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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

KEN BRIGGS, JUDY ROBERTSON, MARK JOHNSON,
BEVERLY NUNN, JAMI SMITH, SHIRLEY BADER, PAM
ZELLER, MARGARET ("PEGGY") CLARK and VALERIE
BRUCK,

Plaintiffs/Appellants

v.

NOVA SERVICES, a Washington non-profit corporation, and
LINDA BRENNAN,

Defendants/Respondents.

APPELLANTS' REPLY BRIEF

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I. RESPONSE TO RESPONDENTS' STATEMENT OF THE CASE

Respondents assert in their Statement of the Case that plaintiffs did not allege any specific illegal conduct on the part of the Executive Director. The plaintiffs did, however, raise concerns in their letter to the Board of Directors on April 6, 2005, about violations of the Fair Labor Standards Act, and possible violations of the organization's contractual obligations to funders and duties with respect to its charitable status with the Internal Revenue Service. CP 74, 76. The employees told Mike Love during his investigation that their ability to identify specific illegal conduct was limited because Ms. Brennan shared very little information with the employees, despite the fact that they were nominally designated "managers." CP 165:7-16. They observed her behavior with both staff and third parties, such as customers and county funders; and they observed her regular absences from work and her apparent expenditures of company funds for personal travel; they observed her failures to staff adequately and to resolve health and safety issues affecting their clients. CP 165:7-16; 158:25-27. The employees were aware that going directly to the Board of Directors with their concerns was a violation of Nova's personnel policies, but after in some cases years of being ignored when they brought their concerns to the Executive Director, they believed they had no other option. CP 164:8-12; 168:2 – 8.

The Board hired Spokane attorney Mike Love to do an investigation. CP 164:23; 183:23-24. Despite his allegedly extensive report, plaintiffs noted that Mr. Love had ignored many of the things they had told them, and mischaracterized other points they had made. CP 186: 4-27, 187: 1-23. Mr. Love may also not have been a completely objective investigator; plaintiff Johnson became aware after his termination from Nova that Mr. Love had represented or otherwise been involved with PreVocational Training Center (“PVTC”), another provider of services to disabled people, at which Valerie Olson had worked for many years before being hired by Nova as Executive Director Brennan’s “personal assistant”. CP 185:8-15; 187:1-8.

After Mr. Love's investigation was complete, the Board hired Ellen Flanigan, though the Board had indicated it would hire a mediator. CP 164:15-17; 183:4-26.

The first time Ms. Flanigan met with the six employees she told them "this is Linda's company", "Nova is not a democracy", "we don't need to like Linda, just learn to work with her", and that dismissal of Ms. Brennan was not an option. CP 166:3-5; 171:3-4. Respondents characterize Ms. Flanigan as being concerned that it would be “unwise and unfair” to subject Ms. Brennan to a meeting with the concerned employees, but the perception of the aggrieved employees is that Ms. Flanigan had little concern or interest in what they had to say, and simply

wanted to protect the Executive Director from further criticism. CP 164:15-21; 172: 13- 16.

Respondents state that Ms. Flanigan arranged for the employees to express their concerns directly to the Board, which implies that it was Ms. Flanigan's idea. In fact, the employees made numerous attempts to get a hearing before the Board of Directors before Ms. Flanigan finally agreed to set up a meeting for them to meet with the Board. CP 168:27; 184:2-7. Though they had sent their concerns to the Board in their April 6, 2004 letter, Ms. Flanigan insisted they set out their concerns again in writing to submit to the Board. CP 184:6-8. The employees met with the Board on or about June 29, 2004 for approximately one hour – to the surprise of the employees, the Board had virtually no questions of them. CP 184:4-6. Again, while Respondents assert the employees presented no “legal impropriety” on Ms. Brennan's part, the employees believed that they had already raised concerns about actual and potential legal improprieties in their initial letter. CP 165:7-13.

On July 12, 2004, Ms. Flanigan and Ms. Brennan met with Bev Nunn, Shirley Bader, Mark Johnson and Jami Smith, told them they needed to put aside their concerns and agree to try to work with Ms. Brennan. CP 178:22-27. The four employees (not five as Respondents state) did agree to work to make Nova a better place, partly because they were fearful that refusing to do so would mean being fired, and partly

because they wanted to believe things could get better. CP 184:12-14; 178: 23-27. Nor did they know when they met that Ms. Brennan and Ms. Flanigan would then fire Briggs and Robertson for insubordination, disloyalty to Ms. Brennan, and violation of a company policy. CP 165:23-24; 169:7-8. At the end of the day Ms. Brennan and Ms. Flanigan held an all-company meeting announcing that Briggs and Robertson had been fired, and that the rest of the employees were now expected to stop complaining and move ahead, and told not to consult with their attorney. CP 184:12-15. The employees were not left with the impression that past acrimony had been left behind, given Ms. Brennan's firing of Briggs and Robertson, and threats to the rest of the staff. CP 160:1-5.

Shirley Bader believed at the time, and still believes, that she was fired by Ms. Brennan for refusing to vow personal loyalty to Ms. Brennan, as opposed to the organization. CP 160: 6-15.

The remaining plaintiffs drafted and signed the letter attached to Defendants' Motion as Exhibit 2 to Darlene Fogal's Affidavit, objecting to the firings and demanding the Board refusal to their concerns. CP 184:16-20. The Board did not respond. CP 184:20. Johnson, Smith, Nunn, Clark, Bruck and Castillo were notified approximately July 21, 2004 they were considered to have resigned their employment. CP 176:26. Meanwhile, on Monday, July 19, and Tuesday, July 20, 2004, the managers visited the State Department of Social and Health Services and

the Spokane County Department of Community Services to explain their concerns and request assistance in evaluating Nova and Ms. Brennan. CP 165:15-16; 310:22-26.

The above responses, along with Appellants' Statement of the Case in its Opening Brief, somewhat supplemented by Respondents' Statement of the Case, set forth the proceedings in this matter.

II. ARGUMENT

A. PLAINTIFFS' CR 56(F) MOTION FOR CONTINUANCE SHOULD HAVE BEEN GRANTED

Respondent's counsel argues that plaintiffs had no basis to be granted a continuance pursuant to CR 56(f) because most of them managed to provide affidavits in support of a memorandum in opposition to Respondent's Motion for Summary Judgment, and plaintiffs' counsel even managed to submit a brief. Yet just two months before, on February 11, 2005, Appellant's and Respondent's counsel agreed and represented to Judge Sypolt at the hearing on a Motion for Continuance that there was extensive discovery to be done and that continuance of the discovery period and the trial date were necessary. RP 3:21-24. Respondent's counsel submitted an affidavit in support in which he stated up to thirty depositions were anticipated. CP 30-31. Judge Sypolt granted the motion for good cause. RP 4:11-12. On April 22, 2005, the day of the hearing on Respondent's Motion for Summary Judgment, the rescheduled discovery cutoff was still four and a half months off. Neither party had done any

further discovery at that point. Further, Appellant's counsel had filed a Motion to Compel Discovery seeking production of minutes of the meetings of Respondent's Board of Directors and other documents that Respondent's counsel had refused to provide. These documents were necessary prior to the taking of depositions of the Executive Director and Board members.

Respondent's counsel also asserts that Plaintiffs did not provide "with required specificity any competent relevant evidence that would have created issues of material fact." However, CR 56(f) does not establish a standard for "specificity" – the standard is whether the party "cannot for reasons stated present by affidavit facts essential to justify his opposition." CR 56(f). Appellant's counsel reminded the court that the parties had requested a continuance of the discovery cutoff and trial date to be able to do discovery but that there had not yet been any discovery. RP 9:20-25, 10:1-4. Appellant's counsel acknowledged the hearsay in the affidavits, but also noted that some of the hearsay was the result of not having had opportunity to do discovery. RP 10:11-19. The affidavit of plaintiff Mark Johnson, for example, cited statements made by a member of the Nova Board that raised questions about the knowledge of the Board of Directors concerning the business of Nova. CP 186:5-16. Appellant's counsel stated that she wanted to depose Respondent's Board of Directors, certainly including the Board member quoted by plaintiff Mark Johnson,

in order to find out what the Board of Directors did know about the Executive Director's activities, the obligations concerning the organization, and what they were actually told. RP 31:17-25, 32:1-5. The definition of "discovery" is "the act or process of finding out or learning something that was previously unknown." *Black's Law Dictionary*, Garner, Bryan A., Editor in Chief, 1996. It is not reasonable, nor does it further substantial justice, to demand that a party be able to describe exactly what he or she expects to discover in discovery.

As stated by Appellant previously, the Court of Appeals in *Butler v. Joy* observed that the defendant had not argued that she would have been prejudiced by a continuance. *Butler v. Joy*, 116 Wn.App. 291, 299, 63 P.3d 671 (2003). The court there concluded, "However, 'the primary consideration on the motion for a continuance should have been justice'", and held that the denial of the continuance constituted an abuse of discretion. *Id. citing Coggle v. Snow*, 56 Wn.App. 499, 508, 784 P.2d 554(1990). The Court of Appeals concluded that justice was not served by the "draconian application of time limitations" and that they could not discern a tenable ground or reason for the trial court's decision and held that the trial court improperly exercised its discretion in denying the motion for continuance. *Id.* In the instant case Respondent made no argument that Nova would be prejudiced by a continuance and makes no such argument now.

B. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS OF WRONGFUL TERMINATION, NEGLIGENT SUPERVISION AND RETALIATION SHOULD NOT HAVE BEEN GRANTED.

Respondents' counsel states the plaintiffs did not allege any "specific illegal conduct" in their April 6, 2004 letter to the Nova Board of Directors. Even if this were accurate, and it is not - the employees alleged violations of the Fair Labor Standards Act and expressed concerns that there were failures by the organization to abide by requirements for charitable organizations - it is irrelevant. (CP: 74, 76). The right of employees under RCW 49.32.020 and the National Labor Relations Act to band together for "concerted activity" is not limited to protesting specific illegal activity of an employer. Employees may engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protections." *Bravo v. Dolsen*, 125 Wn.2d at 745, 748.

Respondents assert that the employees' complaints to the Board of Directors were purely "personal complaints" and not the subject of public policy. The April 6, 2004 letter and the written statements the employees were finally allowed to submit to the Board of Directors on June 28, 2004, make it clear the employees were not simply complaining about personal issues - they were complaining that the organization they worked for, a charitable organization with a mission to serve disabled people with public funds and individual and corporate donations, was not doing its job. It was not doing its job because its Executive Director was not doing her job.

It is at the very least a matter that deserved far more attention than the trial court gave to it.

Respondents further assert that the employees did not plead a legislatively or judicially recognized public policy, and therefore their complaint fails on its face. Aside from the fact that Respondents were arguing a motion for summary judgment, not a motion to dismiss on the pleadings, the pleadings did in fact contain an allegation of discharge in violation of public policy, including discouraging the conduct of plaintiffs in violation of public policy (CP 7:20-21). Washington's C.R. 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" Further, pleadings are intended to give notice to the court and the opponent of the general nature of the claim asserted. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn.App. 18, 23, 974 P.2d 847 (1999). While a pleading may be insufficient if it does not give the opposing party fair notice of what the claim is and the grounds upon which the claim rests, "the true nature of a cause of action stated in a complaint must be determined by its allegations and the evidence offered in support of its prayer for relief, and not by the pleader's conclusions as to its nature nor the label he puts on it." *Hein v. Chrysler Corp.*, 45 Wn.2d 586, 277 P.2d 708 (1954). The facts pled by the former Nova employees support a claim for termination because of their conduct, specifically coming together to raise concerns about their employer, which was alleged

in the complaint to be a breach of public policy. Further, the employees alleged they were discharged in retaliation for their activities in coming together to complain, and there is nothing unclear about the basis for that claim. (CP 8:8-20).

Respondents argue that RCW 49.32.020 and the National Labor Relations Act (“NLRA”) do not protect the plaintiffs other than plaintiffs Briggs and Robertson, because the other plaintiffs were not fired. The other plaintiffs, however, assert that they were fired, and that they were fired because they attempted to collectively petition the Board of Directors to reinstate their colleagues Briggs and Robertson and to terminate the Executive Director. Respondents then assert that Briggs and Robertson, who Respondents acknowledge were terminated, are not unorganized employees, but instead are “exempt, salaried managers” to whom the protections of Washington law and the NLRA do not apply. First, Respondents assert without any basis in fact or law that Briggs and Robertson were exempt, salaried managers. Even if they were so classified by Nova’s Executive Director, there is no evidence that they were properly classified under either state or federal law; under the Fair Labor Standards Act, titles alone are insufficient to establish exempt status. 29 CFR §541.2. Second, even if they are “exempt, salaried managers”, nothing in the language of RCW 49.32.020 precludes protection of such employees, if they are organizing for the purposes of “mutual aid or protections.” Nor is

it for the trial court to conclude on a motion for summary judgment whether or not plaintiffs acted together for mutual aid or protection; the plaintiffs allege facts supporting the conclusion that they did, and that they were all terminated as a result, and whether they are factually correct or not was not for the trial court to decide.

III. CONCLUSION

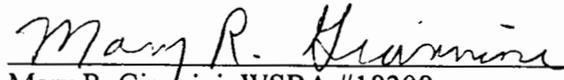
For the following reasons, and as set out in Appellants' Opening Brief, the Court of Appeals should reverse the order granting defendants' Motion for Summary Judgment on plaintiffs' claims of wrongful termination, negligent supervision and retaliation, Order of Dismissal as to all of plaintiffs' claims and Order Denying plaintiffs' Motion for Reconsideration:

1. The trial court's denial of plaintiffs' CR 56(f) Motion for Continuance was an abuse of discretion;
2. The trial court's refusal to grant plaintiffs' Motion Compelling Discovery was an abuse of discretion;
3. The trial court erred in granting defendants' Motion for Summary Judgment on plaintiffs' claims of wrongful termination, negligent supervision and retaliation, Order of Dismissal of All Claims and Order Denying Plaintiffs' Motion for Reconsideration.

This case should be remanded for further proceedings.

RESPECTFULLY SUBMITTED this 27^{+h} day of March, 2006.

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.



Mary R. Giarnini, WSBA #18308

R. Max Etter, Jr., WSBA #1928

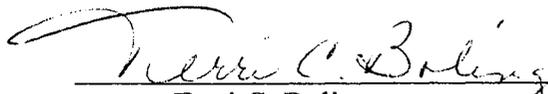
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

On the 27th day of March, 2006, I caused to be served a true and correct copy of the within document described as APPELLANTS' REPLY BRIEF to be served on all interested parties to this action as follows:

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