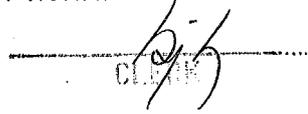


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**SUPREME COURT NO. 83882-8**

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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ROBERT PIEL & JACQUELINE PIEL, husband and wife,

Petitioners,

v.

THE CITY OF FEDERAL WAY, a Municipality organized pursuant to  
the laws of the State of Washington,

Respondent.

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BRIEF OF RESPONDENT

---

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## I. INTRODUCTION

While a police officer at the City of Federal Way (the “City”), Robert Piel (“Piel”), who was upset at the City’s police department, indicated to fellow officers that he had thought about murdering members of the department. During the ensuing investigation regarding the incident, Piel was dishonest and flatly and repeatedly denied making any such statement. Now, Piel does not dispute he made the murder comment. Nor does he now dispute that, during the investigation, he flatly and repeatedly denied making the comment. Based on Piel’s untruthfulness and his workplace violence statement, after an independent investigation, the City terminated his employment. Piel’s own union refused to pursue the matter to arbitration.

Piel and his wife (the “Piels”) sued the City, claiming that numerous unlawful motivations—rather than Piel’s murder comment and lies—led to the City’s decisions with respect to his employment. The trial court properly dismissed all of the Piels’ claims.

On appeal, the Piels take issue only with the dismissal of the claim for wrongful termination in violation of public policy (“WTVP”) based on RCW 41.56. They have abandoned their other claims.

On appeal, the Piels assert incorrectly the trial court ruled that the *Korslund* case overrules the *Smith* case. The trial court did no such thing. It recognized that the two cases address entirely different issues. *Korslund*

addresses the Jeopardy Element of the WTVP tort. The Piels cannot satisfy this element, which is why their claim was dismissed.

*Smith*, on the other hand, while involving a RCW 41.56 claim, does not address the Jeopardy Element and thus does not apply to this case. There, the Court addresses the questions of “whether the common law tort of wrongful discharge in violation of public policy extends to employees who may be terminated only for cause and, if so, whether an employee must first exhaust administrative and contractual remedies before pursuing such an action.” These questions are not at issue in the instant case.

Finally, the Piels failed to present material issues of fact to avoid summary judgment, which failure provides separate and independent grounds for affirming dismissal of the claim. Among other things, they failed to present evidence demonstrating a causal link between any alleged protected conduct under RCW 41.56 and the termination.

This Court should affirm the trial court’s decision.

## **II. ASSIGNMENTS OF ERROR**

The Piels state their assignments of error as follows: “The trial court erred in granting the City’s motion for summary judgment, in dismissing the Piels’ claims, and in entering summary judgment dismissal.” Their brief indicates, however, that they are claiming only that the trial court erred in dismissing their claim for WTVP based on RCW 41.56. The Piels are no longer pursuing their other claims.

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. The Piel's WTVP claim based RCW 41.56 was dismissed based on *Korlund's* holding regarding the Jeopardy Element of the claim. Does the *Smith* case address the Jeopardy Element or is it inapposite to this case?

B. Did the Piel's fail to raise genuine issues of material fact regarding their WTVP claim based on RCW 41.56, thus providing separate and independent grounds for affirming the trial court's decision?

### IV. STATEMENT OF THE CASE

#### A. Piel's Murder Comment, Dishonesty, and Dismissal.

The events central to this case regard Piel's dismissal from the City in 2008. In the summer of 2007, after Piel grieved an earlier termination—which matter proceeded to a labor arbitration—Piel's termination for certain misconduct in 2006 was reduced by an arbitrator to a demotion. CP 205. He was demoted from the position of lieutenant to police officer. CP 205. Piel's first day back at work after the demotion was August 13, 2007. Piel admitted that, the next day, August 14, he was feeling "angry" at the City, "[a]pprehensive," "nervous," and bitter. CP 409-411; 413. Piel's telephonic communication that day with Valley Communications, the City's dispatcher, reflects his negative attitude toward the City, particularly the then Chief of Police, Anne Kirkpatrick:

[Piel]: Yeah, I was fired. . . . Then I won in arbitration and they realized they illegally fired me and I did nothing wrong. . . . So they had to rehire

me. . . . With back pay . . . and benefits and a spanking. . . . I got to spank the Chief in front of everyone.

CP 207-208. In addition to reflecting Piel's attitude, this statement was false. As discussed below, the arbitrator had found by clear and convincing evidence that Piel had certainly done something wrong; hence, the demotion.

The same day, at a swing shift briefing, Piel exhibited a negative and hostile attitude. He asked a newlywed female officer if her husband was "ugly" and said he sent a book on testifying (referring to the arbitration) to Chief Kirkpatrick. CP 232. As Piel admitted in his deposition:

And I just made the stupid comment, you know, I was trying to be funny I guess, but I said, "Well, is he ugly or something, or why don't you want to tell me about him?" It was an off-colored joke that I shouldn't have said, but I think I was nervous and I was just trying to make people laugh, I don't know, I can't explain my reasoning. It wasn't right.

CP 412.

At the same shift briefing, in the presence of other officers, Piel made a comment to the effect that he had thought about murdering others in the police department at some point during the period he was away from the City while his grievance was pending. CP 232-233. The incident involving Piel's workplace violence comment was investigated by an independent and experienced investigator outside the City,<sup>1</sup> and it was

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<sup>1</sup> The investigation had been initially commenced by the City. *See* CP 277.

concluded that Piel had made the comment. CP 232-233. It was noted in the investigation that even joking about workplace violence was a violation of City policy. CP 232-233.

During the investigation, notwithstanding the multiple witnesses to the incident, Piel was dishonest and flatly and repeatedly denied making any such comment. CP 256-257. When a police officer is subject to an internal investigation at the City, the officer is required to be completely honest. *See* CP 211. The following is an excerpt from the first investigatory interview of Piel regarding the statement:

[Q.] . . . Did you make a statement similar to “I haven’t held a gun since I thought about coming back here and murdering a couple of people”?

[A.] No.

[Q.] No?

[A.] No, I did not say that.

[Q.] Are you sure?

[A.] I am absolutely positive.

[Q.] Okay. If you did not make a statement to that effect do you recall what you did say?

[A.] I didn’t say anything remotely even in that context and I don’t remember ever talking about my gun, except to Seth.

CP 215. Later in the questioning, Piel was given the chance to state that he could not recall whether he had made such a statement. But again, he absolutely denied it:

[Q.] . . . So the next question would not be appropriate, you don't recall making a statement?

[A.] I didn't make that statement.

[Q.] You didn't make that statement?

[A.] Absolutely not.

CP 215-216. The following is an excerpt from the second investigatory interview of Piel regarding the statement, in which he again denied making the workplace violence comment:

[Q.] . . . did you make a comment in any context regarding thinking about shooting or murdering anyone?

[A.] No.

[Q.] You didn't use the word shooting or murdering or anything to that effect?

[A.] I didn't talk about shooting, murdering, killing, harming, injuring anybody.

CP 226.

Witnesses to the incident include Jail Coordinator Jason Wilson, who initially reported the comment. Wilson particularly noticed the use of the word "murder," and he said that Piel's tone was flat, and he did not appear to be joking. CP 231. The Piels contend erroneously that Wilson had given an earlier statement in which he said that Piel "likes to joke around[,] suggesting that Piel's murder comment was an attempt at humor. Opening Brief of Petitioners ("Opening Brief"), 26. However, for this incorrect contention, the Piels cite to a statement by Officer Jason Ellis, not Jason Wilson. Opening Brief, 26 (citing to CP 472).

But Officer Ellis was another witness to the incident. And he recalled that Piel had said something about shooting someone. CP 232. Likewise, Officer Brian Bassage stated that Piel had talked about “murdering” others in the department. CP 231. Contrary to the Piels’ characterization, the witnesses’ statements were not “inconclusive.” Opening Brief, 27.

Piel was then investigated for dishonesty by the independent investigator—during which investigation he changed his story and stated he could not recall the statement—and it was determined that the City could reasonably conclude that he had been untruthful. CP 257. The Piels go to great lengths in attempting to attack the investigator’s report. *See* Opening Brief, 29. It is important here to compare the Piels’ limited quotations to the actual and complete text of the report. CP 255-257. For example, the Piels contend falsely that the investigator admitted that Piel could have been telling the truth. Opening Brief, 29. To support this false contention, they present the following limited quotation from the report:

In such circumstances, Piel could credibly be unable to recall making one of many negative comments. This could be true even regarding the murder comment, which he said in passing without particular emphasis.

Opening Brief, 29 (quoting and citing CP 256). The Piels fail to present the next two sentences of the paragraph, which undermines their contention:

Piel, in fact, denied making *most* of the alleged comments and said he recalled only being in the room a few minute and keeping to himself. He said he didn’t even recall sitting next to Officer Ellis, who is his friend and was to be

his FTO [(Field Training Officer)]. This is contrary to the well-established facts.

CP 256 (emphasis in original).

Likewise, as another example of mischaracterization, the Piels say that the investigator “acknowledged” that, “given his mental statement at the time, Piel may not have been quite aware of what he was saying at the briefing.” Opening Brief, 29 (quoting and citing CP 256). They say that she “acknowledged” that “he could have even failed in good faith to recall most of it.” Opening Brief, 29 (quoting and citing CP 256). However, they fail to quote the very next sentence of the report, which states as follows:

However, he flatly denied making the comment or anything like it—both when initially questioned by Commander Arbuthnot on September 13, 2007, and when questioned by me later that month.

CP 256. The investigator reached her conclusion by stating, “Piel is an experienced police officer and if the City, based on its knowledge of what that entails, believes Piel knows the difference between a denial and saying he can’t remember, then his denial was not truthful and honest.”

CP 256.

Later, after receiving a letter of intended discharge, Piel wrote a letter to the Chief of Police, trying to explain his conduct as follows:

I stand by my statement as to not having any recollection of making some of the statements, including the allegation of “murdering” someone. But I clearly lost control of emotions that I had buried and made the mistake of “venting” in the company of other employees. For that I offer a sincere apology to anyone I offended. I have found that sometimes people try to create humor when dealing with a stressful situation, and I may very well be guilty of

that as well.

CP 259.

On appeal, the Piels present a rather long and tortured version of these events. *See* Opening Brief, 19-29. Notably, however, they do not dispute that Piel made the murder comment. Nor do they dispute that he flatly and repeatedly denied making the comment.

On November 29, 2007, Piel was served with a notice of intent to terminate his employment. CP 277-278. The Piels then filed this action on January 14, 2008. CP 1.

On January 31, 2008, the Chief of Police Brian Wilson (who had succeeded Chief Kirkpatrick) issued a letter of discharge to Piel, making clear the significant policies at issue. CP 276-281. The letter states that a safe work environment within the police department is essential and indicates, “Your comment about murdering or shooting Department members heightens my responsibility to protect the members of this Department because you are a commissioned police officer with the knowledge and ability to carry out such an action.” CP 279. In this era of the David Brame incident,<sup>2</sup> Chief Wilson’s concern was understandable, particularly with respect to a law enforcement officer authorized to carry firearms.

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<sup>2</sup> It is widely known that Brame, a former police chief of Tacoma, Washington, fatally shot his wife and killed himself in 2003. *See* [http://en.wikipedia.org/wiki/David\\_Brame](http://en.wikipedia.org/wiki/David_Brame).

With respect to Piel's dishonesty, Chief Wilson's letter states, "Given your law enforcement experience and the factual pattern as set out above and in more detail in the Standards Investigation, I believe that you do distinguish the difference between 'denial' and 'I can't remember.'" CP 280. With respect to the honesty policy, the letter states, "honesty is the cornerstone of law enforcement." CP 280. It cites the case of *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 140 Wn. App. 516 (2007), in which the Court of Appeals stated that a "proven record of dishonesty prevents [one] from useful service as a law enforcement officer. To require [one's] reinstatement to a position of great public trust in which [one] cannot possibly serve violates public policy." *Id.* at 526.<sup>3</sup> During his deposition, Piel acknowledged the policy against dishonesty at the City's police department:

Q. . . . Do you understand the policy against untruthfulness at the police department?

A. Absolutely.

Q. Tell me what you understand about it.

A. If you lie during the course of an official investigation, you will be fired.

Q. And why is that the case?

A. Well, because it would probably take away your credibility as a police officer capable of telling the truth at all costs during any situation.

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<sup>3</sup> As a result of the United States Supreme Court's ruling in *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors must notify defendants and their attorneys when a law enforcement official involved in their case has a sustained record for lying in an official capacity.

Q. Would you agree that's an important policy?

A. Absolutely.

CP 414-415.

On February 25, 2008, the City denied Piel's request for reinstatement. CP 283-290. On March 12, 2008, the City denied Piel's appeal of the discharge. CP 292.

Piel did not submit the matter to arbitration, as the Federal Way Police Guild refused to pursue to case. CP 418-419. Nor did he commence a civil service proceeding to challenge the termination. CP 418-419. Piel also chose not to file an unfair labor practice with the Public Employment Relations Commission, alleging that his termination was unlawful discrimination.

**B. Piel's Misconduct in 2006 and Demotion in 2007.**

As stated above, Piel was demoted in 2007. This was the result of an arbitrator's decision to reduce to a demotion the City's decision to discharge Piel in 2006. CP 183-205. This City had decided to dismiss Piel due to significant acts of misconduct that year. First, Piel was responsible for a decision not to arrest a firefighter, who had driven under the influence of alcohol, simply because of the driver's special status as a firefighter for the City. CP 192-193. Second, while the firefighter incident was being investigated, Piel improperly attempted to undermine the credibility of the main witness in the incident. CP 191-196.

After Piel was investigated, it was recommended that the allegations against him be sustained. CP 196. While this matter was pending, on May 5, 2006, Piel submitted a claim for damages pursuant to RCW 4.96. CP 294-307.

Chief Kirkpatrick issued a letter of discharge on July 7, 2006. CP 161-172. The City Manager upheld the decision to terminate on August 23, 2006. CP 176-181. Piel then grieved the termination, and the matter proceeded to an arbitration hearing in April 2007. CP 183.

On July 5, 2007, the arbitrator issued his award. CP 183-205. The Piel's mischaracterize the nature of the award. The arbitrator stated that the burden of proof of establishing just cause for the termination rested with the City, and that the burden itself was to make this showing by clear and convincing evidence, which is a heavier burden than the traditional preponderance of the evidence standard. CP 198-199. The arbitrator held that the City had shown by clear and convincing evidence that just cause existed to discipline Piel in connection with the firefighter incident. CP 201. The arbitrator noted that the City had presented substantial evidence to support discipline for abuse of discretion in connection with undermining the witness. CP 202. He ruled, however, that the City did not meet the clear and convincing standard. CP 203. Accordingly, the arbitrator reduced Piel's discharge to a demotion from lieutenant to officer. CP 205. Not surprisingly, the arbitrator gave no weight to Piel's assertion that the City was motivated by any alleged protected conduct under RCW 41.56. CP 183-205.

**C. The Trial Court Proceedings.**

As mentioned above, the Piels filed their lawsuit on January 14, 2008, asserting numerous causes of action. Ms. Piel's claim sounds in loss of consortium. CP 20. The Piels submitted an amended complaint on June 23, 2008. CP 22.

On September 29, 2008, the City moved to dismiss Piel's claims for retaliation under RCW 41.80.110, harassment in violation of public policy, violation of privacy rights under common law, statutory law, and the state constitution, and violation of free speech rights. CP 53. The trial court dismissed all these claims except for the privacy claim under common law. CP 98-99. At the time, the City had not moved to dismiss any WTVP claim.

In August 2009, the City moved under CR 12(c) (failure to state a claim) and CR 56 (summary judgment) for dismissal of the Piels' remaining claims. CP 323-342; 582-594. In October 2009, the trial court dismissed the claims. CP 767-778. On October 30, 2009, the Piels appealed. CP 779-782. The Piels' opening brief on appeal makes clear that they take issue only with the dismissal of their WTVP claim under RCW 41.56.

## V. ARGUMENT

### A. Standard of Review.

The trial court dismissed Piel's RCW 41.56 WTVP claim under CR 12(c). Such a dismissal is reviewed *de novo*. See *Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 329-30 (1998).

A separate and independent basis for affirming the trial court's ruling is that summary judgment was warranted with respect to the RCW 41.56 WTVP claim. Such a matter is also reviewed *de novo*. See *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794 (2003).

### B. *Korlund*, and not *Smith*, Applies to This Case.

#### 1. The Tort of Wrongful Discharge in Violation of Public Policy.

The claim at issue is the common law tort WTVP. This tort is an exception to the terminable-at-will doctrine. *Hollenback v. Shriners Hosp. for Children*, 149 Wn. App. 810, 825 (2009). Washington courts require that the tort WTVP be narrowly construed. *Id.* Piel's WTVP claim is based on RCW 41.56, which governs collective bargaining for public employees.

To establish the tort of WTVP, a plaintiff must establish (1) the existence of a clear public policy (the "Clarity Element"); (2) that discouraging the protected conduct in which plaintiff engaged would jeopardize the public policy (the "Jeopardy Element"); (3) that the protected conduct caused the dismissal (the "Causation Element"); and (4)

the employer defendant must not be able to offer an overriding justification for the dismissal (the “Absence of Justification Element”). *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 207 (2008). The WTVP claim was dismissed under CR 12(c) due to the failure, as a matter of law, to establish the Jeopardy Element.

**2. *Korlund* Addresses the Jeopardy Element, Which the Piels Fail to Establish.**

In 2005, the Court discussed the Jeopardy Element in *Korlund v. Dyncorp Tri-Cities Services, Inc.* 156 Wn.2d 168 (2005), which element had not been at issue in the *Smith* case. In *Korlund*, the plaintiffs asserted a public policy claim under the federal Energy Reorganization Act (“ERA”). 156 Wn.2d at 181. The Court held that the plaintiffs failed to satisfy the Jeopardy Element of the claim “because there is an adequate alternative means of promoting the public policy on which they rely.” *Id.*

It reasoned as follows:

In order to establish jeopardy, “a plaintiff must show that he or she ‘engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of public policy.’” . . . The plaintiff has to prove that discouraging the conduct that he or she engaged in would jeopardize the public policy. . . . And, of particular importance here, the plaintiff also must show that other means of promoting the public policy are inadequate . . . .

While the question whether the jeopardy element is satisfied generally involves a question of fact, . . . the question whether adequate alternative means for promoting public policy exist may present a question of law, i.e., where the inquiry is limited to examining existing laws to

determine whether they provide adequate alternative means of promoting the public policy.

*Id.* at 181-82. The Court went on recognize that the ERA includes comprehensive remedies, including an administrative process to protect the public policy therein. *Id.* at 182. It thus concluded that the remedies available under the ERA were adequate to protect the public policy at issue and thus that, as a matter of law, plaintiffs' public policy tort claim failed. *Id.* at 183.

Likewise, here, Piel does not have a public policy tort claim under RCW 41.56, because that set of statutes includes comprehensive remedies to protect the public policy at issue. RCW 41.56.140 enumerates unfair labor practices for a public employer, i.e., it reflects the public policy at issue here. And RCW 41.56.160 empowers the Public Employment Relations Commission ("PERC") to address and prevent unfair labor practices, including through remedial orders, cease and desist orders, reinstatement orders, and damage awards. PERC may also petition a superior court for enforcement of its orders. RCW 41.56.160(3). Also, legal expenses may be recovered. *See Pasco Housing Authority v. State, PERC*, 98 Wn. App. 809 (2000); *Lewis County v. PERC*, 31 Wn. App. 853 (1982); *see also* WAC 391-45 (unfair labor practice case rules for PERC); WAC 391-45-410 (backpay).

The Piels assert incorrectly that the trial court dismissed the WTVP claim "on the grounds that they had an alternative remedy under [Piel's] CBA[.]" Opening Brief, 1. Rather, the trial court found that the

alternative remedies under RCW 41.56 were adequate to protect the public policy ground in the statute. CP 771.

Nevertheless, the Piels did have the additional protections of the grievance procedures of Piel's union's collective bargaining agreement and the right to commence civil service commission proceedings. *See* RCW 41.56.122(2); City of Federal Way Civil Service Rule 18.1.1. The existence of these additional means further weakens any argument that the remedies available to the Piels inadequately protected the public policy of RCW 41.56.

*Korslund* does not require that, to protect a public policy under a statute, the available remedies be coextensive with those that may be sought in a tort action. Rather, it requires that the remedies "provide adequate alternative means of promoting the public policy." *Id.* at 182. The *Korslund* Court explicitly recognized the difference between adequacy of redress for the employee versus whether a public policy is adequately protected. The tort of WTVP is not designed to protect an employee's private interest; rather, it operates to protect the public interest by prohibiting employers from acting in a manner contrary to fundamental public policy. The question here, as it was in *Korslund*, is whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy. To be sure, the extensive alternative remedies here are adequate and, thus, the Piels cannot satisfy the Jeopardy Element.

3. ***Smith*, Which Does Not Even Discuss the Jeopardy Element, Addresses Issues Entirely Different From Those Addressed in *Korslund*.**

Contrary to the Piels' contention, the Court's opinion in *Smith*, issued in 2000, does not address the question at issue here and thus does not apply here. The *Smith* Court did not address the Jeopardy Element.<sup>4</sup>

Rather, the *Smith* Court was presented with the following issues:

“whether the common law tort of wrongful discharge in violation of public policy extends to employees who may be terminated only for cause and, if so, whether an employee must first exhaust administrative and contractual remedies before pursuing such an action.” 139 Wn.2d at 795. The Court answered both these questions in the affirmative. *Id.* at 808, 811. But the *Smith* Court did not address the question here presented, i.e., whether the remedial scheme set forth in RCW 41.56 makes it impossible, as a matter of law, for the Piels to satisfy the Jeopardy Element of their WTVP claim. Simply put, the *Smith* Court—which rendered its opinion five years prior to *Korslund*—was not presented with the issue raised here.

The Piels claim that the trial judge determined that *Korslund* overruled—*sub silentio*—*Smith*. This is incorrect. In a passage to which the Piels do not refer—much less quote—the judge determined properly that the two cases address different issues:

While *Smith* cites *Gardner [v. Loomis Armored, Inc., 128 Wn. 2d 931 (1996)]* for the proposition that a wrongful discharge tort is available outside the employment-at-will

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<sup>4</sup> In fact, the term “jeopardy” does not appear to be even once mentioned in the *Smith* opinion.

context, . . . the court did not analyze whether Smith satisfied the four elements of the tort set forth in *Gardner*. *Korlund* clearly did. Instead of focusing on placing unionized employees on the same footing as at-will employees, *Korlund* asked whether the remedies available to the employee were adequate to protect the public policy on which the plaintiffs relied. The court concluded that the remedies available under the ERA were adequate[.]

CP 770-771. The trial court thus recognized that the two cases presented different issues and that *Korlund* does not overrule *Smith*.<sup>5</sup>

The Piel's note correctly that *Korlund* cites *Smith* for the proposition that the WTVP “cause of action is . . . available to employees who are dischargeable only for cause (and who may be covered by a collective bargaining agreement).” 156 Wn.2d at 178. But this proposition is not in controversy here. The City is not suggesting that the WTVP claim is barred by virtue of Piel’s status as an employee dischargeable only for cause. (Nor is the City asserting, as did the employer in *Smith*, that Piel failed to exhaust his administrative remedies.) Rather, it is the Jeopardy Element that is insurmountable for the Piel's. The trial court properly ruled that the Piel's failure to meet this requirement must result in the dismissal of the claim.

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<sup>5</sup> The Piel's opening brief states that an issue in this case is whether this Court overruled *Smith sub silentio* in *Korlund*. Opening Brief, 2. But this is not at issue. The trial court did not indicate there was any such overruling. And the City agrees there was no such overruling. Applying *Korlund*'s Jeopardy Element analysis here does not conflict in any way with *Smith*, which does not even discuss the Jeopardy Element.

Likewise, the Piel's brief states that an issue in this case is whether the common law tort of WTVP still extends to employees who may be terminated only for cause and, if so, whether an employee still need not exhaust administrative or contractual remedies before pursuing such an action. Opening Brief, 2. And again, such questions—which were at issue in *Smith* but not in *Korlund*—are simply non-issues here.

**C. In Addition, the Piels Failed to Raise Genuine Issues of Material Fact to Preclude Summary Judgment on the WTVP Claim Based on RCW 41.56.**

Separate and independent reasons exist for affirming the decision below: the Piels failed to establish issues of material fact to avoid summary judgment. They failed to establish the Causation Element, i.e., that Piel's alleged protected conduct caused his termination. Also, it should be noted that Piel's first termination cannot serve as the basis for a WTVP claim, as an arbitrator reduced the termination to a demotion; plus, the Piels' did not file their lawsuit until after the limitations period with respect to this employment action. In any event, the Piels also fail to establish the Causation Element with regard the first termination/demotion.

**1. The Piels Fail to Establish the Causation Element.**

Even based on the Piels' own factual assertions—which are replete with inaccuracies and mischaracterizations—they failed to establish the Causation Element of their WTVP claim. They failed to submit evidence that Piel's alleged protected conduct caused his termination. Furthermore, the Piels fail to show that the reasons for the termination—i.e., Piel's workplace violence comment and his lies about it—were pretextual. Nor do they otherwise present evidence to support a reasonable inference that Piel's protected conduct caused the dismissal.

**a. The Piels Fail to Specify the Alleged Protected Conduct under RCW 41.56.**

The Piels do not make clear what they contend was the alleged protected conduct under RCW 41.56, which concerns collective bargaining for public employees. Presumably, it includes (1) Piel's alleged participation in the formation of the lieutenants' union in 2002 and 2003; and (2) Piel's grievance of his 2006 termination, which was reduced to a demotion.

The Piels, however, also refer to certain other workplace complaints that are not actually grievances. For example, on appeal, the Piels claim that Piel's 2005 complaint about his performance appraisal was a grievance. Opening Brief, 11. But the complaint was not a grievance under Piel's collective bargaining agreement. CP 544-546; *see also* CP 126.

As another example, the Piels claim that Piel grieved his being investigated for violating department policies during an investigation. Opening Brief, 11. But the complaint was not a grievance under Piel's collective bargaining agreement; it was an appeal under the City's employee guidelines. CP 548-549.

In any event, it is clear that the only reasons for Piel's dismissal were his murder comment and dishonesty about it. Neither Piel's alleged protected conduct, nor any other of his alleged complaints in the workplace, caused his termination.

**b. The Piels Fail to Establish a Causal Link Between the Alleged Protected Conduct and the Termination in 2008.**

The Piels submitted no evidence to establish causation between his alleged protected conduct under RCW 41.56 and his 2008 dismissal.

First, the Piels make much of Piel's membership in the lieutenants' union. But Piel was not even a member of the lieutenants' union's initial bargaining team; and members of this team have since thrived and been promoted. CP 609-610. Piel's alleged involvement in the formation of the union cannot form the basis for establishing causation for his termination .

Second, the Piels face a significant hurdle with the lack of temporal proximity. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9<sup>th</sup> Cir. 2002) (lack of temporal proximity precludes inference of causation); *cf. Tyner v. State*, 137 Wn. App. 545, 565 (2007) (even assertion of temporal relationship insufficient to show pretext); *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481 (2004) ("coincidence is not proof of causation"). Piel's alleged protected conduct, including his union activities in 2002 and 2003, far predated his termination in 2008. By contrast, Piel's murder comment and dishonesty—the reasons for his termination—took place in August and September 2007. Trying to overcome their problem with temporal proximity, the Piels present a series of allegations regarding Piel's treatment in the intervening time period. These allegations divert attention from what is at issue i.e., the termination and the murder comment and dishonesty that led to it.

Third, the Piels advance a confused theory of causation. For example, their briefing suggests that the City retaliated against Piel due to his involvement in the Officer Clary incident and his report to Chief Kirkpatrick regarding Commander Osborne. Opening Brief, 9. But such alleged conduct on Piel's part would not have been protected under RCW 41.56. The Piels' muddled presentation regarding causation reflects, simply, a lack of evidence as to this element.

Fourth, the Piels cite the City's withholding of witness statements during the 2007 investigation. The Piels' reference to the bargaining agreement provision upon which they base this argument is inadmissible hearsay, as they did not submit it. CP 678 (noting the City's hearsay objection). Also, as there is no time restriction under the provision, plaintiffs cannot argue that the City was required to provide the statements during the investigation. And it is unreasonable to suggest that Piel should have been provided statements during the investigation, which would have compromised the integrity of the process. The City's management has consistently interpreted the provision at issue to mean that the statements will be provided upon request at the end of an investigation—for all officers and not just with respect to Piel. CP 606-607. In addition, if the Guild believed the City had violated the contract requirements, it certainly could have pursued a grievance challenging Piel's termination. Instead, it decided not to challenge the discharge.

Fifth, the contention that Piel received good evaluations and then negative ones is irrelevant, as he cannot dispute the factual basis for the

discipline at issue. The receipt of good evaluations does not immunize one from discipline in the event of misconduct. Also, Piel mischaracterizes his evaluations. He fails to mention evaluations that include areas for improvement (including a notation in 2002 that he spoke about issues inappropriately). CP 502-542. He counts “145 ‘Exceeds Expectations’” ratings, which are merely checked boxes—among many—in a series of evaluations of the course of his employment at the City. Piel omits an evaluation from December 1998, when he received a “below expectations” rating and an explanation of his development needs. CP 613-620. These negative reviews predated his alleged protected activities here.<sup>6</sup>

Sixth, the Piels cite an alleged statement by Chief Kirkpatrick in 2003 that, if the lieutenants’ union were formed, the lieutenants would not be “considered as close members of the administration,” and she “wouldn’t be able to continue to share personnel matters with the supervisors as openly as she had been able to.” But the citation to this statement tacitly ignores the fact that Chief Kirkpatrick was not involved in Piel’s 2008 dismissal; the decision-maker was Brian Wilson. In any event, it is merely the truth that, if the supervisors’ group organized, the Chief would need to be somewhat more careful about sharing information. *Cf. PERC v. Vancouver*, 107 Wn. App. 694 (2001) (no violation unless reasonable employee would perceive interference with rights). Under well

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<sup>6</sup> Nor is it clear what the Piels mean when they contend that there were “proven” improperly low evaluations. *See* Opening Brief, 42.

established public sector labor law, once a group of employees organizes the employer is required to deal with the union rather than directly with the employees for all matters that relate to wages, hours and working conditions. See RCW 41.56.140(2) and (4); *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 466 (1997). Further, a comment does not reflect wrongful intent unless it is proximate in time to the termination; made by the decision-maker; and related to the termination. See *Griffith v. Schnitzer Steel*, 128 Wn. App. 438, 457-58 (2005); *Domingo v. BECU*, 124 Wn. App. 71, 89-90 (2004). The alleged comment by Chief Kirkpatrick does not satisfy any of these criteria.

Seventh, while Chief Wilson was the decision-maker with respect to the 2008 dismissal, the Piels presented no evidence that he was aware of Piel's alleged 2002-2003 participation in the formation of the lieutenants' union. Nor do they otherwise show a connection between Piel's other alleged protected activity and Chief Wilson's discharge decision.

The Piels contend that Chief Wilson said that Piel would never work at the City again. To support this contention, they submitted a curious declaration dated August 16, 2009, by former officer Miguel Monico. CP 445-447. But the statements attributed to Chief Wilson therein do not reflect a bias against Piel due to his alleged protected conduct under RCW 41.56. That is the remaining issue in this litigation. Also, while it indicates Monico "knew" that Wilson was referring to Piel in connection with "throwing good people under the bus[,]," it sets forth no basis for this knowledge. Monico says that the conversation with Wilson

took place before Piel's "return to work in September, 2007." But Piel returned to work on August 13, 2007. So, according to the date in Monico's declaration, Wilson may have made the statements after Piel's workplace violence comment; thus, the Piel's cannot argue that Wilson intended to dismiss Piel even before the murder comment.

Most troubling, the 2009 Monico declaration conflicts materially with his declaration of May 9, 2008 (less than a year after the alleged conversation). CP 625-626. Monico's 2008 declaration states that the discussion with Wilson took place on or about the "fall" of 2007, i.e., no earlier than September, and thus after Piel's August murder comment and possibly after Piel's dishonesty (the 2009 declaration says the discussion took place in the "summer"). The 2008 declaration makes no mention whether the discussion with Wilson took place before Piel's return to work. And it offers an otherwise surprisingly different description of Monico's alleged discussion with Wilson.<sup>7</sup> Regardless, neither declaration creates a material issue of fact. Further, it is rather incredible that Wilson would tell a non-member of the department that Piel was never coming back in the summer of 2007, as now asserted, given that the arbitrator had ordered reinstatement. *Cf. Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185

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<sup>7</sup> In contrast to the 2009 Monico declaration, the 2008 Monico declaration offers this version of the interaction with Chief Wilson: "During the course of our conversation I asked Chief Wilson if I could get a positive recommendation. He replied, 'Of course, Miguel, you did a great job at this agency, and it's not like you're throwing good people that work here under the bus.'" I asked him what he meant by that. Chief Wilson then stated, "Bud Piel will never set foot in this station again." I inquired about what Lt. Piel had done. Chief Wilson stated he couldn't comment any further. We concluded the meeting and I left." CP 625-656.

(1989) (party cannot create material issue of fact by submitting sworn statement that contradicts previous sworn statement).

Eighth, the Piels mischaracterize Piel's first termination as a "proven" wrongful termination. Opening Brief, 42. As mentioned above, the arbitrator held that the City had shown by clear and convincing evidence that just cause existed to discipline Piel in connection with the firefighter incident. CP 201. The arbitrator noted that the City had presented substantial evidence to support discipline for abuse of discretion in connection with Otto. CP 202. He ruled, however, that the City did not meet the clear and convincing standard. CP 203. Accordingly, the arbitrator reduced Piel's discharge to a demotion from lieutenant to officer. CP 205. The arbitrator gave no weight to any assertions that the City was motivated by any alleged protected conduct under RCW 41.56. CP 183-205.

Finally, it should be noted that the Piels' submissions at the summary judgment stage included numerous inadmissible materials, which the Piels now cite to on appeal. The City objected to these materials,<sup>8</sup> which could not be considered at the summary judgment stage. CP 678; *see* CR 56(e).

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<sup>8</sup> These include the following statements in Piel's declaration of August 24, 2009: "Officer Clary said he recently came home to find Commander Osborne talking with his wife in their home." Objection: Hearsay.

"Our policy manual did not support Commander Wilson returning of the reports after they had already been approved by another commander." Objection: Hearsay.

"On my first day returning to work from medical leave I was advised by two of the lieutenants that I was named, as one of five lieutenants, by Deputy Chief Wilson in a staff meeting as being 'problems to the administration.'" Objection: Hearsay.

**c. The Piels Fail to Show that the City's Reasons for Dismissal—i.e., the Murder Comment and Dishonesty—Were Pretextual.**

The City decided to discharge Piel due to his murder comment and dishonesty about it. The Piels fail to show these reasons were pretextual.

The Piels may show pretext only with evidence that: “(1) the reasons which are given have no basis in fact, (2) even if the reasons are based in fact, the employer was not motivated by these reasons, or (3) the reasons are insufficient to motivate an adverse employment decision.”

*Hollenbeck v. Shriners Hospitals*, 149 Wn. App. 810, 824 (2009).

Summary judgment may be proper “even though [a] plaintiff . . . presents *some evidence* to challenge the defendant’s reason for its action.”

*Milligan v. Thompson*, 110 Wn. App. 628, 637 (2002) (emphasis added).

If the record conclusively reveals a legitimate reason for the employer’s decision, or if the plaintiff creates “*only a weak issue of fact* as to whether the employer’s reason was untrue” and there is “abundant and uncontroverted independent evidence” that no retaliation occurred,

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“I was contacted by Officer Schwan and told that while he was working with Commander Wilson he was questioned about ‘anything’ I may have been doing wrong during briefings or other times. Schwan told me that he told Greg Wilson that he did not care to get involved in the department’s head hunting games, and that Bud was worried about his future already. Schwan said Wilson responded, ‘well he better be.’” Objection: Hearsay.

Quotation of provision in collective bargaining agreement on page 18, footnote 1. Objection: Hearsay.

The statements regarding the polygraph examination. Objections: (1) Polygraph results are inadmissible. *State v. Thomas*, 150 Wn.2d 821, 860 (2004). (2) Hearsay, as the polygraph result was not submitted.

summary judgment is proper. *Id.* (emphasis added). Here, the Piels failed to establish even a weak issue of fact.

The Piels cannot argue that the City's reasons for terminating Piel's employment are insufficient to motivate termination. A workplace violence comment and dishonesty about it unquestionably suffices to motivate termination, especially with respect to a law enforcement officer authorized to carry firearms. Nor can the Piels argue that the City's reasons for dismissal have no basis in fact. Notably, it is undisputed that Piel made the murder comment and that he flatly denied making the comment. The Piels thus attempt to construct an argument that the City was not motivated by Piel's murder comment and dishonesty; but, as discussed above, this falls short.

But the arbitrator had found by clear and convincing evidence that there were grounds for the demotion. In any event, the City should not be required to tolerate a law enforcement officer who makes a workplace violence comment and then lies about it in an investigation.

**2. The First Termination Cannot Serve as the Basis for a WTVP Claim.**

It is unclear whether the Piels are claiming WTVP of public policy with respect to his termination in 2006, which was reduced to a demotion. The Piels may simply be claiming that circumstances surrounding the 2006 termination/demotion constitute evidence with respect to the 2008 termination. However, if the Piels are basing a WTVP claim on the first

termination/demotion, such a claim fails for the three separate and independent reasons here discussed.

- a. **As the termination was reduced to a demotion, it cannot serve as the basis for a WTVP claim.**

The tort of WTVP is limited to discharges and, as such, the claim is limited to terminations. *See White v. State*, 131 Wn.2d 1, 18-20 (1997). As a result, the Piels cannot base a WTVP claim on Piel's first termination, which was eventually reduced to a demotion by an arbitrator. As a matter of law, the termination was never final. Piel grieved it under his collective bargaining agreement. The arbitrator heard the matter and reduced the discipline to a demotion. Further, backpay was awarded for the time period between the dismissal and reinstatement.

- b. **With respect to the first termination/demotion, the Piels did not commence their lawsuit with the applicable limitations period.**

RCW 41.56.160(1) imposes a six-month limitations period for filing an unfair labor practice complaint with PERC. As the Piels' claim sounds in public policy, based on RCW 41.56, the policy of this limitations period applies to the claim. Piel's first termination was in 2006; the Piels did not commence their lawsuit until 2008, well beyond the limitations period with respect to the first termination. To allow the Piels to commence an RCW 41.56 lawsuit based on a termination that took place more than six months before the action would be to undermine

the clear legislative policy of RCW 41.56.160(1). In providing a relatively short statute of limitations for unfair labor practice claims, including unlawful discrimination based on union activity, the Legislature expressed a clear policy requiring the expeditious resolution of matters involving labor relations in the workplace. Adoption of a longer statute of limitations for such claims when brought in court would eviscerate this legislative purpose. Accordingly, any claim based on the first termination is time barred.

**c. In any event, the Piel's fail to establish the Causation Element with Respect to the First Termination/Demotion.**

The Piel's failed to submit any evidence that Piel's alleged protected conduct caused his first termination/demotion. Again, with respect to this adverse employment action—which Piel grieved—the arbitrator did rule that the City had shown by clear and convincing evidence that just cause existed to discipline Piel in connection with the firefighter incident. CP 201. Further, the arbitrator noted that the City had presented substantial evidence to support discipline for abuse of discretion in connection with Otto. CP 202. He ruled, however, that the City did not meet the clear and convincing standard. CP 203. Accordingly, the arbitrator reduced Piel's discharge to a demotion from lieutenant to officer. CP 205. But the arbitrator gave no weight to any assertion that the City was motivated by any protected conduct under RCW 41.56. CP 183-205.

Nor do the Piels submit any evidence that Chief Kirkpatrick—the decision-maker with respect to the first termination/demotion—was motivated by any conduct protected by RCW 41.56. Again, as discussed above, her alleged 2003 statement regarding the formation of the lieutenants’ union does not evince any wrongful animus. Rather, it merely constitutes a statement of the law. Furthermore, the Piels’ suggestion that Chief Kirkpatrick may have been motivated by Piel’s involvement in the Clary matter does not raise any RCW 41.56 concerns. To be sure, there is an absence of evidence showing a causal link between Piel’s alleged protected conduct and the first termination/demotion.

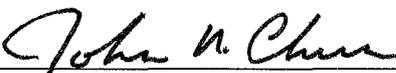
## VI. CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court affirm the decision below.

DATED this 5th day of April, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER

I certify that on the \_\_\_\_\_ day of April, 2010, I caused a true and  
correct copy of this Brief of Respondent to be served on the following in  
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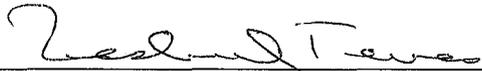
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