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COURT OF APPEALS  
DIVISION ONE

APR 06 2011

No. 66408-5

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JAMES WOODBURY,

*Appellant/Cross-Respondent,*

vs.

CITY OF SEATTLE,

*Respondent/Cross-Appellant,*

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**BRIEF OF RESPONDENT**

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ORIGINAL

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## I. INTRODUCTION

After setting aside the pages of irrelevant and misleading recitation of facts in Appellant Woodbury's brief, it is apparent that he has no authority to support his claim that he has the right to litigate his statutory whistleblower claim in Superior Court. The plain language in the State Statute and City's Code provide local government whistleblowers with the right to appeal an adverse finding to an Administrative Law Judge (ALJ) at the Office of Administrative Hearings (OAH). There is no mention in RCW 42.21.040 of a cause of action in Superior Court, as there is in the statute providing whistleblower rights to state employees. The case on which Woodbury relies in support of his claim of Superior Court jurisdiction is a non-binding opinion from the Western District concerning the requirement of exhaustion of administrative remedies. The analysis in that opinion fails to consider the entire provisions in the statute for local whistleblowers and presumes, without citing any authority, that a local whistleblower seeking appeal of an adverse decision has another choice of forum. This assumption is incorrect.

A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). The Superior Court has no subject matter jurisdiction to decide local

whistleblower claims, except when sitting in appellate capacity. RCW 42.41.040(9). Woodbury is entitled to seek Superior Court review of an OAH decision on his whistleblower claim. He has an appeal pending in that forum, and is not prejudiced by a ruling requiring him to complete that process.

Related to the hearing before the ALJ, it is equally clear that Woodbury is not entitled to litigate his million dollar emotional distress claim. Again, the whistleblower statute provides significant remedies such as reinstatement, back pay, attorneys' fees, and even fines against the retaliator. The reference to emotional distress damages is noticeably absent, even though the related statute allows for emotional distress claims by state whistleblowers. The differing treatment of local whistleblowers is sensible, given the size and resources of many small governmental agencies subject to the law. Whistleblower rights should not be a "golden ticket." They are not intended to make someone a millionaire.

Finally, with respect to discovery on such claims, the City contends that if there is any right to seek emotional distress damages, the City is entitled to direct access to medical records directly related to the harm that is claimed. This includes the right to have the person seeking emotional distress damages participate in an examination pursuant to CR 35. There is nothing unfair about requiring such disclosure and participation when a

million dollar injury is asserted. The trial court did not abuse its discretion in protecting the privacy rights of Woodbury's peers who were not parties to this lawsuit. Woodbury is not entitled to delve through their personnel files when the reduction in rank decision he complains of did not involve a review of the personnel files of any employee.

Woodbury should be directed to complete the administrative appeal he started, without seeking emotional distress damages. The trial court's dismissal for lack of jurisdiction should be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. Woodbury Properly Filed an Administrative Complaint Asserting Whistleblower Status**

On January 7, 2009, Woodbury initiated a complaint under the City's Whistleblower Code. CP 14 (Compl., ¶2.39). In April 2009, the Mayor's Office notified him that it had fully investigated his claim of whistleblower retaliation and found no cause to believe that retaliation had occurred. CP 1446 (Labelle Letter). The Mayor's Office further advised Woodbury that he could seek review of this determination, pursuant to RCW 42.41.040. *Id.* He responded, through counsel, asserting "Mr. Woodbury is dissatisfied with the response from your office and would like to request a hearing, pursuant to 4.20.860(C) and RCW 42.41.040." CP

1448-1449 (Sheridan Letter). He asked for a hearing “within the timeframe specified in RCW 42.41.040.” *Id.*

In response, the City contacted the Office of Administrative Hearings (OAH) and sought “an adjudicative proceeding before an administrative law judge pursuant to RCW 42.41.040(5).” CP 1451-1453 (Boler Letter). On May 26, 2009, ALJ Krabill issued an Order, providing a schedule for submission of exhibits, and a July 6-10, 2009 hearing date. CP 1455-1459. The issue for consideration by the ALJ was designated as “Whether the City improperly retaliated against Chief Woodbury for engaging in protected activity under Chapter 42.41 RCW and if so, what the proper sanctions should be.” *Id.*, p. 2. Sanctions, at this point in time, would have included: reinstatement,<sup>1</sup> back pay, injunctive relief necessary in order to return Woodbury to the position he held before the retaliatory action and to prevent any recurrence of retaliatory action, costs and reasonable attorneys' fees. RCW 42.41.040(7).

Once the ALJ issues a decision on the merits of the whistleblower claims, the parties are entitled to seek judicial review “under the arbitrary and capricious standard.” RCW 42.41.040(9). Woodbury did not complete his hearing initiated two years ago, so his OAH appeal is still pending.

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<sup>1</sup> Woodbury was later offered a position at his former rank, 16 pay periods after his reduction, when a Deputy Chief vacancy occurred. CP 1011, CP 1615.

**B. Without Completing His Administrative Whistleblower Challenge, Woodbury Filed a Superior Court Claim Based on the Same Facts and Issues**

**1. Woodbury seeks a stay**

On June 15, 2009, Woodbury filed a complaint in Superior Court, alleging violation of the City's Whistleblower Code and RCW 42.41.040. Compl. ¶¶1.1, 3.2 (CP 91). In his civil suit, he sought back and front pay, as well as damages for mental anguish, emotional distress and attorneys' fees and costs. Compl. ¶¶4.1-4.5 (CP 106). On June 22, 2009, Woodbury sought a stay of his administrative hearing on whistleblowing because he claimed he needed more time to conduct discovery. CP 20. He asserted that he had no obligation to exhaust administrative remedies before filing suit in Superior Court. CP 20-21. The parties did not argue over whether the Superior Court had jurisdiction, only over whether the administrative appeal could be put "on hold" pending the comparatively lengthy process in Superior Court. *See* CP 17-32. Woodbury conceded that he had filed with the OAH to preserve his claim. CP 20.

**2. Woodbury withholds medical information and seeks to avoid expert evaluation regarding his million dollar claim for emotional distress**

During the discovery process in his civil suit, Woodbury testified he suffered emotional harm, which he valued at one million dollars. CP 1371. He also refused to allow the City access to medical records that he testified would support his emotional distress claim. Instead, after the City learned that he had withheld information about his medical records, Woodbury quashed the City's subpoena to his health care provider, and represented that he would review the medical records and supply the City with records that he believed were relevant to his claim. CP 2067, CP 2069-2070, CP 558-565 (Woodbury deposition, Motion to Quash). The parties had a protective order which allowed him to designate all of the records as confidential, and precluded the City from making them public without approval of Woodbury or the Court. CP 421-425. Woodbury represented that he would submit all records for in camera review and let the court evaluate whether he had any obligation to disclose additional records. CP 729-730 (Order). There is no record that this ever occurred, and if it did, there is no information on what records were reviewed and deemed relevant to Woodbury's million dollar emotional distress claim.

Next, Woodbury sought a protective order to avoid a CR 35 exam from the City's expert Patricia Lipscomb, M.D. CP 808-816. The expert

sought review of all of his medical records, and sufficient time to conduct standardized tests and a related interview. CP 825-828. Woodbury demanded to be allowed to tape record his exam by Dr. Lipscomb. Following the examination, he refused to make the only tape recording available for transcription. VRP 97:23-99:5 (10/29/10 Hearing).

**3. Motion for Summary Judgment, based on lack of causation, is denied**

At the completion of discovery, the City filed a Motion to Dismiss because Woodbury lacked any evidence that his temporary reduction in rank was caused by his whistleblowing. CP 878-902. The Appellant's brief contains substantial details relating to whether he is a victim of whistleblower retaliation, even though this is not an issue before this Court. Opening Brief, pp. 10-21.<sup>2</sup> The City respectfully disagrees with the trial court's determination that there was a factual basis to support the whistleblower claim on the merits. CP 1374-1376. The parties agree that Woodbury raised meritorious concerns about the failure of a Fire Department Lieutenant to bill for fire services provided to a vendor. However, Woodbury's claim that Fire Chief Dean reduced his rank

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<sup>2</sup> The City does not correct the multiple misstatements of fact because none of the assertions in Woodbury's "fact" section are relevant to the appeal. Failure to correct the record should not be viewed as an acknowledgement or agreement with the information provided on pages 10-21 of Appellant's brief.

because of his whistleblowing is an assertion that is not factually supported. CP 1042, CP 1072, CP 845-848, CP 856-858, CP 866, CP 876-877.

The outside investigator retained by the Mayor considered the retaliation claim and rejected it, because Chief Dean only approved Woodbury's reduction in rank upon recommendation of his Assistant Chiefs. CP 1042, CP 1072. There was no evidence that Chief Dean manipulated the recommendation, and the Assistant Chiefs who did recommend Woodbury for reduction in rank were unaware of his intent to file an ethics complaint. CP 1072-73. The City's materials on summary judgment supported this analysis. CP 845-854 (Hepburn), CP 856-858 (Nelson), CP 862-869 (Tipler), and CP 875-877 (Vickery). The lack of evidence of causation was the basis for the City's summary judgment motion on the merits. CP 879, CP 892-895. The trial court found it was possible to conclude that Dean "exercised his influence at that meeting to come out with the recommendation he wanted." VRP 92:24-93:2 (10/29/10 Hearing). While there was no record of manipulation by Dean, the trial court reasoned that a true leader could achieve this result, by getting the others at the meeting to believe the reduction was their idea, without actually asking for the reduction. VRP 14:4-15:25 (10/29/10 Hearing).

In preparation for a denial of summary judgment, the City prepared a challenge to Woodbury's million dollar claim for damages for emotional harm. CP 1356-1365. On the date of the trial court's denial of summary judgment, the City served the Appellant and the Court with a motion to strike all claims for emotional distress damages, based on the fact that the statutory structure providing whistleblower protection to municipal employees contains no provision to remedy such harm. VRP 96:7-97:22 (10/29/10 Hearing); CP 1356-61. The Court astutely recognized that the significance of the issue would reduce the potential value of Woodbury's claim from a million dollar claim to a \$25,000 claim for damages. VRP 96:18-24 (10/29/10 Hearing).<sup>3</sup>

The City also challenged whether Woodbury's statutory claim could be heard in the first instance by a superior court, and sought dismissal of the whistleblower claim based on lack of jurisdiction. The trial court found it lacked jurisdiction over the claim. VRP 36:19-23 (11/19/10 Hearing) (The issue is "whether a person who has a whistle-

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<sup>3</sup> Oral argument on the City's Motion for Summary Judgment was held on October 29, 2010. That same day, the City filed a notice for hearing with oral argument set for November 5, 2010, on a Motion to Strike Remedies Sought in Plaintiff's Complaint for Emotional Distress Damages. CP 2095-2096, CP 1356-1364. On November 12, the City filed its last Notice for Hearing with oral argument to be held November 19, 2010, for a Motion to Dismiss for Lack of Jurisdiction. CP 2105-2106, CP 1377-1442. This hearing date and time was noted as directed by the Court. The judge determined that all three of the City's motions would be heard on November 19, 2010.

blower complaint under City Code also has a claim in Superior Court.

That's all it is. I am going to rule that they don't."').<sup>4</sup> The judge signed the City's Order, dismissing the case. CP 1635-1636. Woodbury sought the Court's approval to provide supplemental briefing the following Monday. VRP 41:22-42:3 (11/19/10 Hearing); CP 1637-1653 (Motion for Reconsideration).<sup>5</sup> The Court did not ask the City to respond and denied the Motion for Reconsideration eight days after it was filed.<sup>6</sup> CP 1654.

In his request for reconsideration, the plaintiff argued, as he does now, that the Court wrongly relied on an unpublished case and the wrong legal analysis. CP 1642. At hearing, the Court did mention the *Blumhoff* decision from Division I, which holds that a local government

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<sup>4</sup> Woodbury's assertions that the trial court based its decision on this Court's decision in *Blumhoff v. Tukwila School Dist.*, 147 Wn.App. 1028, 2008 WL 4902630 (Div. 1, 2008) are simply at odds with the record. The Court stated numerous times that he did not rely on the case. VRP 23:12-15, 40:1-41:16, 42:5-10 (11/19/10 Hearing). The court did express frustration that the decision was unpublished, and that the court could not rely on it. *Id.* 37:2-23 (11/19/10 Hearing).

<sup>5</sup> Plaintiff filed an immediate Motion for Reconsideration on November 22, 2010, the next court-business day following the hearing on the Motion to Dismiss. Although the issue of whether plaintiff received sufficient notice on the Motion to Dismiss arose in one sentence in a footnote (CP 1639), plaintiff's motion contained supplemental briefing regarding the issue of jurisdiction (*see* CP 1637-1653).

<sup>6</sup> Appellant's Motion for Reconsideration does contain a footnote about the truncated briefing schedule on the motions, which the City did not have an opportunity to respond to and therefore there is no record to which to cite to the Court. However, the truncated briefing schedule was based on the direction of the trial court. The City actually sought to set aside pre-trial deadlines and the trial date to give Woodbury more time to respond. CP 2097-2098, CP 2099-2104 (Notice and Motion).

whistleblower seeking to challenge a wrongful termination in violation of public policy receives adequate protection of their rights under the whistleblower code and fails to meet the criterion for a wrongful discharge tort claim. *Blumhoff v. Tukwila School Dist.*, 147 Wn.App. 1028, 2008 WL 4902630 (Div. 1, 2008). Despite continual goading from counsel, the Court repeatedly stated it did not rely on this opinion in ruling on the issue of jurisdiction of the Court to hear a whistleblower claim. VRP 23:12-15,<sup>7</sup> 40:1-41, 42:5-10 (11/19/10 Hearing). Although there are claims by counsel that the Motion to Dismiss for lack of jurisdiction was untimely,<sup>8</sup> it is well settled that a party may raise the issue of lack of subject matter jurisdiction at any time. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

The Court did not rule on the issue of emotional distress damages. Given disposal of the case on jurisdictional grounds, the measure of damages available became moot. VRP 2:4-16 (11/19/10 Hearing).

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<sup>7</sup> An early exchange regarding the *Blumhoff* case reads as follows:

MR. SHERIDAN: Judge, because you are relying on this --

THE COURT: I am not relying on it. I am not entitled to rely on precedent that is unpublished. VRP 23:12-15.

<sup>8</sup> The real issue seems to be that the matter was heard on a shortened briefing schedule, which is different than timeliness. However, the City only noted the matter consistent with instructions from the court.

### III. ISSUES

1. Whether the Superior Court has jurisdiction to consider a statutory whistleblower retaliation claim instead of the Office of Administrative Hearings, which is the agency designated for review by the City's whistleblower code.
2. Even if there is Superior Court jurisdiction, may the whistleblower seek emotional distress damages when the statute and code specify remedies including back pay, reinstatement, attorneys' fees and fines against a retaliator, but fail to specify emotional harm or general damages?
3. With respect to discovery in a whistleblower retaliation claim there are three issues:
  - a. May a plaintiff withhold medical records related to his emotional condition and prevent direct access to the records by means of a subpoena, when the parties have entered a protective order which precludes publication of confidential medical records, unless there is consent of the parties or a court order?
  - b. May a defendant conduct an independent medical examination of a plaintiff seeking a million dollars in compensation for emotional harm, even if the plaintiff does not designate his own expert?
  - c. Is a plaintiff entitled to personnel records of peers who are not parties to his lawsuit, when none of the employee personnel records were relied upon in the non-disciplinary decision to abrogate plaintiff's position and reduce his rank?

#### **IV. ARGUMENT**

##### **A. Both State Law and City Code Limit the Role of the Superior Court to Appellate Review of an Agency Decision**

State law specifically provides local government agencies the authority to promulgate a local whistleblower process:

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.

RCW 42.41.050

The City's whistleblower code combines a reporting and investigative process at the City with an adjudicative process at the Office of Administrative Hearings. City employees who report improper governmental action are protected by City Code. SMC 4.20.800. A City employee who believes they are the victim of whistleblower retaliation may file a complaint with the Mayor's Office. SMC 4.20.860.

If an employee who has filed a complaint of retaliation under this section is dissatisfied with the response and desires a hearing pursuant to Section 42.41.040 RCW, the employee shall deliver a request for hearing to the Office of the Mayor within the time limitations specified in that section. Within five (5) working days of receipt of the request for hearing, the City shall apply to the state office of administrative hearings for a hearing to be conducted as provided in Section 42.41.040 RCW. 4.20.860(C).

The findings and conclusions of the administrative law judge are then *subject to review* by the Superior Court, based on an arbitrary and capricious standard. RCW 42.41.040(9). The City's Code, and State Code which it incorporates, contain no reference to an independent cause of action or jurisdiction in Superior Court.

Local government whistleblower codes govern the reporting and adjudicative processes, so long as local code upholds the intent of RCW 42.41. See *Wilson v. City of Monroe*, 88 Wn.App. 113, 943 P.2d 1134 (1997) *review denied*, 134 Wn.2d 1028, 958 P.2d 318 (1998); *Keenan v. Allan*, 889 F.Supp. 1320 (E.D.Wash.1995) (Grant County whistleblower program met intent of RCW 42.41 because it provided protection and remedies that "paralleled" the language in the Act), *aff'd*, 91 F.3d 1275 (9th Cir.1996). By incorporating part of the very adjudicative process guaranteed by RCW 42.41, it is clear that the City meets its obligation to provide a process meeting the intent of State Statute.

A court's objective in construing a statute is to determine the Legislature's intent. *Dep't of Ecology v. Campbell v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If the statute's meaning is plain, effect is given to that plain meaning as the expression of the Legislature's intent. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007) *citing State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Plain

meaning is determined from the ordinary meaning of the language used in the context of the *entire* statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole; intent is not to be determined by a single sentence or a single phrase. *Washington State Human Rights Commission v. Cheney School Dist.*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982).

There are three chapters of the Revised Code of Washington that relate to whistleblower complaints and protections: (1) Chapter 42.41 RCW, for local government whistleblowers; (2) Chapter 42.40, state employee whistleblower protection; and (3) RCW 49.60.210, which provides that whistleblower retaliation is an “unfair practice” against “a whistleblower as defined in chapter 42.40.” A city employee is excluded by definition from the procedures and remedies provided to state employees because RCW 4.20.020(2) defines an employee as “any individual employed or holding office in any department or agency of state government.” This means the only statute governing Woodbury’s right to an adjudicative process is RCW 42.41.040.

The purpose of Chapter 42.41 RCW is: “to protect local government employees who make good-faith reports to appropriate governmental bodies and to provide remedies for such individuals who are subjected to retaliation for having made such reports.” RCW 42.41.010. It

is not necessary to provide whistleblowers “a civil action in a court of competent jurisdiction”<sup>9</sup> to achieve such intent. By combining its own reporting provisions with the adjudicative process in RCW 42.41.040, the City provides prompt responses to whistleblower allegations, subject to prompt review by a neutral agency, which may order meaningful relief such as reinstatement, back pay, attorneys’ fees, and costs. RCW 42.41.040(6)-(8). Review by a superior court is not contemplated until administrative adjudication is complete. RCW 42.41.040(9).

The process adopted by our Legislature, and incorporated by the City’s Code, clearly presumes that a superior court sits only in appellate capacity, after the completion of an administrative hearing. Based on the plain language in RCW 42.42.040(9), there is no basis for invoking jurisdiction of the Superior Court until such time when Woodbury’s administrative hearing concludes. Then, either party can seek review of the ALJ’s decision in Superior Court. *Id.* In fact, the overall statutory scheme provides for prompt remedial action and review that is actually undercut by allowing the matter to await resolution in a superior court.

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<sup>9</sup> RCW 49.60.210(2) provides that whistleblower retaliation against a state employee is an “unfair practice.” “Any person deeming himself or herself injured by any act in violation of [RCW 49.60] shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys’ fees.” RCW 49.60.030(2) (*emphasis added*).

**B. The Legislature Provided Jurisdiction for State Whistleblower Claims in Superior Court and Presumably Would Have Done so for Local Whistleblowers If That Was its Intent**

State employees may assert whistleblower retaliation claims pursuant to Chapter 42.40 RCW. RCW 42.40.020(10) defines a “whistleblower” and cross references RCW 49.60, so that the definition of “whistleblower” is consistent in both chapters. In describing the remedies available to a whistleblower, RCW 42.40.050(1) provides that a state employee<sup>10</sup> “subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW.” RCW 49.60.210(2) provides that whistleblower retaliation against a state employee is an “unfair practice.” RCW 49.60.030(2) provides: “(2) Any person deeming himself or herself injured by any act in violation of this chapter [RCW 49.60] *shall have a civil action in a court of competent jurisdiction* to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees” (*emphasis added*). Historically, this provision applicable to *state*

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<sup>10</sup> RCW 42.40.050(1) refers to “a whistleblower, as defined in RCW 42.40.020.” RCW 42.40.020(10) defines a whistleblower using the word “employee.” An “employee” is also defined in RCW 42.40.040(2) as “any individual employed or holding office in any department or agency of state government.”

employees has included the right of direct review to a superior court. *Bayless v. Community College Dist. No. XIX*, 84 Wn.App. 309, 310, 927 P.2d 254 (1996).<sup>11</sup>

This specific reference to a court proceeding is also relevant because RCW 42.41 does not refer to “a civil action,” an action in Superior Court, or even make reference to an individual cause of action. The lack of reference to Superior Court jurisdiction in RCW 42.41 is presumed to be intentional. Where the Legislature uses certain language in one instance, but different, dissimilar language in another, a difference in legislative intent is presumed *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998). When the Legislature enacted the code for local whistleblowers, it passed a law with significantly different provisions than other statutes conferring rights to employee whistleblowers. Employees seeking redress for the wrongful conduct of their employers under RCW 49.60 may enforce their rights, through “a civil action” (RCW 49.60.030). State whistleblowers are entitled to the more vague “cause of action”

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<sup>11</sup> In *Bayless*, the Court noted that former RCW 42.40.050 provided that “any employee who supplied information to the auditor which the auditor found warranted further investigation, or which was provided in good faith, and who was subjected to any “reprisal or retaliatory action,” could “seek judicial review of the reprisal or retaliatory action in Superior Court, whether or not there has been an administrative review of the action.”

(RCW 42.40.050(1)). The failure to include similar language in RCW 42.41 is telling.

In 1992, when the Legislature enacted the local government whistleblower code, it presumably knew it could provide a civil action or cause of action, but did not include these references, or even a cross reference, to RCW 49.60. *See* Appendix A (Substitute Senate Bill 6321, enacted June 11, 1992, adding new Chapter 42.41 for local government whistleblowers). CP 1392-1405. On the same date, the Legislature passed a bill revising RCW 42.40 and RCW 49.60 provisions applicable to whistleblowers. Appendix B (Engrossed Substitute Senate Bill 5121, enacted June 11, 1992). CP 1406-1430. Revisions to RCW 42.40 and 49.60 provided state whistleblowers with “remedies provided under Chapter 49.60 RCW” (revision to RCW 42.40.050), and designated whistleblower retaliation an “unfair practice” (revision to RCW 49.60.210). The newly enacted RCW 42.41 did not, and does not now, cross reference RCW 49.60 or adopt the right of “a civil action in a court” because the Legislature did not intend to provide an individual cause of action in Superior Court when it enacted RCW 42.41.

Even a statute providing employee rights does not presumptively provide all rights and remedies an employee may wish to pursue. The employee seeking relief is limited to the rights and remedies in the

enabling statute. *Washington State Human Rights Commission v. Cheney School Dist.*, 97 Wn.2d 118, 641 P.2d 163 (1982)(Human Rights Commission was empowered to enforce law against discrimination but lacked authority to award emotional distress damages because the statute did not provide the Commission with such authority). Certainly, there are other important legal rights which are adjudicated in an administrative forum. *See Trachtenberg v. Washington State Dept. Of Corrections*, 122 Wn.App. 491, 93 P.3d 217 (2004) (statutory scheme providing for review of discipline before a State Personnel Appeals Board, did not provide a civil service employee the right to bring an independent action or suit to challenge a disciplinary decision); RCW 48.04.010 (right to hearing for actions taken in regard to an insurance license); RCW 53.20.040 (appeal of benefit determination for unemployment compensation). Looking to the specific language and the State Statute and the City Code, one can only conclude there is no authority for a local governmental whistleblower to seek relief directly in Superior Court.

**C. Woodbury's Authority Does Not Establish Superior Court Jurisdiction**

**1. *Eklund* does not address, let alone decide, the jurisdictional issue**

Woodbury's brief relies heavily on the non-binding analysis of the Western District Court in the *Eklund* case. Opening Brief, 27-28. However, that Court's analysis of a failure to exhaust administrative remedies is, with all due respect, incorrect and lacks any discussion of whether a superior court has jurisdiction of a whistleblower claim.<sup>12</sup> Exhaustion is required where: (1) a claim is cognizable in the first instance by an agency alone; (2) the agency has clearly established mechanisms for the resolution of complaints by aggrieved parties; and (3) the administrative remedies can provide the relief sought "can be obtained by resort to an exclusive or adequate administrative remedy." *Ryder v. Port of Seattle*, 50 Wn.App. 144, 151, 748 P.2d 243 (1987) citing *State v. Tacoma-Pierce Cy. Multiple Listing Serv.*, 95 Wn.2d 280, 284, 622 P.2d 1190 (1980).

*Eklund* asserted alternate theories: (1) a violation of the City's whistleblower code; and (2) a wrongful discharge in violation of public

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<sup>12</sup> The failure to exhaust administrative remedies was not addressed on appeal in the *Eklund* case because the jury ruled in favor of all defendants on the wrongful discharge claim.

policy. *Eklund v. City of Seattle*, 2008 WL 112040, \*3-\*4 (W.D.Wash., 2008). Eklund's wrongful discharge tort claim was defective because his whistleblower rights were adequately protected by the whistleblower provisions in City Code, and therefore failed to satisfy the requisite "jeopardy element"<sup>13</sup> of a wrongful discharge claim. *Blumhoff v. Tukwila School Dist.*, 147 Wn.App. 1028, 2008 WL 4902630 (Div. 1, 2008) ("As a matter of law, the existing procedures under chapter 42.41 RCW adequately protect local government employees from whistleblower retaliation.").

The City argued that Eklund failed to take the prerequisite steps necessary to perfect his City whistleblower claim, which was true. *Eklund v. City of Seattle*, 2008 WL \*7. Eklund had not appealed the Mayor's determination that Eklund was not a victim of whistleblower retaliation to the OAH. *Id.* Instead, he went to Superior Court and filed his statutory whistleblower claim. The District Court concluded that failure to use mandatory language in all sections of the Code providing for appeal meant that the OAH appeal is not required. *Id.*, \*8. However, for exhaustion to apply, it is not necessary that the administrative agency provide an

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<sup>13</sup> One of the requisite elements of a wrongful discharge in violation of public policy claim is the "jeopardy" element: that discouraging the conduct in which the employee engaged would jeopardize the public policy. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996).

*exclusive* remedy, if the agency provides an *adequate* remedy. *Ryder v. Port of Seattle*, 50 Wn.App. 151. Under the combined City Code and State Statute, Eklund (and Woodbury) are entitled to reinstatement, back pay, attorneys' fees, and costs. RCW 42.41.040(6)-(8). Though Woodbury may want more, these remedies are clearly adequate remedies for a valid whistleblower claim.

The *Eklund* analysis failed to consider adequacy of the remedy and evaluated the issues as if there were a choice between OAH appeal process and something else. SMC 4.20.860(C)'s language provides that "[i]f an employee desires a hearing...they shall deliver a request for hearing to the Office of the Mayor." Since the OAH hearing is the *only* adjudicative process provided for a local whistleblower, the only choice is whether to seek review at the OAH, or not at all. Moreover, in *Eklund*, the Court failed to consider the entire statutory scheme, which makes abundantly clear that the Superior Court sits in appellate capacity. RCW 42.41.040(9). The statute providing the whistleblower right does not confer jurisdiction on the court. Additionally, the District Court's analysis is at odds with well established principals of administrative law.

The City's Code creates an internal, administrative process for evaluating a whistleblower complaint. There are three methods of appeal from administrative decisions: (1) direct appeal expressly authorized by

statute; (2) review pursuant to a statutory writ of certiorari [RCW 7.16.040]; and (3) discretionary review pursuant to the courts' inherent constitutional powers. *Kreager v. Washington State University*, 76 Wn.App. 661, 886 P.2d 1136 (1994). The only way local government whistleblower retaliation complaints should be heard in a trial court is following adjudication of whistleblower allegations in an administrative hearing. *See e.g., Heiner v. Skagit County Emergency Medical Services Com'n*, 2009 WL 2855722 (slip opinion, W.D. Wash. 2009).<sup>14</sup> The City is unable to find, and Woodbury has not offered, any decision approving litigation of a statutory whistleblower claim litigated in trial court when the plaintiff has not also completed an administrative hearing. This is not surprising, given the language of the statute and the well established *appellate* jurisdiction of a superior court with respect to administrative claims.

Woodbury seeks to appeal the decision of the Mayor's Office, which found there was no factual basis for his claim that his short-lived reduction in rank resulted from his whistleblower complaint. CP 1446 (Labelle Letter). The City's Code already provides for an administrative

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<sup>14</sup> There are also unpublished state court decisions in this same posture. *See e.g., City of Port Orchard v. Rolfs*, 136 Wn.App. 1030 (Div. 2, 2006); *Isaacson v. City of Centralia*, 125 Wn.App. 1045 (Div. 2 2005).

process to appeal that determination, which does not provide for direct appeal to superior court. A superior court's inherent authority to review administrative decisions parallels the review provided in RCW 42.42.040(9). Under Article 4, Section 6 of the Washington State Constitution, superior courts possess constitutional and inherent power to review allegedly illegal, or manifestly arbitrary and capricious nonjudicial administrative action violative of a "fundamental right." *Hough v. Washington State Personnel Bd.*, 28 Wn.App. 884, 887, 626 P.2d 1017(1981). RCW 42.41.040(9) provides "The final decision of the administrative law judge is subject to judicial review under the arbitrary and capricious standard." *See also Kreager v. Washington State, supra*, 76 Wn.App. at 664 (statute said, "Within thirty days after the recording of the order and the mailing thereof, either party may *appeal to the superior court.*"). All roads for a local whistleblower lead to an appellate review by a superior court, based on an arbitrary and capricious standard of review.<sup>15</sup>

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<sup>15</sup> Woodbury's concern about the application of collateral estoppel of his civil claim (Opening Brief, p.35) makes little sense, since he would not be in Superior Court to retry his claim and therefore concerned about the preclusive effect of an ALJ. The statute provides that he can appeal the findings and conclusions, but subject to an arbitrary and capricious standard of review, not de novo.

The related concepts of administrative exhaustion and jurisdiction are clearly causing confusion and require some published direction from this Court. The only clear direction is from our Supreme Court, which rejected a common law whistleblower tort claim based on disciplinary action less severe than termination. *White v. State*, 131 Wn.2d 1, 19, 929 P.2d 396 (1997). Thus, there can be no wrongful demotion in violation of public policy tort in a civil lawsuit.

Nor is the analysis regarding exclusive remedies applicable to a claim that is solely based on a whistleblower code. This case is distinguishable from the claim raised in the holdings of *Wilson v. City of Monroe*, *supra*, and *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 821 P.2d 18 (1991) relied upon by Woodbury. Opening Brief, 28-29. Both plaintiffs in *Wilson* and *Wilmot* were terminated and therefore raised common law tort claims that they were wrongfully terminated in violation of public policy. *Wilmot* at 51; *Wilson* at 117. The issue presented in each case was whether statutory rights (RCW 51.48<sup>16</sup> or RCW 42.41) could be considered *the exclusive remedies* for these whistleblowers, requiring dismissal of their wrongful discharge cases. *Wilmot* at 53; *Wilson* at 122.

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<sup>16</sup> In looking at the entire statute, it is clear that RCW 51.48.025 does not provide for administrative resolution of disputes, but provides Superior Court jurisdiction for retaliatory conduct proscribed by the statute and expressly allows actions brought directly by the employee against the employer. *Wilmot* at 57, 66.

Thus, each plaintiff had the option of pursuing a common law tort claim if there was no exclusive jurisdiction.

However, Woodbury has no common law alternative claim. *White v. State, supra* at 19. Disciplinary action less severe than termination does not give rise to a common law civil claim because “subjecting each disciplinary decision of an employer to the scrutiny of the judiciary would not strike the proper balance between the employer's right to run his business as he sees fit and the employee's right to job security.” *Id.* at 20. There is *only* the statutory claim. Thus, it is improper to analyze whether the Legislature intended to eliminate a common law tort claim of wrongful demotion<sup>17</sup> because the statute could hardly eliminate a non-existent right. The whistleblower claim that *is* created is a creature of statute and code that *only* provides for adjudication of the whistleblower complaint before an administrative agency and appeal from that decision.<sup>18</sup>

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<sup>17</sup> Woodbury refers to his reduction in rank as a demotion. *See e.g.*, Opening Brief, p.2. However, there is no record that the City's decision to eliminate a Deputy Chief position and then reduce Woodbury in rank was a *disciplinary* decision.

<sup>18</sup> Perhaps because of the existence of a common law tort claim, this Court declined to evaluate whether Mr. Wilson had a personal right of action under City Code and State Statute. *Wilson* at 122, n.22. The time has come to evaluate that question because there is no alternative tort claim pled by Woodbury.

**D. Plaintiff's Act of Invoking the Jurisdiction of the Office of Administrative Hearings Is an Admission of OAH's Jurisdiction Over the Claim**

Plaintiff sought to invoke the jurisdiction of the Office of Administrative Hearings in April of 2009, making specific reference to both the City Code that requires an appeal before an ALJ and RCW 42.41. CP 18. Therefore, he obviously does not dispute that OAH has the authority to hear his claim. At the time Woodbury sought a stay from the trial court over the administrative process, he argued that the OAH review was too abbreviated and did not allow adequate time for discovery. CP 20. Perhaps this would be a compelling argument if the Court had jurisdiction over his complaint and he had a right to invoke the rules of civil discovery.

There is simply no reason why Woodbury cannot achieve complete relief from an ALJ, as provided by the Legislature. He is entitled to compensatory relief, if he can present any evidence of financial loss, his attorneys' fees, costs and even potential fines against the wrong-doers – all of which would safeguard the public policy of preventing whistleblower retaliation. The Legislature provided a right, an administrative process and substantial remedies, all designed to provide prompt, meaningful relief. This intent should not be ignored so that plaintiff can obtain a forum in which to pursue a million dollar emotional distress claim. As is

also equally clear from the language in the statute, there is no legal authority for an award of emotional distress damages to a local government employee.

**E. Woodbury Is Not Entitled to Pursue His Million Dollar Emotional Distress Claim as a Local Government Whistleblower**

Based on its plain language, the City's Code (1) implements the State Code applicable to municipal employees; (2) provides a process for reporting improper governmental action; and (3) provides protection from retaliatory action. SMC 4.20.810. These objectives are achieved by directing employees on where to report the improper governmental action, giving them access to a process to complain if they are victims of whistleblower retaliation, and protection from retaliation. While the City Code itself does not speak directly to remedies, it specifically refers employees who believe they are entitled to further relief to the adjudicative process provided in RCW 42.41, the Washington Code applicable specifically to municipal employees. SMC 4.20.860(B) (If an employee who has filed a complaint of retaliation under this section is dissatisfied with the response and desires a hearing pursuant to RCW 42.41.040, the employee shall deliver a request for hearing to the Office of the Mayor). The remedies provided under RCW 42.41 include: reinstatement, with or without back pay; injunctive relief necessary to

return the employee to the position he or she held before the retaliatory action, and to prevent any recurrence of retaliatory action, and costs and reasonable attorneys' fees. There is no mention of emotional distress remedies in either City or State Code.

The State Supreme Court addressed the same issue in regard to a state employee who sought emotional distress damages through a complaint filed with the State Human Rights Commission. *Washington State Human Rights Commission v. Cheney School Dist.*, 97 Wn.2d 120. The Court looked first to the history of the Washington Law Against Discrimination, which evolved from a statutory right to obtain orders to cease and desist to a right to provide remedies including reinstatement, instatement and back pay. *Washington State Human Rights Commission* at 120-21. However, the statute made no mention of emotional distress damages. This lack of reference to emotional distress damages in a statute that enumerated other forms of relief indicated a clear intent by the Legislature not to vest the Commission with the authority to provide emotional distress damages. *Id.* at 126. "An administrative agency may exercise only the power conferred upon it, either expressly or by necessary implication, applies to the case at bar. The Commission has not either expressly or by implication been given the power to award general damages for humiliation and mental suffering." *Id.* at 127. Likewise, there

is no express or implied power to allow Woodbury emotional distress damages under the whistleblower code.

Instead, the City process allows Mr. Woodbury to recover “back pay” for any portion of time during which he was wrongfully reduced in rank. Of course, since he was already reinstated to his former rank, the reinstatement provision of the Code provides no further economic relief beyond the difference in pay for the 16 weeks he was reduced in rank. CP 1011, CP 1615. He may also seek to recover attorneys’ fees and costs, if he is successful. However, since Woodbury presents *only* a local whistleblower claim and his statutory authority does not provide for emotional distress damages, he has no authority to seek recovery for pain and suffering, mental anguish, emotional distress and humiliation. *See* CP 15 (Compl. ¶4.2).

City employees are limited to code remedies for municipal employees. *Wilson v. City of Monroe, supra*, 88 Wn.App. at 122 (plaintiff, a city employee, was not entitled to the remedies provided by the statute for state employees). State employees seeking whistleblower remedies, are governed by RCW 42.40.050, which allows for the remedies provided under RCW 49.60 (the Washington Law Against Discrimination). The City agrees that RCW 49.60 would provide for more expansive damages than the local whistleblower code, but that language is inapplicable to Woodbury. His

assertions to the contrary are unsupported and simply wrong. Opening Brief, 34.

**F. Woodbury's Claim Is Not a Common Law Tort Claim, so He Is Not Entitled to Tort Damages for Emotional Distress**

Most of Woodbury's authority regarding emotional distress damages relies on the premise he presents a common law tort claim. This is incorrect. Plaintiff's complaint seeks relief pursuant to state law (RCW 42.41) and City Code (SMC 4.20.810), as he must, because there is no common law claim of whistleblower retaliation applicable to an employee who has not been terminated. *See* Complaint, ¶3.2; *White v. State*, 131 Wn.2d 1, 19, 929 P.2d 396 (1997).<sup>19</sup> Wrongful discharge in violation of public policy and statutory whistleblower claims are separate legal claims, although the outcome of one may affect the other.<sup>20</sup>

The right to seek redress for retaliation for reporting some government misconduct has its roots in RCW 42.40. The statutory

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<sup>19</sup> In *White*, the Supreme Court refused to allow recovery for disciplinary actions that do not result in discharge where the employer's actions violate a clear mandate of public policy. The Court reasoned that that "the courts are ill-equipped to act as super personnel agencies." *White* at 19-20.

<sup>20</sup> *See Dewey v. Tacoma School Dist. No. 10*, 95 Wn.App. 18, 31 n.6 (1999) (because plaintiff could not establish he was a whistleblower under school district's whistleblower policy, the court declined to rule on his separate claim of wrongful discharge in violation of public policy).

whistleblower claim evolved from allowing a state employee subjected to any “reprisal or retaliatory action” the right to “seek judicial review of the reprisal or retaliatory action in superior court,” with “reasonable attorney’s fees” offered as the only monetary remedy (Laws of 1982, Ch. 208, § 5) to a claim in which the whistleblower could seek *all remedies* set forth in RCW 49.60, including injunctive relief, actual damages and attorneys’ fees. Laws of 1992, Ch. 118, § 3; *Bayless v. Community College Dist. No. XIX*, 84 Wn.App. 309, 311, (1996).

In determining whether a claim sounds in tort, the relevant inquiry is whether the statute is merely a codification of preexisting common law tort remedies or a new cause of action not previously available. *Wilson v. City of Seattle*, 122 Wn.2d 814, 823, 863 P.2d 1336(1993). Plaintiff points to no common law history of whistleblower tort claims because there is none. The earliest decision referring to whistleblower retaliation is *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989), although the plaintiff in *Dicomes* asserted wrongful discharge in violation of public policy – a policy statement found in RCW 42.20.<sup>21</sup> Plaintiff fails to provide any support that the statutes he relies upon are a codification of

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<sup>21</sup> RCW 42.41 and 42.40 are not the only statutory basis for whistleblower retaliation claims. Similar rights are found in RCW 49.17.160(1) (whistleblower provision of the Washington Industrial Safety and Health Act (WISHA)), RCW 49.32.020 (prohibiting coercion or interference with labor organizing), and a host of federal statutes.

common law claims. The statutory basis for his claim renders his tort claim arguments irrelevant.

Woodbury is limited to the remedies provided under his *statutory* claim and his remedies are significant, even if they do not allow for his million dollar emotional distress claim. Woodbury's argument that he is entitled to general tort damages because the City's whistleblower code lacks a list of whistleblower remedies is nonsensical. Opening Brief at 38. SMC 4.20.860(c) makes specific reference to the adjudicative hearing process provided in RCW 42.41.040, which provides a list of remedies for local whistleblowers. *See* RCW 42.41.040(7). Plaintiff's claim that the City sought to invoke the hearing process, but not to incorporate the specific remedies in the same section of that very statute, is contrary to the rule of statutory construction that statutes be construed to avoid absurd results. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Indeed, it would be absurd to presume that the ALJ would provide plaintiff with any remedies he requests, regardless of whether they are found in RCW 42.41.040(7). The lack of reference to emotional damages in either City Code, or the State Code incorporated into the City's Code, is fatal to his attempt to obtain emotional distress damages. The Legislature made a choice to limit damages and plaintiff proceeds subject to those limitations.

**G. The Statute Limits State Employees to \$20,000 for Emotional Distress Damages and Intentionally Excludes Emotional Distress Damages for Local Government Whistleblowers**

The Legislature, in providing for damages to whistleblowers, is explicit both in describing the kind of damages provided, and in limiting the amount recovered. RCW 49.60.250(5) makes specific reference to damages for “humiliation and mental suffering” for a victim of an “unfair practice.”<sup>22</sup> Indeed, mental suffering damages are actually *limited to \$20,000*. *Id.* By comparison RCW 42.41.040(7) describes, *in detail*, all remedies provided to a local whistleblower, but fails to mention humiliation and mental suffering. The omission is a significant one, given that the same legislature, on the same day, enacted the local government whistleblower code while revising and updating the whistleblower code for state employees. *See* Motion to Dismiss, Appendices A, CP 1392-1405, (Local Whistleblower Protection Act, [SSB 6321], Ch. 44, 1992 Laws of Wash), and B, CP 1406-1430, (Whistleblower Investigation and Protection Act, [ESSB 5121], Ch. 118, 1992 Laws of Wash).

As the 1992 Legislature was revising provisions of RCW 42.40, it revised RCW 49.60.250, which limited mental suffering damages to an

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<sup>22</sup> An “unfair practice” includes retaliation against a whistleblower “as defined in RCW 42.40.” RCW 49.60.210. RCW 42.40.020(2) defines an employee as “any individual employed or holding office in any department or agency of state government.”

amount “not to exceed one thousand dollars.” *See id.*, Appendix B. Thus, when the Legislature created local whistleblower statutory rights, it was clearly aware of emotional distress remedies existing for state whistleblowers, but did not include emotional distress damages *or* cross reference the provisions for such damages in RCW 49.60. Where the Legislature uses certain language in one instance, but different language in another, a difference in legislative intent is presumed. *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998). Looking to the overall scheme provided by the local whistleblower statute and City Code, there is no implication that the Legislature intended to provide emotional distress damages.

The presumption here is that the Legislature intended to give local government whistleblowers some, but not all, of the remedies provided to their state employee counterparts. Given the obvious difference of resources between many local governments and state government, this policy decision makes sense. It is also noteworthy that even a state employee is *limited* in his or her access to emotional harm damages. RCW 49.60.250(5). This provision must be viewed as recognition by the Legislature that there are limits to relief available to a whistleblower. In this case, plaintiff is limited to damages for lost pay, attorneys’ fees, and costs. He also has a right to pursue reinstatement in rank, which he has already achieved. He may not pursue his

million dollar emotional distress claim because that is not what the Legislature intended.

**H. Plaintiff's Statutory Remedies Require His Claims Be Heard by an Arbitrator**

Plaintiff testified that his financial losses are \$35,378. CP 1370 (statement of damages). Although the City contends this overstates economic loss,<sup>23</sup> it is clear that the amount in controversy is less than \$50,000 for economic harm. Pursuant to RCW 7.06.020 his claim (if there is jurisdiction in Superior Court) is subject to mandatory arbitration. LMAR 1.1.

**I. The Court Correctly Ordered Plaintiff to Submit to a CR 35 Mental Examination**

**1. Plaintiff placed his mental state in controversy**

In his complaint, plaintiff alleged that defendant's actions caused him emotional harm. He sought damages for "loss of enjoyment of life, pain and suffering, mental anguish, emotional distress, injury to reputation, and humiliation." CP 15. Since his prayer for relief clearly placed plaintiff's mental state "in controversy," defendant asked the Court to order plaintiff to submit to a CR 35 examination. Under CR 35(a), "an examination by a physician or a psychologist requires a showing that the person's physical or mental condition is in controversy, and that good

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<sup>23</sup> In 2009, plaintiff actually worked significant overtime hours resulting in total compensation of \$205,000. CP 1620 (Overbey Dec., Ex. B).

cause exists for such an examination to determine the existence and extent of such asserted injuries.” *Schlagenhauf v. Holder*, 379 U.S. 104, 119, 85 S.Ct. 234, 13 L.Ed. 152 (1964). The Court agreed with defendant that plaintiff had placed his mental state in controversy and ordered him to appear for an independent mental examination. CP 843-844. The Court’s ruling did not abuse its discretion under CR 35.

The factors used by courts to address the “in controversy” requirement in Rule 35 are as follows: “(1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) the Plaintiff’s offer of expert testimony to support a claim of emotional distress; and/or (5) the Plaintiff’s concession that her mental condition is in controversy within the meaning of Rule 35.” *Bethel v. Dixie Homecrafters, Inc.*, 192 F.R.D. 320, 322 (N.D.Ga.2000). Plaintiff’s pleadings, along with his deposition testimony, interrogatory answers, and the charts he prepared purporting to show the severity of his emotional injuries, amply place his emotional state in controversy.

A complaint that goes beyond a mere assertion of emotional distress is sufficient to put the Plaintiff’s mental condition “in controversy,” even without a claim of intentional or negligent infliction of

emotional distress. See *Ali v. Wang Laboratories, Inc.*, 162 F.R.D. 165, 168 (M.D.Fla. 1995); *Shepherd v. American Broadcasting Companies, Inc.*, 151 F.R.D. 194, 212-213 (D.D.C. Sep 03, 1993), *reversed on other grounds*, 62 F.3d 1469 (D.C.Cir. 1995). Rule 35 only requires that a person's mental condition be placed in controversy and “does not require specific claims of personality alterations or behavioral disorders.” *Schlunt v. Verizon Directories Sales-West, Inc.*, 2006 WL 1643727 \* 3 (M.D.Fla. 2006).

In addition to the many types of emotional distress he has alleged in his complaint, plaintiff has testified to alleged specific and significant symptoms of emotional distress, including stress, anxiety, grief, humiliation, depression, increased drinking, sleeplessness, anger, weight gain, loss of interest in relationships with family and friends, and lack of interest in daily activities and amusements. CP 2069-2076, CP 2080-2092. The California Supreme Court has held that plaintiff's assertion of the same types of injuries placed her emotional condition in controversy and constituted good cause for a CR 35 examination. *Vinson v. Superior Court*, 43 Cal. 3d 833, 839-40, 740 P.2d 404 (Cal. Sup Ct. 1987). Plaintiff testified that these injuries are ongoing. At his deposition he produced charts that he prepared to demonstrate the severity of his emotional distress in the categories of anguish, humiliation, anxiety and stress. CP

2067, CP 2092, CP 687-689, and CP 760-764. Ongoing emotional distress is grounds for a CR 35 examination. *Henry v. City of Tallahasee*, 2000 WL 33310900 (N.D. Fla. 2000).

Further, plaintiff testified that his family doctor administered an examination to plaintiff to determine if he was suffering any mental disorder. CP 2069. As the result of the test, plaintiff's doctor concluded that plaintiff was suffering from a mental disorder caused by his downgrade. CP 2070. In his answers to interrogatories, plaintiff evaluated his emotional distress damages as one million dollars. CP 1371. His claims for emotional distress damages are over 30 times greater than his lost economic damages of \$35,000. These facts place plaintiff's mental state in controversy, and provide good cause for the mental examination ordered by the trial court.

## **2. Good cause existed for the CR 35 examination**

In addition to finding that plaintiff had placed his mental state in controversy, good cause existed for defendant to examine plaintiff under CR 35. Plaintiff made sweeping allegations of the various types of emotional distress he claimed to have incurred in his complaint. He followed his pleading with a series of self-prepared charts that purported to show periods of time when he was suffering from severe anguish,

humiliation, anxiety and stress. CP 687-690, CP 760-764. Plaintiff served interrogatory answers claiming one million dollars in emotional distress damages. CP 1371. He stated in his deposition that his emotional distress was ongoing. CP 2076, CP 2092. Defendant's exposure to emotional distress damages dwarfs plaintiff's modest claim for economic loss. Plaintiff's doctor conducted an examination to diagnose a mental disorder.

Thus, defendant's need for the examination was based on facts, not on mere conclusory allegations contained in the pleadings. Defendant's forensic psychiatrist examined plaintiff to determine what, if any, role the downgrade played in any emotional distress that plaintiff had incurred. Among the subjects to address in the examination was the significance of plaintiff's charts depicting his emotional distress, an assessment of the scope and extent of plaintiff's one million dollar emotional distress claim, the validity of the diagnostic test administered by plaintiff's doctor, and the basis for plaintiff's claim that his emotional injuries were "ongoing." The trial judge had ample grounds for ordering that plaintiff undergo a CR 35 mental examination. *In Re Green*, 14 Wn.App. 939, 943, 546 P.2d 1230 (1976) citing *Schlagenhauf v. Holder*, 379 U.S.104, 118, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964).

Emotional distress is in controversy and good cause exists for examination where plaintiff's emotional state of health "...appears to be

the central factual dispute in reference to damages.” *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296, 299 (E.D. Pa. 1983). Good cause exists where the “severity of plaintiff’s emotional problems has been placed on this record and will play a central role in this case.” *Eckman v. Univ. Rhode Island*, 160 F.R.D. 431, 433 (D.R.I. 1995). *Shepherd v. American Broadcasting Companies, Inc.*, 151 F.R.D. 194, 214 (D.D.C. 1993) (mental condition in controversy and good cause found where “gravity of [plaintiff’s] mental distress seems central to her overall damage claim”). The lower court had good cause to order the examination.

**3. The order to undergo a CR 35 Examination did not conflict with *Jaffee v. Redmond***

Plaintiff argues that *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) requires a different result because the Supreme Court refused to allow a plaintiff to force a defendant police officer to undergo a mental examination. Plaintiff asserts that the need to protect a police officer’s right to receive counseling and treatment after a traumatic incident is analogous to plaintiff’s right to undergo treatment free from fear of having statements made during therapy revealed later. Opening Brief, p. 41. But plaintiff has not undergone any therapy and there is no evidence that he declined to do so because of his fear that he

would be forced to reveal the contents of any therapy. Further, once he put his emotional state “in controversy,” defendant’s right to determine the basis for plaintiff’s million dollar claim for emotional distress differed radically from society’s interest in protecting a police officer’s right to obtain treatment for the impact of having to shoot a citizen during the performance of the officer’s duties.

Plaintiff put his emotional state at issue when he instituted the litigation. Unlike the police officer, “...who had a controversy thrust upon him, a party who chooses to allege that he has mental and emotional difficulties can hardly deny that his mental state is in controversy.” *Vinson v. Superior Court, supra*, 740 P.2d at 409. *Jaffee* does not support plaintiff’s position that the CR 35 examination was improper.<sup>24</sup> No such records are at issue here.

**J. The Court Properly Granted Defendant’s Request to Prohibit Plaintiff from Discovering Private Personnel Files That Are Irrelevant to His Claims**

**1. Plaintiff failed to show that the personnel files are relevant to his claims**

In order to prevail on his whistleblower claim, plaintiff had to show that (1) he engaged in protected activity; (2) the employer knew that;

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<sup>24</sup> Plaintiff’s reliance on *Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. Cal. 2003) is misplaced. *Fitzgerald* relied upon *Jaffee* to quash subpoenas seeking to obtain plaintiffs’ psychiatric, psychological, counseling and group therapy records.

and (3) the employer took an adverse action against plaintiff because of his protected activity. Plaintiff sought discovery of personnel files of the decision maker, Fire Chief Gregory Dean, Assistant Chief Ken Tipler and four other deputy chiefs – Michael Walsh, Robert Lomax, Steve Oleson and Gary English. CP 171-172. Based on the nature of his claim and the factual allegations, plaintiff failed to establish any basis for reviewing their personnel files.<sup>25</sup> The court refused to allow plaintiff to access their files. CP 419-420. The plaintiff sought reconsideration and the court ruled, “what I’m telling you is that I’m imposing a limit. That you don’t get to look at the personnel records of everybody to compare your client when he was not dismissed for personnel issues.” VRP 106:15-18 (10/29/10 Hearing).

Plaintiff contended that he was entitled to review complete deputy chief personnel files to establish their qualifications and experience. CP 226-227. However, there is no evidence that either the Fire Chief or any of the Assistant Chiefs, who recommended plaintiff for downgrade, reviewed personnel files in order to recommend or select plaintiff for downgrade.

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<sup>25</sup> Plaintiff also demanded to review the files of three firefighters, one of whom (Footer) was the employee whose activities led to the filing of plaintiff’s whistleblower complaint. CP 374-376. These employees were neither comparators nor decision makers.

Plaintiff was provided with a complete copy of his own personnel file and found no evidence of any retaliatory motive in his file.

Moreover, the appropriate way to gather information that might be relevant to the decision at issue is to make specific, narrow discovery requests, not to seek production of entire personnel files. *Raddatz v. Standard Register Co.*, 177 F.R.D. 446 (D. Minn. 1997) (production of personnel files in their entirety should not be ordered when relevant information is available through less intrusive means of discovery) *citing Sanchez v. City of Santa Ana*, 936 F.2d 1027 (9th Cir. 1990). Personnel files contain documents on a wide variety of subjects, including employment applications, test results, address and emergency contact information, payroll deduction and benefit selection records, beneficiary designations, commendations and other irrelevant information. Not only are these records not relevant, but they are private.

**K. The Lower Court Correctly Refused to Allow Plaintiff to Discover Personnel Files Containing Private Information**

Personnel files contain perhaps the most private information about an employee within the possession of an employer. *Whittingham v. Amherst College*, 164 F.R.D. 124 (D. Mass. 1995). Many documents found in a personnel file relate to matters “which most individuals would not willingly disclose publicly.” *Dawson v. Daly*, 120 Wn.2d 782, 797,

845 P.2d 995 (1993), abrogated in part by *Soter v. Cowles Publ'g Col*, 162 Wn.2d 716, 174 P.3d 60 (2007). Even with broad application of discovery standards, the privacy interests of these individuals in their personnel files outweigh the interest of a litigant seeking personnel records of marginal relevance. See *Miles v. Boeing Co.*, 154 F.R.D. 112 (E.D. Pa. 1994) (discovery of confidential personnel files should be limited); *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994) (releasing personnel files of others would violate privacy interests). Even requests for relevant employment information must be balanced against privacy interests in a personnel file. *Sanchez v. City of Santa Ana*, 936 F.2d 1027 (9th Cir. 1990).

**L. The Washington Public Records Act Does Not Control the Standard for Discovery in This Litigation**

Plaintiff complains that he was entitled to the information he seeks under the Washington Public Records Act, (“PRA”) RCW 42.56, therefore he should have been allowed to discover the personnel files. However, in Washington, a personnel file is not necessarily a public record; the determination of whether the information is subject to disclosure depends on the nature of the information within the file. *Tacoma Public Library v. Woessner*, 90 Wn.App. 205, 951 P.2d 357 (1998), remanded on other grounds, 136 Wn.2d 1030, 972 P.2d 101 (1998). Information that could

violate personal privacy interests is exempt from disclosure. RCW 42.56.210 (formerly codified at RCW 42.17.310). Personnel evaluations and letters of direction qualify as personal information within the meaning of the exemption. *John Does v. Bellevue School Dist.*, 164 Wn.2d 199, 211, 189 P.3d 139 (2008).

Moreover, the discovery rules and the PRA are two separate means of obtaining information. The Superior Court has the responsibility for determining what is discoverable under the Civil Rules. The mere fact that a record may be subject to disclosure under the PRA does not mean that it is discoverable. *O'Connor v. DSHS*, 143 Wn.2d 895, 25 P.3d 426 (2001). Requestors are not entitled to disclosure of documents that would not be available under the rules of civil discovery. RCW 42.17.310(1)(j). The trial court did not err when it denied plaintiff's discovery of personnel files.

## **V. CONCLUSION**

The Superior Court's decision dismissing the complaint was correct and should be affirmed. Woodbury has no cause of action in Superior Court, unless that court sits in appellate capacity. He is limited in his administrative hearing to the remedies enumerated in the statute applicable to local government whistleblowers, which does not include a remedy for emotional distress.

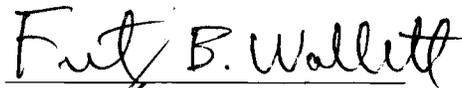
The issues pertaining to discovery of medical records are dependent on the rulings regarding remedies. If there is no claim for emotional distress, then the City agrees there is no basis for recovery of medical records and the court does not have to decide either the CR 35 or medical records issue.

The issue regarding personnel files is relevant in any case. The lower court did not abuse its discretion in denying discovery of personnel files that are not likely to lead to admissible evidence and contain private and sensitive information about non-parties.

DATED this 6th day of April, 2011.

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Assistant City Attorneys

Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on this date, I caused a true and correct copy of the foregoing to be served on the following in the manner(s) indicated:

John P. Sheridan Sheridan Law Firm, PS 1200 Hoge Building 705 Second Ave. Seattle, WA 98104 jack@sheridanlawfirm.com	<input type="checkbox"/> U.S. MAIL <input type="checkbox"/> LEGAL MESSENGER <input type="checkbox"/> FACSIMILE <input type="checkbox"/> E-MAIL <input checked="" type="checkbox"/> HAND DELIVERY
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DATED this 6th day of April, 2011, at Seattle, King County, Washington.

  
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ANGELICA M. GERMANI

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