disabled. *Kaplan*, 323 F.3d 1226. The primary reason for this rule is to prevent the “bizarre” result of requiring employers to accommodate disabilities that do not in fact exist. *Bass v. The County of Butte*, 197 Fed.Appx. 655, 2006 WL 2348467 (9th Cir. 2006). Washington would follow this federal precedent. Our Supreme Court has held when Washington statutes or regulations have the same purpose as their federal counterparts, they will look to federal

because of a disability. He only claims that the City “regarded him as disabled” and terminated him for that reason.

decisions to determine the appropriate construction. *Fahn v. Cowlitz Cy.*, 93 Wn.2d 368, 376, 610 P.2d 857, 621 P.2d 1293 (1980); *Clarke v. Shoreline Sch. Dist.* 412, 106 Wn.2d 102, 118, 720 P.2d 793 (1986).

Recognition by this court of Mr. Brownfield's claim would foster employer misconceptions and lead to discrimination in a variety of circumstances. Reasonable accommodation of employees regarded as disabled would "permit healthy employees to, through litigation (or the threat of litigation), demand changes in their work environments under the guise of reasonable accommodations for disabilities based on misperceptions." *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir.1999), *cert. denied* 528 U.S. 1078, 120 S.Ct. 794, 145 L.Ed.2d 670 (2000). Further, it would create a windfall for legitimate regarded as disabled employees. Federal Courts including the Fifth, Sixth, Eighth, and Ninth Circuits have concluded that Congress, in enacting the ADA, could not have intended to cause disparate treatment between employees whose impairments are correctly assessed and those who are not. *Strippit, Inc.*, 186 F.3d 907.

Kaplan is instructive. Similar to Jeff Brownfield, the plaintiff in *Kaplan* was not a qualified individual with a disability within the meaning of the ADA. (See brief, *infra*) The plaintiff then argued that he was entitled to reasonable accommodations because the City "regarded him" as disabled, even though he did not have an actual disability. *Kaplan*, 323

F.3d 1226. Frederick Kaplan was a police officer who, at the time of termination, could not perform the essential job functions without accommodations. He had an injury that the city believed was permanent. The City fired Kaplan because he could not perform the essential functions of the job. *Kaplan*, 323 F.3d at 1227. Looking to the ADA, 42 U.S.C. § 12112, the court concluded:

On the face of the ADA, failure to provide reasonable accommodation to an otherwise qualified individual with a disability constitutes discrimination. And, on its face, the ADA's definition of qualified individual with a disability does not differentiate between the three alternative prongs of the disability definition. The absence of a stated distinction, however, is not tantamount to an explicit instruction by Congress that regarded as individuals are entitled to reasonable accommodations. Moreover, because a formalistic reading of the ADA in this context has been considered by some courts to lead to bizarre results, *Weber*, 186 F.3d at 917, we must look beyond the literal language of the ADA. In *Weber*, the Eighth Circuit explained: The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees. Accordingly, we hold that regarded as disabled plaintiffs are not entitled to reasonable accommodation. (Emphasis added)

Kaplan, 323 F.3d at 1232 Mr. Brownfield is not entitled to reasonable accommodation as a "regarded as" individual.

Mr. Brownfield next argues that Mr. Zais' order that he submit to a FFDE was invalid and therefore discriminatory. However, Mr. Brownfield again refuses to acknowledge that this issue has already been decided against him and he cannot reargue it. In his federal claim, he raised the same argument which was summarily rejected by both the district court judge and the three judge panel of the 9th Circuit Court of Appeals. The 9th Circuit summed it up best when it wrote:

We agree with the district court that the City had an objective, legitimate basis to doubt Brownfield's ability to perform the duties of a police officer. Undisputed facts show that Brownfield exhibited highly emotional responses on numerous occasions in 2005, four occurring in a single month immediately prior to his referral: He swore at a superior after abruptly leaving a meeting despite a direct order to the contrary; he engaged in a loud argument with a coworker and became extremely angry when he learned the incident was being investigated; he reported that his legs began shaking and he felt himself losing control during a traffic stop; his wife called police to report a domestic altercation with Brownfield; and he made several comments to a coworker such as "It doesn't matter how this ends."

Brownfield attempts to explain away each incident by providing background facts suggesting his reactions were entirely reasonable and by challenging the third-party reports as factually inaccurate, but he does not dispute that he reacted as described or that the third-party reports were made to the YPD. Although a minor argument with a coworker or isolated instances of lost temper would likely fall short of establishing business necessity, Brownfield's repeated volatile responses are of a different character. Moreover, our consideration of the FFDEs' legitimacy is heavily colored by the nature of Brownfield's employment.

Police officers are likely to encounter extremely stressful and dangerous situations during the course of their work. *See Watson*, 177 F.3d at 935 (“Police departments place armed officers in positions where they can do tremendous harm if they act irrationally.”). When a police department has good reason to doubt an officer's ability to respond to these situations in an appropriate manner, an FFDE is consistent with the ADA. Reasonable cause to question Brownfield's ability to serve as a police officer was present here. (Footnote omitted)

Brownfield v. City of Yakima, 612 F.3d at 1146 -1147. The order to submit to Dr. Ekemo's FFDE was lawful and necessary.

While not argued by Mr. Brownfield, the City feels obligated to point out yet another reason why his WLAD claim must be dismissed. Based on Dr. Decker's reports, the City determined that Mr. Brownfield was psychologically unfit for duty. As such, he could not safely perform the essential functions of his job as a police officer. Therefore, he had no right to bring a WLAD claim in the first instance. To establish a prima facie case of handicap discrimination, an employee must prove that he or she (1) has a disability; (2) could perform the essential functions of the job with or without reasonable accommodations; and (3) was not reasonably accommodated. *Easley v. Sea-Land Serv., Inc.*, 99 Wn.App. 459, 468, 994 P.2d 271 (2000), *rev. denied* 141 Wn.2d 1007, 16 P.3d 1263 (2000). (Emphasis added) However, an employer does not discriminate by denying a job to a disabled person who is not qualified to perform it,

Clarke at 106 Wn.2d 121, or ‘if the particular disability prevents the proper performance of the particular worker involved.’ RCW 49.60.180(1); WAC 162-22-050; *Dedman v. Washington Personnel Appeals Board*, 98 Wn. App. 471, 477, 989 P.2d 1214, 1217 (1999); See also, *Kees v. Wallenstein*, 973 F.Supp. 1191, 1197 (W.D.Wash.1997) (Plaintiffs cannot perform the essential functions of a corrections officer with or without accommodation. The County's motion for summary judgment on plaintiffs' WLAD claims was granted).

Clarke , is instructive. *Clarke*, a teacher of mentally retarded students, suffered from visual and hearing impairments. *Clarke*, 106 Wn.2d at 103. The school district placed him on probation for, among other things, failing adequately to handle student discipline problems. 106 Wn.2d at 106, 720 P.2d 793. The school district attempted to accommodate *Clarke* by giving him instructional assistants, choosing his students based on his limitations, and giving *Clarke* special consideration in the assignment of a classroom. 106 Wn.2d at 107, 720 P.2d 793. *Clarke*, nevertheless, requested further accommodations. 106 Wn.2d at 107-08, 720 P.2d 793. Ultimately, the school district discharged *Clarke* for failing to remedy the deficiencies for which he was on probation. 106 Wn.2d at 108, 720 P.2d 793. The Supreme Court held that WLAD's prohibition against discrimination does not apply if the disability prevents proper

performance of the job. *Clarke*, 106 Wn.2d at 117-18, 720 P.2d 793. The Court looked to section 504 of the federal Rehabilitation Act, 29 U.S.C. § 794, for guidance, and concluded:

[A]n employer may discharge a handicapped employee who is unable to perform an essential function of the job, *without attempting to accommodate that deficiency*. In this case, the Superintendent gave as one of the reasons for Clarke's discharge and nonrenewal the fact that Clarke constituted "a hazard to the welfare and safety of students under [Clarke's] charge ..." As found by the hearing officer, this deficiency in Clarke's performance was attributable to his handicaps. Maintenance of the safety and welfare of [disabled] students clearly is an essential function of a teacher of such students, a function Clarke was unable to perform. In other words, Clarke was not "otherwise qualified" to teach. Accordingly, we hold the School District was not required to accommodate Clarke in the manner he requested.

Clarke, 106 Wn.2d at 119, 720 P.2d 793. (Emphasis added). *In accord*, *Molloy v. City of Bellevue*, 71 Wn.App. 382, 388, 859 P.2d 613, 617 (1993), *rev. denied* 123 Wn.2d 1024, 875 P.2d 635 (1994)(City had no duty to accommodate a police officer by exempting him from some of his duties or to create a special position for him).

Both Dr. Decker and Dr. Mar determined that plaintiff was "not fit for duty" because of his significant psychological issues. CP [184-206] As such, he was not able to perform the essential functions of the job. Since he was not able to perform the essential functions of the job, he was

not a qualified individual under WLAD and could have been terminated because of his unfitness.

Finally, the most compelling reason that his WLAD claim must fail as a matter of law is because the City had a legitimate, non-discriminatory reason for terminating him. *Klein v. Boeing Co.*, 847 F.Supp. 838, 843 (W.D.Wash.1994) Our courts apply the *McDonnell Douglas* burden-shifting scheme to state-law discrimination claims. *Short v. Battle Ground School Dist.*, 169 Wash.App. 188, 204-205, 279 P.3d 902, 911 - 912 (2012); See also, *Hill v. BCTI Income Fund-I*, 144 Wash.2d 172, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wash.2d 214, 137 P.3d 844 (2006); *Renz v. Spokane Eye Clinic, P.S.*, 114 Wash.App. 611, 618, 60 P.3d 106 (2002) Under this burden-shifting scheme, the employee must first establish a prima facie case of retaliation. *Renz*, 114 Wash.App. at 618, 60 P.3d 106. If the employee fails to establish a prima facie case, then the defendant employer is entitled to summary judgment as a matter of law. *Hill*, 144 Wash.2d at 181, 23 P.3d 440. If, however, the employee succeeds in establishing a prima facie case, a legally mandatory, rebuttable presumption of retaliation temporarily takes hold, and the burden shifts to the employer to produce admissible evidence of a legitimate, nonretaliatory reason for its adverse employment action. *Hill*, 144

Wash.2d at 181; *Renz*, 114 Wash.App. at 618. If the employer fails to meet its burden, the employee is entitled to an order establishing liability as a matter of law because no issue of fact remains in the case. *Hill*, 144 Wash.2d at 181–82; *Renz*, 114 Wash.App. at 618. If the employer provides such legitimate nonretaliatory reason, then the burden shifts back to the employee to show that the employer's reason is actually pretext for what, in fact, was a retaliatory purpose for its adverse employment action. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 364, 753 P.2d 517; *Renz*, 114 Wash.App. at 618–19, 60 P.3d 106. If the employee fails to make this showing, however, the employer is entitled to judgment as a matter of law. *Hill*, 144 Wash.2d at 182, 23 P.3d 440; *Renz*, 114 Wash.App. at 619, 60 P.3d 106.

In *Jones v. Kitsap County Sanitary Landfill, Inc.*, 60 Wn.App. 369, 803 P.2d 841 (1991), our court stated that, once a plaintiff has made out a prima facie case of discrimination and the employer has met its burden of articulating a non-discriminatory reason for a termination, to avoid summary judgment, the plaintiff must then *produce evidence* that the articulated non-discriminatory reason is mere pretext. *Jones*, 60 Wn.2d at 371, 803 P.2d at 842 (citing *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988)). To establish pretext, a plaintiff must provide “some evidence that the articulated reason for the

employment decision is unworthy of belief.” *Kuyper v. State*, 79 Wn.App. 732, 738, 904 P.2d 793, 797 (1995), *rev. denied* 129 Wn.2d 1011, 917 P.2d 130 (1996). The Washington Supreme Court has held that when the “record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,” summary judgment is proper. *Milligan v. Thompson*, 110 Wn.App. 628, 637, 42 P.3d 418, 423 (2002) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)); In accord, *Tyner v. State* 137 Wn.App. 564, 154 P.3d 929 (2007), *rev. denied* 162 Wn.2d 1012, 175 P.3d 1094 (2008). When the employee cannot establish that the employer's nondiscriminatory reasons for termination are false (pretextual), then the employer is entitled to dismissal as a matter of law. *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 491, 859 P.2d 26 (1994) In accord, *Ware v. Mutual Materials Co.*, 93 Wn.App. 639, 647-648, 970 P.2d 332, 335 - 336 (1999), *rev. denied* 137 Wn.2d 1037, 980 P.2d 1286 (1999).

Judge Whaley, in his opinion granting summary judgment on the federal claims, specifically determined that “no reasonable jury could find that an adverse employment action resulted from anything other than

Plaintiff's unfitness for duty and his insubordination. [CP 442] He also concluded, as a matter of law, that Defendant had two legitimate reasons for terminating the plaintiff, his insubordination and his unfitness for duty. [CP 444] Mr. Brownfield is estopped from claiming otherwise.

Even if the court did not apply collateral estoppel, Mr. Brownfield's WLAD claim is still worthy of summary dismissal. The trial judge made a careful review of the evidence submitted on this motion and concluded that "[N]o reasonable trier of fact could find that the City's nondiscriminatory reason for discharge – Plaintiff's insubordination for not attending the follow-up evaluation – was pretext[ual]." [CP 723]

D. NEGLIGENT SUPERVISION

Mr. Brownfield clarifies his negligent supervision claim in his opening brief. He now claims that City Manager Zais failed to exercise appropriate supervision over Chief Granato resulting in Mr. Brownfield's termination. Negligent supervision has been applied almost entirely in *third party* negligence claims.¹¹ A negligent supervision claim requires

¹¹ The concept does not make sense in the context of an employment termination case. There is no "vicarious liability" for wrongful termination since the employer is in privity with the employee. The City believes that this claim should be disallowed in this context much like the court has disallowed negligent infliction of emotional distress claims and negligent investigation claims in employment actions. *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wash.2d 233, 244, 35 P.3d 1158, 1164 (2001); *Lambert v. Morehouse*, 68 Wash.App. 500, 505, 843 P.2d 1116, 1119 (1993). The court does not have to

showing: (1) an employee acted outside the scope of his or her employment; (2) the employee presented a risk of harm to other employees; (3) the employer knew, or should have known in the exercise of reasonable care that the employee posed a risk to others; and (4) that the employer's failure to supervise was the proximate cause of injuries to other employees. *Niece v. Elmview Group Home*, 131 Wash.2d 39, 48–49, 51, 929 P.2d 420 (1997); *Briggs v. Nova Services*, 135 Wash.App. 955, 966–967, 147 P.3d 616, 622 (Div. 3 2006).

However, when an employer does not disclaim liability for the acts of its employee, a negligent supervision claim collapses into a direct tort claim against the employer. *Niece, supra*; *Shielee v. Hill*, 47 Wn.2d 362, 287 P.2d 479 (1955); *Gilliam v. Dep't of Social & Health Servs.*, 89 Wn.App. 569, 950 P.2d 20 (1998); *LaPlant v. Snohomish County*, 162 Wash.App. 476, 479–480, 271 P.3d 254, 256 - 257 (2011). In this case the City does not disclaim any liability for the actions of its Chief of Police or City Manager. Instead, the City claims that it was proper to terminate Mr. Brownfield. Since all of these actions were within the scope of employment the trial judge properly granted summary judgment on this claim. This court should uphold the trial court's ruling.

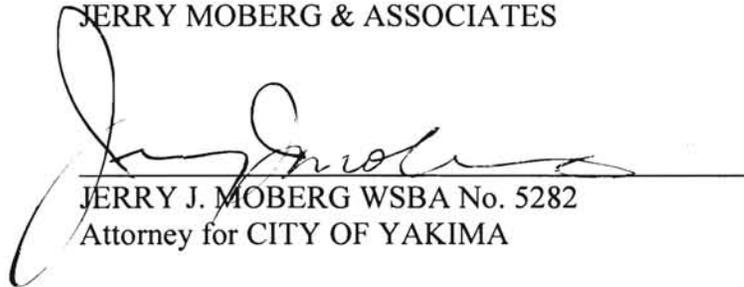
address this broader issue since Mr. Brownfield cannot establish the elements of this claim in the first instance.

IV. CONCLUSION

Mr. Brownfield was rightly terminated for his insubordination. In addition he was psychologically unfit for duty and the City could not safely employ him as a police officer until he obtained a “clean bill of health” from a doctor. That was precisely the reason the City Manager ordered Mr. Brownfield to attend the FFDE of Dr. Ekemo. Mr. Brownfield’s obstinate refusal to complete the FFDE let the City with no choice but to terminate him. The trial judge was correct in granting this summary judgment. This court should affirm his ruling.¹²

RESPECTFULLY SUBMITTED this 17th day of January, 2013.

JERRY MOBERG & ASSOCIATES



JERRY J. MOBERG WSBA No. 5282
Attorney for CITY OF YAKIMA

¹² To date the matter has been reviewed by 5 learned judges and they all agree that a summary dismissal of Mr. Brownfield’s claims is warranted.

v. **APPENDIX**

APPENDIX A



SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF YAKIMA

Judge Robert E. Lawrence-Berrey
Department No. 7

Yakima County Courthouse
128 N. Second Street
Yakima, Washington 98901

Phone: (509) 574-2710
Fax No. (509) 574-2701

May 10, 2012

John Bergmann
Helsell Fetterman LLP
1001 Fourth Avenue, Ste 4200
Seattle, WA 98154-1154

Jerry Moberg
451 Diamond Drive
Ephrata, WA 98823

Brownfield v. City of Yakima, YCSC No. 09-2-03860-0

Dear Counsel:

As mentioned during the close of the summary judgment argument, this letter decision is a simple outline of the reasons for my decision; I have decided against writing an extensive opinion analyzing the elements of each of the four causes of actions and the parties' arguments.

1. Whistleblower Claim:

The City is exempt if it has adopted its own whistleblower policy which accomplishes the purposes of RCW 42.41, et seq. During argument, Plaintiff's counsel clarified that this issue is not contested. The City's summary judgment motion is granted on this cause of action.

Court's Memorandum Decision
Granting City's Motion for Summary Judgment
Page 1 of 1

2. *Wrongful Discharge in Violation of Public Policy:*

Plaintiff claims that he was discharged for complaining about uneven work load between him and a co-employee, and in complaining that this co-employee may have stolen public funds.

There are three elements to this tort. In summary lingo, they are: (1) clarity element; (2) jeopardy element; and (3) causal element. Also, even if the plaintiff satisfies all three, the employer may prevail by offering an overriding justification for the discharge.

This court concludes that no reasonable trier of fact could find that the second and third elements are present. The jeopardy element is missing because, as a matter of law, there are at least two avenues in which Plaintiff could have sought protection for this alleged wrong – the City’s Whistleblower process, or filing a union grievance. A court may not add an additional layer of protection to the already existing and adequate remedies that were available to Plaintiff. Moreover, Judge Whaley determined as a matter of law that Plaintiff was not terminated for exercising free speech rights – complaints about public employees and misappropriation of funds. The elements of collateral estoppel are met as to this issue. (Identity of issue, final judgment, same parties, no injustice).

The City’s summary judgment motion is granted on this cause of action.

3. *Washington Law Against Discrimination (WLAD):*

As mentioned during argument, the most difficult barrier that Plaintiff faces on this cause of action is producing sufficient evidence of pre-text that would warrant submitting this claim to a jury. The required sufficiency of evidence is not stringent: “Can a reasonable trier of fact find that the offered non-discriminatory reason was pretext?”

Plaintiff argues that the work environment under former police Chief Sam Granato was toxic, and that hiring and firing decisions were made on the basis of favoritism. Plaintiff points to Chief Granato’s extensive history of employee

disputes, lawsuits, and settlements. Plaintiff argues that this history is sufficient to meet its burden here.

Here, Chief Granato's role in the termination process was (1) authorizing a fitness for duty evaluation, and -- after a psychiatric finding by Dr. Dekker that Plaintiff was not fit for duty-- (2) scheduling a pre-termination hearing. If this was the extent of the evidence, there would be genuine issues of material fact.

However, the City -- through its City Manager, Dick Zais -- permitted Plaintiff to have a second medical opinion. The second opinion -- that of Plaintiff's doctor, Dr. Mar -- agreed that Plaintiff was presently unfit for duty, but recommended intensive psychological therapy which likely would allow Plaintiff to resume his duties. *City Manager Zais agreed to this.* After Dr. Newell provided Plaintiff with the recommended therapy, the City needed to obtain a third medical opinion to resolve the disagreement between Dr. Dekker and Dr. Mar. This third opinion was to be given by Dr. Ekemo.

Plaintiff agreed to an extensive evaluation by Dr. Ekemo. After the initial meeting, Dr. Ekemo informed Plaintiff that additional testing was required, and scheduled the follow-up exam for March 6, 2007. Plaintiff initially agreed. Plaintiff later refused to appear for the scheduled evaluation. City Manager Zais wrote Plaintiff and clearly warned him that failure to attend the scheduled evaluation would likely lead to his termination. Nevertheless, Plaintiff did not meet with Dr. Ekemo. This immediately led to a pre-termination hearing on the grounds of unfitness for duty and insubordination, resulting in Plaintiff's discharge.

First, there was nothing arbitrary or capricious about Chief Granato directing a fitness for duty evaluation -- his concerns were verified both by Dr. Dekker and Dr. Mar. Second, City Manager Zais took over the process by agreeing to Plaintiff's medical treatment, and warning Plaintiff of the consequences of failing to attend the follow-up evaluation with Dr. Ekemo. Given this context, this court determines as a matter of law that no reasonable trier of fact could find that the City's nondiscriminatory reason for discharge -- Plaintiff's insubordination for not attending the follow-up evaluation -- was pretext.

This is the same conclusion reached by Judge Whaley. However, the causation standard between federal (“but-for”) and state (“substantial-factor”) discrimination laws are different, and this court decided to engage in its own analysis rather than applying collateral estoppel to bar this claim.

The City’s summary judgment motion is granted on this cause of action.

4. *Negligent supervision, hire, and retention (of Chief Granato):*

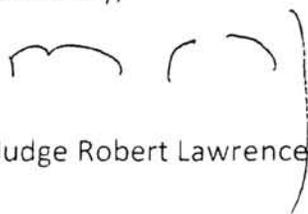
Negligent hire applies only to situations where the wrongdoer-employee was acting *outside* of his scope of employment. This is not the situation here. Chief Granato was acting within his scope of employment at all material times.

Negligent hire and retention requires proof that Plaintiff would not have suffered harm in the absence of the negligent hire or retention. Assuming only for the sake of argument that the City was negligent in hiring Chief Granato, there is no evidence that his hire or retention caused Plaintiff’s harm. (See pretext discussion in WLAD analysis).

The City’s summary judgment motion is granted on these causes of action.

The City is directed to schedule a telephonic presentation of its order granting summary judgment.

Sincerely,


Judge Robert Lawrence Berrey

APPENDIX B



CONFIDENTIAL

Kathleen P. Decker, M.D.
40 Lake Bellevue, Suite #100
Bellevue, WA 98005

Phone: (425) 467-1369
Fax #: (425) 451-9438

FINAL REPORT
PSYCHIATRIC EVALUATION: FIT FOR DUTY
EVALUÉE NAME: Jeff Brownfield DATE OF EVALUATION: 10/19/05
DATE OF INITIAL REPORT: 11/11/05 DATE OF FINAL REPORT: 12/12/05

Dear Captain Copeland and Chief Granato;

This letter is in regard to Officer Oscar "Jeff" Brownfield. It represents the final report on his Fitness for Duty status. Since the initial report submitted on 11/11/05 (of which a copy is attached), Officer Brownfield was referred to Dr. DeAndrea, a forensic neurologist. This evaluation has been accomplished. Dr. Gondo has never submitted any information regarding Officer Brownfield. In this case, it is not necessary for his assessment to draw conclusions about Officer Brownfield's case.

Question #1: Is Officer Brownfield Fit for Duty at the current time?

Answer: Officer Brownfield is UNFIT for DUTY at the current time.

Question #2: What condition(s) render Officer Brownfield Unfit for Duty?

Answer: DSM-IV Diagnosis:

- Axis I: (Primary) Mood Disorder due to a General Medical Condition with mixed features,
- Axis II: Defer due to severity of #1
- Axis III: History of Motor Vehicle Accident with loss of consciousness- multiple medical sequelae including: neck fusion at C6,7, residual neurologic deficits including sensory and motor nerve impairment
- Axis IV: Moderate Stressors
- Axis V: Moderate Impairment

To clarify this diagnosis I referred Officer Brownfield to Dr. DeAndrea. She was specifically requested to look for evidence non-dominant hemisphere neurologic impairment which might account for some of Jeff's current symptoms. Specifically, he has exhibited poor

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FINAL REPORT p. 2

PSYCHIATRIC EVALUATION: FIT FOR DUTY

EVALUEE NAME: Jeff Brownfield DATE OF EVALUATION: 10/19/05
DATE OF INITIAL REPORT: 11/11/05 DATE OF FINAL REPORT: 12/12/05

judgment in a variety of spheres in both professional and personal arenas, which calls into question his ability to function safely as a police officer. Dr. DeAndrea found evidence of a number of neurological impairments but did not find evidence of clinically significant anosognosia. Thus, he does not suffer from a NEUROLOGIC syndrome which is causing cognitive impairment at this point. However, it is well-known that even relatively minor head injury can cause persistent personality changes and/or psychiatric symptoms.

Officer Brownfield was comatose following the accident and had a difficult recovery. He stated he had memory problems... "very forgetful. I could remember long-term but couldn't remember short-term, like going to the store or stuff. I've more impulsive and can't follow simple instructions like in physical therapy. I went to speech therapy to develop new techniques." He was paralyzed on left side for 2 weeks, he still has a loss of memory for 9 days, only remembers fragments.

Your department has provided me with documentation of a number of instances of Officer Brownfield's behavior which demonstrate poor judgment, emotional volatility and irritability.

Question #3: What is the expected duration of Officer Brownfield's impairment?

Answer:

As his accident is now several years in the past, Officer Brownfield's brain has undergone most of the recovery it may have. Thus, these PSYCHIATRIC symptoms are now likely to be fixed. Because the judgment errors are unlikely to improve with treatment, and represent the most serious impairment, the expected duration of impairment is permanent.

Question #4: What treatment modalities might restore Officer Brownfield to Fitness?

Answer:

Some of Officer Brownfield's impairment may be improved by treatment, but some of it may be very difficult to impact. The irritability and emotional volatility might be amenable to stabilization with medications such as Neurontin, Tegretol, Depakote or other mood-stabilizer. However, Officer Brownfield reports having tried a course of Neurontin and he discontinued it. In any case, although he might be calmer with such medication, the type of judgment difficulties Officer Brownfield displays is not amenable to medication treatment.

Question #5: Are there any reasonable accommodations the Police Department can make to facilitate Officer Brownfield's return to duty?

FINAL REPORT p. 3
PSYCHIATRIC EVALUATION: FIT FOR DUTY

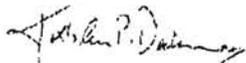
EVALUÉE NAME: Jeff Brownfield DATE OF EVALUATION: 10/19/05
DATE OF INITIAL REPORT: 11/11/05 DATE OF FINAL REPORT: 12/12/05

Answer:

Because of the permanent nature of Officer Brownfield's residual symptoms, there is no reasonable accommodation that can be made. The frequent, life and death interactions with violent people that police officers encounter daily necessitates a calm demeanor and a high level of ability to refrain from emotional displays. Similarly, police officers need to use great care in making judgments on the job that may either save lives or if made inappropriately, result in loss of life. Officer Brownfield, although he has made remarkable improvements from his motor vehicle accident, has residual impairment in these two critical areas of police skills. While he may be fit for some civilian occupations, he is neither fit for police work, nor can "light duty" with an eventual return to patrol suffice to circumvent his limitations.

Thank you for requesting my assistance with this evaluation. I can be contacted for further clarifications at the above address and phone.

Sincerely,



Kathleen P. Decker, M.D.
Clinical Assistant Professor, University of Washington,
Department of Psychiatry
Diplomate, NMBE, ABPN, ABPS (ACFPE)

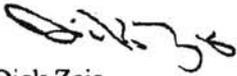
APPENDIX C

Jeff Brownfield
August 22, 2006
Page - 2

meeting for you on Wednesday, September 6, 2006, at 2 p.m. in my office for you to present any additional information you would like me to consider. You may be represented by a union representative during the meeting.

Thank you for your attention to this matter.

Very truly yours,



Dick Zais
City Manager

Encl

cc w/ encl: Robert Hester, YPPA Representative
Jim Cline, Attorney for YPPA
cc w/o encl: Sam Granato, Police Chief
Greg Copeland, Captain, Police Department
Sheryl Smith, Interim Human Resource Manager
Sofia Mabee, Assistant City Attorney

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APPENDIX D



City of Yakima
Police Department

Samuel Granato, Chief of Police

200 South Third Street
Yakima, Washington 98901

Telephone: (509) 575-6200 • Fax (509) 575-6007



Officer Jeff Brownfield,
810 N 6th Ave, #208
Yakima, WA 98902

February 1, 2007

Dear Officer Brownfield:

A previous letter from City Manager Dick Zais advised you that you would be required to see Dr. Ekemo for a Fitness For Duty Examination.

The exam has been scheduled for 10:00 a.m. on February 15, 2007. Dr. Ekemo's office is located at the following address:

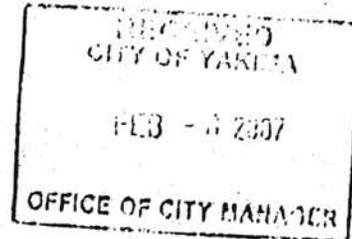
Dr. William Ekemo, PhD
2300 130th Ave NE Bldg "A" Suite 211
Bellevue, WA 98805

Directions to Dr. Ekemo's office are attached.

The requirement that you attend this exam is an order. Failure to comply with these orders can subject you to disciplinary action, including termination. Dr. Ekemo is also requiring you to complete the included "Patient History" form prior to the appointment and to bring it with you to the appointment.

Sincerely


Greg Copeland
Captain, Yakima PD
(509) 575-3032



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APPENDIX E



OFFICE OF THE CITY MANAGER
 129 North Second Street
 CITY HALL, Yakima, Washington 98901
 Phone (509) 575-6040

RECEIVED
 CITY OF YAKIMA
 FEB 14 2007
 OFFICE OF CITY COUNCIL

February 13, 2007

Jeff Brownfield
 810 N. 6th Ave #208
 Yakima, WA 98901

Re: Your February 12, 2007 E-Mail

Dear Mr. Brownfield:

This letter responds to the e-mail you sent the Mayor, and Assistant City Attorney Sofia Mabee, and me on February 12, 2007.

Your e-mail suggests that the federal Family Medical Leave Act (FMLA) requires that a third fitness for duty evaluation be binding. It is my understanding that you are confusing the law. Apparently, your legal authorities relate to medical certifications required for FMLA leave, not fitness for duty evaluations. The City is not in the process of evaluating an FMLA leave request for you. The City is in the process of evaluating your psychological fitness for duty.

I will also point out that Dr. Mar's August 3, 2006 report (the "third" evaluation according to you), found you unfit for duty. In fact, even Dr. Mar's report received January 4, 2007 does not find you fit for duty. Dr. Mar states that you "would" be fit if you increased your therapy sessions. However, he is not the final authority or decision-maker in this matter. To my knowledge, you remain unfit for duty at this time according to Dr. Mar and are permanently unfit for duty according to Dr. Decker. For that reason, you remain on sick leave, and you are being sent to Dr. Ekemo for a third evaluation in an effort to resolve the issue of your future fitness for duty. Law enforcement officers have the authority and sometimes the obligation to use deadly force in the performance of their duties. Ensuring that you are psychologically fit for duty is a primary responsibility the City bears to ensure both your safety and the safety of the public.

In response to your request for the reasons for the examination, please refer to previous correspondence on that issue as well as Article 11 Section 2(i) of your collective bargaining agreement, Police Civil Service Rule V, and the Americans with Disabilities Act (ADA) 42 U.S.C. § 12112(c)(4)(A) and (B). If you have evidence relevant to your fitness for duty, please provide it to Dr. Ekemo.

My order that you attend a fitness for duty evaluation is lawful and if you willfully violate it, at your peril you face termination of employment. The lawfulness of this order has been explained in writing to you multiple times. The case law referenced in the latter part of your e-mail does not convince me otherwise. The fact that you are being ordered to submit to a fitness for duty

E-1

FOR COUNCIL INFO ONLY
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APPENDIX F



OFFICE OF THE CITY MANAGER
129 North Second Street
CITY HALL, Yakima, Washington 98901
Phone (509) 575-6040

March 1, 2007

Jeff Brownfield
810 N. 6th Ave #208
Yakima, WA 98901

Re: Fitness for Duty Appointment March 6, 2007

Dear Mr. Brownfield:

I understand you appeared for the fitness for duty evaluation scheduled on February 15, 2007 with Dr. William Ekemo. It is my understanding that Dr. Ekemo did not have sufficient time to complete the evaluation and informed you that you would have to return on March 6, 2007. I am in receipt of a letter from your lawyer to Dr. Ekemo stating that you are refusing to return to Dr. Ekemo to complete the evaluation. Dr. Ekemo has reported to the City that he cannot render an opinion regarding your fitness for duty without your continued participation.

The requirement that you cooperate fully with Dr. Ekemo's fitness for duty evaluation is lawful and mandatory. Your lawyer does not have the ability to withdraw the order. The order is explicitly permitted by your collective bargaining agreement, Police Civil Service Rules, and the law. I will remind you that your collective bargaining agreement states, "When there is probable cause to believe that an employee is psychologically or medically unfit to perform his/her duties, the employer may require the employee to undergo a psychological or medical examination in accordance with current standards established by the Washington Association of Sheriff's and Police Chiefs, the International Association Chiefs of Police, the American with Disabilities Act, and other applicable State or Federal Laws." Article 11 section 2(i). This language has been provided to you in writing on multiple occasions.

Moreover, when I met with you and your Union representatives on September 6, 2006, you requested the opportunity to obtain psychotherapy treatment. You understood that the City could not return you to duty because both Dr. Mar and Dr. Decker found you unfit for duty. The understanding that you would have to be re-evaluated by both Dr. Mar and Dr. Decker following your psychotherapy treatment was outlined in a letter to your Union's attorney, Jim Cline, on September 7, 2006. I am deeply troubled by your resistance to returning to Dr. Ekemo and remind you that I have a duty to ensure your fitness for duty for your safety, the safety of your co-workers, and the safety of the community. It is vital that you participate with Dr. Ekemo's assessment.

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003452
Yakima
At-Home City

Jeff Brownfield
March 1, 2007
Page - 2

Mr. Brownfield, you have been previously ordered to submit to Dr. Ekemo's evaluation and cooperate with the evaluation process. The purpose of this letter is to re-iterate that order. You are hereby ordered to appear on March 6, 2007, for the continuation of Dr. Ekemo's fitness for duty evaluation and cooperate fully with the evaluation process. If you fail to follow this order, you will be considered insubordinate and the likely penalty of such insubordination is termination of employment. Moreover, if you fail to complete the examination process with Dr. Ekemo, the City will make a determination regarding your fitness for duty based on the medical information to date.

Thank you for your attention to this matter.

Very truly yours,



Dick Zais
City Manager

cc: Robert Hester

003453

APPENDIX G

good behavior and any such person may be removed or discharged, suspended without pay, demoted or reduced in pay, or deprived of vacation privileges or other special privileges for any of the following reasons:

- o **Section 1(b).** Insubordination, any act of omission or commission tending to injure the public service; or any other willful improper conduct on the part of the employee; or any willful violation of the provisions of RCW Title 41 or these Rules, respectively;
- o **Section 1(l).** Willful refusal or failure to comply with the order or direction of a supervisor or superior officer issued to implement a statute, ordinance, departmental regulation, or in the line duty;
- o **Section 1(a).** Inattention to or dereliction of duty.

The YPD Policy and Procedure Manual explains that police officers "will carry out such duties as indicated by their job description as directed by this manual and as ordered by higher ranking personnel." YPD Policy 4.00.02 (previously provided). It was your duty to appear for the evaluation to ensure that you meet Departmental standards requiring fitness for duty and because you were ordered to do so. Therefore, it also appears that Policy 4.00.02 is applicable to this matter.

After considering all of the facts and circumstances, including the statements you made during the pre-termination hearing, I find that the written orders you received to appear for and cooperate with a fitness for duty evaluation by Dr. Ekemo were lawful and that you violated the above-mentioned workplace rules by refusing to obey those orders. There is no question that you were specifically ordered to appear for the evaluation. The orders were very clear. They were issued to you in writing. You were personally served with the orders. You were told the potential consequence of failing to comply with the orders. Your failure to comply constitutes a deliberate, willful, and inexcusable defiance of the authority of your superiors and is considered gross misconduct.

It also appears to me that you fail to acknowledge a basic principle essential to effective law enforcement: the importance of obeying orders even when the orders are inconvenient, unpleasant, or represent a potential risk to your personal safety. Law enforcement work is dangerous. It is absolutely vital that officers follow orders to minimize the dangers involved in the profession and successfully enforce the law. This is something you were taught when you became an officer and it is something you should have learned when you were suspended previously for insubordination. Your union recognized it and you should have too.

2. Unfitness for Duty

The facts indicating you are unfit for duty on a permanent basis are set forth in your Notice of Pre-Termination Hearing and Amended Notice of Pre-Termination Hearing. The following is a summary of statements from your March 19, 2007, pre-termination hearing on this issue and my conclusions.

APPENDIX H

1 determine whether a First Amendment retaliation violation has occurred, the Court
2 must consider the following questions:

3 (1) whether the plaintiff spoke on a matter of public concern; (2)
4 whether the plaintiff spoke as a private citizen or public employee; (3)
5 whether the plaintiff's protected speech was a substantial or
6 motivating factor in the adverse employment action; (4) whether the
7 state had an adequate justification for treating the employee
8 differently from other members of the general public; and (5) whether
9 the state would have taken the adverse employment action even absent
10 the protected speech.

11 *Eng*, 552 F.3d at 1070.

12 The parties focus most of their briefing and argument on whether Plaintiff's
13 speech touched on matters of public concern – that is, whether the speech concerns
14 issues “of vital interest to citizens in evaluating the performance of their
15 government,” *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992), or simply
16 deals with “individual personnel disputes and grievances,” *Coszalter v. City of*
17 *Salem*, 320 F.3d 968, 973 (9th Cir. 2003). The Court finds that Plaintiff's speech
18 consisted primarily of complaints about the unit's unfair workload distribution,
19 Ofc. Dejournette's sloppy work habits and laziness, and favoritism Lt. Merryman
20 showed to Ofc. Dejournette – all of which are the stuff of a personnel dispute, not
21 of vital interest to citizens. As Defendant points out, Plaintiff did not claim any
22 impropriety regarding YPAL's funds other than sloppy bookkeeping until May 25,
23 2006, well after his first FFDE and Dr. Decker's conclusion that he was unfit for
24 duty.

25 Even if Plaintiff did speak on a matter of public concern, and could also
26 establish factors two through four in his favor, the Court concludes that this claim
27 founders at the causation stage (the fifth factor) because no reasonable jury could
28 find that an adverse employment action resulted from anything other than
29 Plaintiff's unfitness for duty and his insubordination

30 The causation question is one of pure fact, and Defendant “may avoid

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT * 19**

1 liability by showing that the employee's protected speech was not a but-for cause
2 of the adverse employment action." *Eng*, 552 F.3d at 1072. Plaintiff has not
3 identified the precise adverse employment action that he claims is at issue here,
4 instead arguing that "the City bears liability for the department's disparate
5 treatment of, and adverse action against, Ofc. Brownfield, leading up to and
6 including his termination." (Plaintiff's Memorandum in Opposition, p. 29). It
7 seems that two actions are at issue: (1) the first FFDE referral, and (2) Plaintiff's
8 termination.⁶ Based on the undisputed facts, the Court finds no but-for causal link
9 between Plaintiff's speech and either of these actions, as a matter of law.

10 First, because Defendant had a legitimate business necessity for the first
11 FFDE referral, Plaintiff's speech cannot constitute a but-for cause of that referral.
12 Second, Plaintiff does not dispute that Mr. Zais made the final decision to fire him
13 and claims no bias on the part of Mr. Zais – Plaintiff simply argues that Chief
14 Granato retaliated against Plaintiff's protected speech by setting the wheels of
15 termination in motion, and influencing Mr. Zais's decision to terminate. Based on
16 the record the parties have made, no reasonable jury could conclude that the
17

18 ⁶ During oral argument, Plaintiff argued that his transfer to patrol duty at
19 some point in 2005 also constituted an adverse employment action. However, the
20 record is clear that Plaintiff himself requested this transfer until he had resolved his
21 issues with Lt. Merryman. (Dep. Ex. 9, p. 4). Plaintiff also argued that the one-
22 sided internal investigation following his encounter with Ofc. Salinas constituted
23 an adverse employment action. It is undisputed that no disciplinary action resulted
24 from that investigation, and Plaintiff cannot demonstrate "the loss of a valuable
25 governmental benefit or privilege" due to the investigation. *Nunez v. City of Los*
26 *Angeles*, 147 F.3d 867, 875 (9th Cir. 1998) (internal quotation omitted).

27 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY**
28 **JUDGMENT * 20**

1 lengthy termination proceedings conducted by Mr. Zais were a “sham or conduit”
2 for any alleged retaliatory motive on the part of Chief Granato. *Lakeside-Scott v.*
3 *Multnomah County*, 556 F.3d 797, 808-09 (2009) (internal quotation omitted).
4 Third and finally, Plaintiff’s speech cannot constitute a but-for cause because
5 Defendant had two legitimate reasons for termination: unfitness for duty and
6 insubordination. Accordingly, summary judgment on this claim is also appropriate.

7 *III. FMLA Claim*

8 The Complaint alleged violations of both FMLA and HIPAA, but Plaintiff
9 has abandoned his HIPAA claim. Plaintiff argues that Defendant violated the
10 FMLA by refusing to restore him to full duty after it received Dr. Gondo’s release,
11 and by terminating him for asserting his rights under the FMLA.

12 Plaintiff’s arguments misconstrue the record. Plaintiff agrees that he was
13 placed on FMLA leave because of his psychological condition, on the basis of Dr.
14 Decker’s report. It is also obvious from the record that Dr. Gondo treated Plaintiff
15 for the injuries that resulted from his car accident of December 1, 2005, and that
16 Dr. Gondo never evaluated or treated Plaintiff for his psychological condition.
17 (Moberg Decl., Ex. H., bates 1147 (specifying diagnoses stemming from an “MVA
18 Collision”)). While Dr. Gondo did disagree with Dr. Decker’s opinion, he never
19 purported to release Plaintiff to work based on recovery from his psychological
20 condition. Therefore, the Court finds the FMLA claim is without merit, and grants
21 summary judgment accordingly.

22 *IV. State Law Claims*

23 Plaintiff advances claims under the Washington Law Against Discrimination
24 and state tort law (negligent hiring and retention, and unlawful discharge in
25 violation of public policy). Because the Court has granted Defendant
26

27 summary judgment on each of Plaintiff’s claims over which the Court has original
28 **ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

OSCAR J. BROWNFIELD

Appellant/Plaintiff,

v.

CITY OF YAKIMA,

Respondent/Defendant.

NO. 309941

CERTIFICATE OF SERVICE

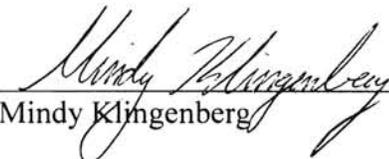
CERTIFICATE OF SERVICE

I, Mindy Klingenberg, certify that I mailed a copy of the Brief of Respondent on January 17, 2013, by Federal Express mail to:

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DATED this 17th day of January, 2013.


Mindy Klingenberg

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CERTIFICATE OF SERVICE -- 1

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