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No. 66408-5

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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JAMES WOODBURY,

Plaintiff/Appellant/Cross-Respondent,

v.

CITY OF SEATTLE,

Defendant/Respondent/Cross-Appellant,

ON APPEAL FROM KING COUNTY SUPERIOR COURT

No. 09-2-22704-7 SEA
(Hon. Michael C. Hayden)

FIRST AMENDED BRIEF OF APPELLANT

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I. INTRODUCTION

Plaintiff/Appellant Chief James Woodbury (“Chief Woodbury”) is a 24-year veteran of the Seattle Fire Department (“SFD”). He currently serves in a Deputy Chief of Operations position, having worked his way up the ranks from firefighter. In 2008, Chief Woodbury worked in the Fire Marshal’s Office (“FMO”) as a Deputy Chief, Assistant Fire Marshal. On October 17, 2008, Chief Woodbury filed a whistleblower complaint with the Seattle Ethics and Elections Commission (“SEEC”) related to several instances of misconduct at the FMO, including the Fire Marshal’s failure to bill approximately \$200,000 for work performed by City firefighters at Qwest Field. FMO Lieutenant Milton Footer had been responsible for those billings. Defendant/Respondent City of Seattle does not contest that Chief Woodbury properly filed his SEEC complaint and was entitled to whistleblower protection under Seattle Municipal Code (“SMC”) 4.20.800, *et seq.*¹ RP 10/29/10 at 79. In accordance with applicable procedures, Chief Woodbury filed a complaint alleging retaliation with the Mayor’s Office on January 7, 2009. CP 252.

Although the identity of a SEEC whistleblower complainant is supposed to be confidential, it is uncontested that Fire Chief Greg Dean

¹ Attached as Appendix 1, for the Court’s convenience, is a true and correct copy of SMC 4.20.800, *et seq.*

knew of Chief Woodbury's plans to file a whistleblower complaint from at least two sources prior to the filing of the complaint. It is uncontested that Chief Dean called SEEC Executive Director Wayne Barnett to inform him that a complaint would be filed by an FMO employee. CP 884. It is uncontested that, after Chief Woodbury filed the whistleblower complaint, Chief Dean asked Labor Relations if he could demote Chief Woodbury for performance problems, even though Chief Woodbury has no documented performance problems. Ultimately, when City budget cuts necessitated the abrogation of one of the eleven Deputy Chief positions in late 2008, it was Chief Woodbury who Chief Dean selected for demotion. Prior to Chief Woodbury's whistleblower complaint, SFD planned to use seniority, or time in grade, as the selection criteria. After Chief Woodbury filed the complaint, Chief Dean decided not to use seniority and selected Chief Woodbury for demotion. Several months after the filing of this lawsuit, Chief Woodbury was reinstated to a Deputy Chief position.

Chief Woodbury properly filed an administrative tort claim with the City pursuant to RCW 4.96.020 and waited over sixty days before filing his Complaint in King County Superior Court on June 14, 2009. CP 3. Chief Woodbury asserted claims of whistleblower retaliation under SMC 4.20.810 and RCW 42.41.040, the Local Government Whistleblower Act.

The trial court stayed the administrative proceeding that commenced consistent with his retaliation complaint filed with the Mayor's Office. CP 89.

After extensive discovery, and after the trial court denied the City's summary judgment motion on the merits, just two weeks before trial, which was set to begin on December 6, 2010, the City brought an untimely Motion to Dismiss. The City alleged that, pursuant to the statutes, Chief Woodbury must first have his claims heard by an administrative law judge and only then could appeal the ALJ's ruling in superior court. The City argued that, absent termination, the administrative forum was the only proper forum under the statutes. This exact issue had already been determined early on in the case when the trial court agreed to stay the administrative proceedings while Chief Woodbury pursued his claims in superior court.

In the Motion to Dismiss, the City incorrectly argued that a wrongful discharge in violation of public policy analysis under *Korlund* was appropriate and thus Chief Woodbury "would have the burden of showing that the public policy of protecting whistleblowers is not adequately protected by the existing process under the City's Code, which incorporates the provisions of RCW 42.41." CP 1377-78. Stating initially that he was relying on an unpublished case cited by the City, Judge

Hayden adopted a wrongful discharge in violation of public policy analysis and dismissed Chief Woodbury's claims, even though Chief Woodbury has not been discharged and does not assert a common law wrongful discharge claim.

The City further alleged that Chief Woodbury was not entitled to tort damages under the statutes, including emotional harm damages, but this issue became moot when the trial court granted the City's Motion to Dismiss.

The trial court additionally erred in ruling that Chief Woodbury waived his physician-patient privilege by asserting a "garden variety" claim for emotional harm damages. On that basis, the trial court granted discovery of plaintiff's medical records and granted the City's motion for a CR 35 examination. The trial court also erred in refusing to allow discovery of personnel files related to other SFD comparators.

Chief Woodbury requests that this Court overturn the dismissal of appellant's whistleblower retaliation claim, find that Chief Woodbury did not waive his physician-patient privilege simply by asserting a "garden variety" emotional harm damage claim, that the trial court erred in granting the CR 35 examination, that he is entitled to tort damages under the statutes, and that discovery of personnel files should be permitted.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in granting the City's untimely motion to dismiss Chief Woodbury's SMC 4.20.810 and RCW 42.41.040 whistleblower retaliation claim, and in denying plaintiff's motion for reconsideration, finding that the statutes do not provide a cause of action in superior court. (CP 1635, CP 1654)
2. The trial court abused its discretion in allowing for the release of Chief Woodbury's medical records, finding that a plaintiff waives the physician-patient privilege by asserting a tort claim for emotional harm damages. (CP 729)
3. The trial court abused its discretion in granting the City's motion for a CR 35 examination because the City failed to satisfy the "good cause" and "in controversy" requirements. (CP 843)
4. The trial court erred in denying Chief Woodbury's request for discovery of personnel files related to discipline and performance problems of his comparators. (CP 419, CP 531, RP 10/29/10 at 104-07)

B. Issues Pertaining to Assignments of Error

1. Whether a plaintiff may bring a cause of action directly in superior court under SMC 4.20.810 and RCW 42.41.040 based on the permissive language of the statutes?
 - a. If a cause of action exists, whether a plaintiff is entitled to actual damages, including emotional harm damages?
2. Whether a plaintiff automatically waives the physician-patient privilege, thus allowing for discovery of his or her medical records, by asserting a tort claim seeking emotional harm damages?
3. Whether the trial court abused its discretion in granting the defendant's motion for a CR 35 examination?
4. Whether the trial court erred in refusing to allow discovery of comparator personnel files related to discipline and performance

problems when the defendant openly criticized plaintiff's job performance in discussions with key personnel prior to plaintiff's selection for demotion, and when certain personnel records had already been released to the press?

III. STATEMENT OF THE CASE

A. The City's Motion to Dismiss

Under SMC 4.20.860(C), which incorporates by reference the provisions of RCW 42.41.040, *if* Chief Woodbury was dissatisfied with the response he received from the Mayor's Office to his claim for whistleblower retaliation, he had fifteen days to request a hearing before an administrative law judge. RCW 42.41.040(4). The Mayor's Office determined that the City had not retaliated against Chief Woodbury when it demoted him shortly after he filed his SEEC whistleblower complaint. CP 526. Although Chief Woodbury planned to file suit in superior court, due to the narrow fifteen day deadline to request an ALJ hearing, he did so as a protective measure. CP 17. Chief Woodbury then moved to stay the administrative proceedings based on the permissive language of the statutes. *Id.* In the Motion to Stay, Chief Woodbury directed the court to a federal district court opinion that had recently interpreted SMC 4.20.860 to be permissive, thus allowing a plaintiff to bring a cause of action in either trial court or before an administrative law judge. *Id.* (*citing Eklund v. City of Seattle*, 2008 WL 112040 (W.D.Wash. 2008)). The City

advocated that an administrative forum could adequately and quickly address Chief Woodbury's claims, and that the Motion to Stay essentially asked the court for an "advisory opinion that [Chief Woodbury] has to exhaust his administrative remedies." CP 28. The court granted Chief Woodbury's request for a stay on June 30, 2009 and the parties continued to progress through the case schedule for the next year and a half. CP 89.

The City brought a timely motion for summary judgment, which was denied by the court following oral argument on October 29, 2010. CP 1374. Then, three weeks before trial, on November 12, 2010, the City filed an untimely CR 12(c) motion to dismiss for lack of subject matter jurisdiction. CP 1377. The motion was noted for oral argument on November 19, 2010 and did not comply with CR 12 and CR 56 deadlines for dispositive motions. Plaintiff had two and a half business days to respond to the motion to dismiss, less than the amount of time allotted for non-dispositive motions in King County. CP 1460, King County Local Rule ("KCLR") 7. The court granted the City's motion to dismiss after oral argument on November 19, 2010, finding that SMC 4.20.860 and RCW 42.41.040 do not provide a cause of action in trial court. CP 1635, RP 11/19/10 at 36-39. Because the court granted the motion to dismiss, it did not rule on the City's motion to strike Chief Woodbury's emotional

harm damages claims, which was also based on the language of the statutes. CP 1356.

B. Discovery of Chief Woodbury's Medical Records

Judge Hayden, in a recent prior case also involving plaintiff's counsel, ruled that "[w]hen a plaintiff seeks emotional harm damages under Washington law in a discrimination case brought under RCW 49.60.180, *et seq.*, the plaintiff waives his right to assert the psychologist-patient privilege." CP 551. In that case, Judge Hayden struck the plaintiff's emotional harm damages claim because the plaintiff refused to waive his psychologist-patient privilege. *See id.* In light of this recent ruling before the same trial judge, Chief Woodbury acquiesced to the trial court's prior ruling, and noting his objection, agreed to release his medical records that were arguably related to stresses caused by the retaliation. CP 558. Chief Woodbury submitted complete, unredacted copies of his medical records from January 2005 through July 2010 to the court for *in camera* review because there were records that had nothing to do with emotional harm. CP 720. Upon review of the medical records, the court agreed to quash the City's subpoena to Group Health and that no additional medical records, other than those already produced by Chief Woodbury to the City, should be released. CP 729. The City asked for reconsideration, but the court denied the request. CP 731.

C. Order Granting the City's Motion for CR 35 Examination

The City filed its Motion for CR 35 Examination on August 12, 2010, noting it without oral argument. CP 745. Plaintiff opposed the motion on August 19, 2010, and the City submitted its reply brief on August 20, 2010. CP 808, CP 817. The court granted the City's request for a CR 35 examination on August 26, 2010, but limited the City's request for a six hour examination to three and a half hours. CP 843.

D. Order Denying Discovery of Personnel Files

Subject to the Protective Order, plaintiff requested copies of the personnel files of certain other comparator SFD employees, including other deputy chiefs, Chief Dean, Fire Marshal Chief Tipler, and the SFD firefighters who had engaged in misconduct related to Chief Woodbury's whistleblower complaint. CP 171-72. Although the City had already permitted The Seattle Times to inspect certain personnel files after first giving the employee the opportunity to object, the City refused to provide discovery of the remaining personnel files to plaintiff, even subject to the Protective Order. CP 110, CP 217, CP 421. The court's order stated: "Plaintiff is entitled to receive only documents from employee personnel files that are relevant to the allegations of his complaint. Defendant does not have to produce personnel files." CP 419. This ruling was somewhat vague and unclear and the City used the ruling to refuse discovery of any

additional personnel files, or parts of files. CP 426. Chief Woodbury asked for reconsideration, which the court granted, in part, but not as to the issue of personnel files. CP 426, CP 531. Plaintiff again requested discovery of the personnel files during oral argument on the summary judgment motion, but the request was denied. RP 10/29/10 at 104-07.

E. Factual Summary

Although Chief Woodbury's appeal concerns primarily legal issues, background facts are set forth below for context. The City does not dispute the findings of the SEEC report related to Lt. Footer's improper governmental actions. CP 890-91.

1. The Structure of Seattle Fire Department Administration in 2008

Chief Dean is the head of the SFD. Dean supervises approximately eight direct reports who make up his leadership team, which meets weekly, and in 2008, was composed of Assistant Chief Hepburn, Assistant Chief Vickery, Assistant Chief Nelsen, Assistant Chief Tipler, SFD Human Resources Director Linda Czeisler, Finance Director Chris Santos, IT Director Lenny Roberts, and Communications Director Helen Fitzpatrick. CP 1691-92. At the weekly meetings, the leadership team discusses issues of a department-wide nature. *Id.*

In 2008, there were eleven deputy chiefs who reported to the assistant chiefs. Below them in the chain of command were battalion chiefs and firefighters. CP 1129. Assistant chiefs and deputy chiefs are exempt employees and serve at Chief Dean's pleasure and may be demoted for any reason so long as it is not for a retaliatory or discriminatory reason. CP 1180, CP 1790-92, CP 1826-27. Dean relies on his assistant chiefs to keep him informed of what is happening in the suborganizations they supervise. CP 1747. In 2008, Chief Woodbury ranked sixth among the eleven deputy chiefs. CP 916.

2. From 2002 to 2008, Lt. Footer Engaged in Gross Misconduct Under the Supervision of Fire Marshals Dean, Nelsen, and Tipler

Lt. Footer was placed as an in-house Fire Inspector at Qwest Field and Events Center, owned and operated by First & Goal, Inc. (F&G). CP 972. The 2001 SFD contract with F&G created Footer's inspector position, but did not contemplate or cover the fireguard services used during events at Qwest Field. CP 312. Fireguard services are overtime duty and reimbursable to the City. CP 973. Footer was responsible for submitting time sheets to the SFD finance department so that an invoice could be generated. CP 974.

The SEEC investigation report, which was conducted as a result of Chief Woodbury's whistleblower complaint, and was released after

Woodbury's demotion, found that "Lt. Footer's failure to do his job led to a gross waste of \$195,697 of public funds" between 2002 and 2008. CP 972.

Chief Dean was the Fire Marshal from 2002-2004 and was the Fire Marshal at the time Lt. Footer was sent to work at F&G. CP 1774-75.

Chief Nelsen was Fire Marshal in 2004 when Dean became Fire Chief, and Nelsen held that position until Chief Tipler took over as Fire Marshal in 2007. CP 1748, CP 1808, CP 1129. The SEEC investigation found that Chiefs Dean, Tipler, and Nelsen each bore responsibility for the failure to collect \$195,697 from F&G. CP 973.

3. Since 2004 Chief Dean Ignored Chief Woodbury's Recommendation that Lt. Footer's Assignment at F&G be Rotated Owing to the Possibility of Improper Conduct Over Time

Chief Woodbury was promoted to deputy chief by Chief Dean in 2004. CP 1856-61. Upon promotion to deputy chief, Woodbury was assigned to be the Assistant Fire Marshal under Assistant Chief/Fire Marshal Nelsen and Woodbury held that position until he was demoted in January 2009. *Id.*

Chief Woodbury never directly supervised Lt. Footer either in or out of the FMO. CP 1186. Footer reported through a different chain of command to the Fire Marshal (Dean, Nelsen, or Tipler). CP 1187.

In 2004, Chief Woodbury became concerned that Lt. Footer was acting more like an F&G employee than a SFD inspector. CP 1129. Chief Woodbury was concerned because Lt. Footer could not produce plans typically used by SFD inspectors for reoccurring events. CP 93, CP 1129. Chief Woodbury recommended to Chief Nelsen that Lt. Footer's position be rotated to avoid potential conflicts of interest, as a good business practice. CP 94, CP 1130. Chief Nelsen brought Woodbury's concerns to Chief Dean and then reported back to Woodbury the following: "Chief Nelsen stated to me that Chief Dean had emphatically told him that Lieutenant Footer was not to be rotated out of this position." *Id.*

In 2007, when Chief Tipler became Fire Marshal, Woodbury made this same recommendation to Tipler concerning the need to rotate Footer out of the position as a good business practice. CP 1130, CP 1188-89. Tipler agreed, but indicated that he did not think Chief Dean would permit the rotation. *Id.*

4. In June 2008 Chief Dean Allegedly Learned for the First Time that Footer had Failed to Invoice F&G at a Potential Cost of \$200,000 to the City

In June 2008, Captain Greene learned that Footer had apparently failed to invoice F&G for several years and believed that the cost to the City might exceed \$250,000. First, Greene reported his findings to Tipler, who was visibly upset and brought Greene to meet with Dean. CP 1915-

18. Greene then told Dean, “It looks like there’s invoices missing all the way back to 2002, I can’t really find any of them. . . . Milt Footer understands the process.” CP 1918. At the meeting, Dean did not seem to be upset at all by the news of Footer’s misconduct and suggested that “we need to figure out how much money is missing, see if we can get 50 cents on the dollar, or whatever we can get.” CP 1918-19. Tipler verified that at the June 2008 meeting, Greene told Dean a large amount of money may not have been invoiced: “something up there” near \$250,000 or \$300,000. CP 1944-47.

5. In June 2008, After Diane Hansen Suggests an Outside Investigator for Footer’s Misconduct with F&G, Dean Accuses Hansen, Woodbury and Tipler of Going After Footer

Diane Hansen worked for the SFD for 29 years as a civilian employee. CP 1968. In 2008, Hansen was a Fire Prevention Administrator and Strategic Advisor 3 with civil service protection. CP 1968-69. In 2008, she worked in the FMO and reported to Tipler, and before that, she reported to Nelsen and Dean when they were Fire Marshal. CP 1969-70. Hansen was an advisor and assistant to the Fire Marshals. CP 1970-71.

Hansen first heard of the Footer invoicing issue from Captain Greene the week of June 3, 2008, when he told her that Footer had failed to invoice for seven years of revenue, which she understood to be a large

amount of money. CP 1971-72. After hearing Greene's report, she immediately notified Chief Woodbury, and then she and Woodbury met with Tipler on June 6, 2008. CP 1972-73. At the meeting with Woodbury and Tipler, Hansen told Tipler that this was "a very serious transgression against the public trust and undermined the integrity of the fire marshal's office and the fire department and that it required action." CP 1974. She also expressed her concern to Tipler that positions at the FMO should be rotated. CP 1975.

Through the summer of 2008, Hansen had no sense that active investigations were going forward. CP 1980-83. In meetings with F&G, Hansen and Woodbury were instructed not to discuss the monies owed but not invoiced. *Id.* In discussions with Santos, Tipler, Woodbury, and Hansen, Tipler instructed them to "focus on going forward." *Id.* Hansen understood the amount of unbilled revenue to be between \$230,000 and \$250,000. *Id.*

Chief Woodbury was also an outspoken member of the FMO during the summer and fall of 2008 regarding Lt. Footer's failure to invoice F&G. CP 1130. Chief Woodbury participated in numerous meetings with Hansen, Tipler, fellow Assistant Fire Marshal English, and Greene over the issue. *Id.* He strongly advocated to Chief Tipler that there be some type of investigation and discipline of Lt. Footer. *Id.* However,

Chief Dean instructed Tipler to inform Woodbury and Hansen that the financial investigation was over. CP 1881.

Once Hansen and Woodbury were told that the financial investigation was over, and Footer's demand for two all-access passes to the Hannah Montana concert came to light around that same time, Hansen and Woodbury began to speak to Chief Tipler about filing a whistleblower complaint or talking with the FBI. CP 1130, CP 1959-60. Chief Woodbury placed copies of the Seattle Municipal Code whistleblower provisions on Chief Tipler's desk in September 2008. *Id.*

Chief Tipler told Chief Dean that Chief Woodbury, Captain Greene, and Hansen were threatening to file an ethics complaint regarding Lt. Footer's misconduct. CP 1959-60. Chief Dean "was concerned about the public perception if this thing got out." CP 1948. Until Woodbury filed the January 2009 whistleblower retaliation complaint with the Mayor's Office, the Mayor's Office had no idea of Footer's misconduct because Dean had not told the Mayor. CP 2005-06.

6. On October 17, 2008, Chief Woodbury Filed a Whistleblower Complaint With the SEEC After Dean and Tipler Refused To Act

Chief Woodbury drafted his whistleblower complaint in September 2008 and showed it to Chief English, Hansen, and Captain Greene for their review. CP 1130. The whistleblower complaint is dated September

30, 2008, and concerns two allegations of misconduct on behalf of Lt. Footer – the failure to invoice F&G and the demand for all access passes to the Hannah Montana concert at Key Arena. CP 2008. The whistleblower complaint states that the failure to invoice F&G had not been done since 2001 and that an estimated \$210,000 to \$250,000 had not been recovered by the City. *Id.* Chief Woodbury met with Kate Flack and Wayne Barnett of the SEEC to discuss the complaint, pre-filing, on October 7, 2008. CP 101-02, CP 1131. Then, on October 17, 2008, Chief Woodbury filed his whistleblower complaint with the SEEC. CP 101-02, CP 2008.

7. On or Before October 17, 2008, Greene Informed Chief Dean That Woodbury was Filing an Ethics Complaint with the SEEC

Greene and Dean told conflicting stories in their depositions. CP 1742-46, 1784-89, 1925-33. But, after all the contradictory testimony, Dean finally admitted in his summary judgment declaration that he knew Woodbury went to the SEEC in September 2008: “Also in September, Greene...mentioned he was being pressured by Woodbury, to join in a complaint that would be presented to the SEEC.” CP 1005. Woodbury was informed of his demotion in December 2008. CP 271.

8. After Learning that Woodbury Filed a Whistleblower Complaint with the SEEC, Chief Dean Begins to Plot

Retaliation Against Woodbury by Deselecting Deputy Chief Walsh for Demotion

In August 2008, the Mayor's Office asked the SFD to abrogate an Assistant Chief position from the 2009 budget, but Chief Dean instead offered to abrogate a Deputy Chief position and a Lieutenant position. CP 2021.

In October 2008, Michael E. Walsh had been publicly identified by Assistant Chief Hepburn as being the person who would be demoted because he was last to be promoted, thus first to be demoted. CP 1702-05. Seniority had been "the primary factor in making moves, when moves were required" within the SFD. CP 1993. Chief Dean stated that, based on advice received from HR, he thought the civil service rules applied to the deputy chief demotion, which is why he believed Walsh would be the person demoted. CP 1781-82, CP 1790-98. Dean seemed to rely on this information for some time, even talking to Walsh about his likely demotion. *Id.* But HR Manager Travis Taylor admitted that Dean knew within 24-hours of inquiring that the civil service rules did not apply to deputy chiefs. CP 1887-89, CP 1898. HR Director Czeisler confirmed for Dean that he had several options and was not required to use seniority. CP 1835-39, CP 1887, CP 1898. Furthermore, it was common knowledge, at least among battalion chiefs and above, that the deputy chief position

serves at the pleasure of the Fire Chief and is exempt from the civil service rules. CP 2026-27, CP 1740.

9. Dean Asked City Labor Relations If He Could Demote Woodbury for Alleged Performance Issues

In mid-November 2008, several weeks after Chief Dean learned that Woodbury was filing a whistleblower complaint with the SEEC, Chief Dean spoke with David Bracilano and Julie McCarty of the City's Labor Relations department to ask if he could demote Chief Woodbury based on performance in the planned abrogation. CP 1776-78, CP 1783. Bracilano and McCarty told Chief Dean that he could not use performance as a basis for the demotion. *Id.* Woodbury had not been subjected to any progressive discipline. CP 1136.

An informal meeting was held on November 18, 2008 between Labor Relations and the chiefs union to discuss the planned abrogation of the deputy chief position. CP 1126-27, CP 1331. Bracilano and McCarty stated that the name they heard for demotion was Chief Woodbury. *Id.*

The inference to be drawn on the following events is that they were designed to cover-up Dean's retaliation. Dean wound up asking for volunteers. When no deputy chiefs volunteered to be demoted, Chief Dean set up meetings with the four assistant chiefs allegedly to decide which deputy should be demoted. CP 1800. Chief Dean did not invite HR to

attend the meetings and no notes were taken at any of the meetings. CP 1801, CP 1805. Chief Dean did not consult HR or the legal department regarding the demotion decision at any time. CP 1835, CP 1806.

Chief Dean testified that he did not criticize Chief Woodbury's performance during the assistant chief meetings. CP 1802-03. Chief Dean also did not inform the assistant chiefs of what he had learned from Labor Relations – that the demotion could not be based on performance. CP 1802. Chief Tipler testified that the performance of each deputy chief was discussed during the meetings. CP 1964. Chief Nelsen testified that, out of all of the other deputy chiefs, Chief Dean criticized only Chief Woodbury's performance at the meetings. CP 2053-58. Chief Hepburn testified that Chief Dean criticized the performance of only two deputy chiefs – Chief Woodbury and Chief Oleson. CP 1696-98. Hepburn also claimed that Oleson was ruled out because of his age and the fear of an age discrimination claim, as was Rosenthal as the only woman, they claim they feared a lawsuit. CP 1699-1701, CP 1706-08. Hepburn also admitted that had he known that Woodbury filed a whistleblower complaint, it would have been “a cause for discussion.” *Id.*

Chief Woodbury was selected for demotion, with the rationale given that he was slated to go into the position to be abrogated in January 2009. CP 1804. Chief Lomax, who was currently in the position to be

abrogated, Special Operations, was not considered for demotion. CP 1809-10. Chief Dean testified that he simply “didn’t bring it up.” CP 1810.

When Chief Dean informed Chief Woodbury that he was selected for demotion, Chief Woodbury asked whether, should a deputy chief vacancy occur in the future, he would be considered for the position. CP 1134, CP 1823-24. Chief Dean responded: “That’s not the way the rules are written,” or words to that effect. *Id.*

10. Dean Demoted Woodbury to Battalion Chief, But Promoted Him Again After Woodbury Filed This Lawsuit, Despite Dean’s Claims that Woodbury Had Performance Problems

After Chief Woodbury filed this lawsuit, Dean re-promoted him to Deputy Chief of Training, an isolated position under Chief Vickery, who further retaliated against Woodbury. CP 927-30, CP 1134, CP 1198-1201. Dean was unable to explain why he wanted Woodbury demoted before the lawsuit, but thought he would make a good Deputy Chief after the lawsuit was filed. CP 1811-12.

After Chief Woodbury filed another administrative claim concerning Chief Vickery’s retaliation, and Chief Dean and other managers testified and their mendacious testimony became apparent, the City transferred Chief Woodbury again to his current position in Operations.

IV. ARGUMENT

A. The Trial Court Improperly Applied the Reasoning of an Unpublished Wrongful Discharge Case to Plaintiff's Statutory Whistleblower Retaliation Claims

The City labeled its Motion to Dismiss as both a CR 12(b)(1) motion for lack of subject matter jurisdiction and a CR 12(c) motion for judgment on the pleadings. CP 1377-78. The trial court ruled that it had subject matter jurisdiction over the action, but that Chief Woodbury could not bring a cause of action in trial court under SMC 4.20.860 and RCW 42.41.040. CP 1635, RP 11/19/10 at 50-51.

The standard of review for a CR 12(c) dismissal is de novo. *Parrilla v. King County*, 138 Wn. App. 427, 431-32, 157 P.3d 879 (2007). “The factual allegations contained in the complaint are accepted as true.” *Id.* Additionally, “[q]uestions of law are reviewed de novo.” *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (“The meaning of a statute is a question of law reviewed de novo”).

The crux of the City's argument appears to be that the plain meaning of the language of SMC 4.20.860 and RCW 42.41.040 creates a cause of action only in the administrative forum. CP 1384. The City argues that the legislature intended the trial court to sit only in appellate capacity for local government whistleblower claims brought under the

statutes. *Id.* In order to demonstrate the legislative intent, the City points to language in RCW 42.40, the State Employee Whistleblower Act, which expressly grants a cause of action to state employee whistleblowers under the Washington Law Against Discrimination. RCW 42.40.050, RCW 49.60.

However, in the Motion to Dismiss, the City misled the Court by arguing a wrongful discharge in violation of public policy analysis and citing to an unpublished Division I case in a footnote, which applied a wrongful discharge analysis to RCW 42.41, the Local Government Whistleblower Act.² CP 1378. The trial court latched onto this wrongful discharge analysis, despite repeated attempts by plaintiff to explain that he was not asserting a wrongful discharge claim and the “jeopardy” element analyzed by the court in the unpublished case, which applied *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005), was not applicable to his claims. RP 11/19/10.

In the Motion to Dismiss, the City incorrectly stated that Chief Woodbury “would have the burden of showing that the public policy of protecting whistleblowers is not adequately protected by the existing process under the City’s Code, which incorporates the provisions of RCW

² The City’s citation of an unpublished Division I opinion was in violation of GR 14.1(a).

42.41.” CP 1377-78. This is not the case. The “burden of showing that the public policy...is not adequately protected by the existing process” is a burden under the “jeopardy” element of a wrongful discharge in violation of public policy claim. *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 183, 125 P.3d 119 (2005). Chief Woodbury has not been discharged and does not assert a wrongful discharge in violation of public policy claim. He is asserting statutory violations under SMC 4.20.860 and RCW 42.41.040.

When the trial court first began to adopt the wrongful discharge reasoning of the unpublished opinion in *Blumhoff v. Tukwila School Dist. No. 406*, 2008 Wn. App. LEXIS 2704 (Div. I, 2008), even the City attorney tried to clarify the issue for the court:

THE COURT: And you found *Blumhoff v. Tukwila School District*, an unpublished opinion from the Division 1?
MS. OVERBEY: I did. I don't think that is really the dispositive case here, because that was really a discussion about whether someone that has a tort claim for wrongful discharge in violation of public policy is adequately protected by the statute. I don't think this is a tort claim, so I don't think that is dispositive.

I mentioned it because even if there were a finding that this is a tort claim, which I don't think it is, that Division 1 has already stated its opinion about whether whistle-blowers are adequately protected by the protections in 42.41 so that they don't have an independent wrongful discharge in violation of a public policy claim.

Of course, that can't apply here, because Chief Woodbury hasn't been terminated. He can only have a Common Law claim, and that is pretty clear from the

Wright [sic] decision, which is published, that if you are suffering from some sort of discipline below termination, you don't have an independent tort claim. Our supreme court won't recognize that.

RP 11/19/10 at 6 (referencing *White v. State*, 131 Wn.2d 1, 29 P.2d 39 (1997)). Although towards the end of oral argument, Judge Hayden backed away from "relying" on an unpublished opinion, throughout the argument, he expressed his belief that the federal district court case cited by Chief Woodbury (*Eklund*) and the Division I case cited by the City (*Blumhoff*) were at odds with each other. RP 11/19/10 at 9, 37-39, 49-50. In the Motion for Reconsideration, Chief Woodbury attempted to clarify again for the court that *Blumhoff* was applying a *Korslund* wrongful discharge analysis, while Chief Woodbury was asserting a claim directly under the statutes, which was the exact issue analyzed in *Eklund*. CP 1637.

1. The Statutory Language of SMC 4.20.860 and RCW 42.41.040 is Permissive and Chief Woodbury was Permitted to Bring his Cause of Action in Either the Administrative Forum or in Trial Court

RCW 42.41.050 permits local governments to create their own policies and procedures for reporting improper governmental actions and protecting employees from being retaliated against for reporting improper governmental actions, as long as those policies comply with the intent of RCW 42.41. It states: "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 of Seattle did just that when it enacted SMC 4.20.800, *et seq.*, which incorporates certain provisions of RCW 42.41.

SMC 4.20.860(C) states:

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.

RCW 42.41.040(4) states:

Upon receipt of either the response of the local government or after the last day upon which the local government could respond, the local government employee **may** request a hearing to establish that a retaliatory action occurred and to obtain appropriate relief as defined in this section. The request for a hearing **shall** be delivered to the local government within fifteen days of delivery of the response from the local government, or within fifteen days of the last day on which the local government could respond.

Emphasis added in both. It is a common rule of statutory construction that the word “‘shall’ is construed as mandatory and ‘may’ is construed as permissive language.” *State v. Goins*, 151 Wn.2d 728, 749, 92 P.3d 181 (2004). Interpretation of whether SMC 4.20.860 and RCW 42.41.040

provide a cause of action in superior court appears to be one of first impression in Washington.

In *Eklund v. City of Seattle*, 2008 WL 112040 (W.D.Wash. 2008), Judge Zilly analyzed the same statutes at issue in the present case and found that the plaintiff was not required to exhaust all administrative remedies before filing a claim in the superior court. The court based its ruling on the permissive language in both statutes. The court stated:

Defendants [the City of Seattle] admit that the language in the state statute providing that an “employee may request a hearing” is permissive. Defendants attempt to contrast this language with the Seattle ordinance’s “shall” request a hearing language. However, ***Defendants have misconstrued the Seattle ordinance – nowhere does it provide that an employee “shall request a hearing.”*** The applicable section of the Seattle Municipal Code provides in full: *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. The SMC 4.20.860(C)’s language “[i]f an employee ...desires a hearing” is parallel to RCW 42.41.040(4)’s language “the local government employee may request a hearing.” Both are permissive.*

Id. at *7-8 (emphasis added). The City made the same argument in this case that the court considered and rejected in *Eklund*. CP 1377, CP 1621.

In that case, the City was willing to admit that RCW 42.41's language, but not the SMC language, was permissive.

Although Eklund also brought a claim for wrongful discharge in violation of public policy, that claim was not a part of the defendant's partial summary judgment motion. *Id.* at *3 n.3, 4. Therefore, in *Eklund* and in the instant case, the claims were brought in the trial court as statutory tort claims under SMC 4.20, not as wrongful discharge in violation of public policy claims, and "jeopardy" is not an element of this claim.

At oral argument and in the pleadings, the City suggested that perhaps the legislature merely intended to state that an individual alleging whistleblower retaliation *may* bring a claim in the administrative forum, or *may* bring none at all. RP 11/19/10 at 31-32 ("The choice is file a claim here or don't file a claim."), CP 1622 ("Plaintiff may or may not initiate a hearing at OAH, but he does not have an individual cause of action in this court.").

In *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 55, 821 P.2d 18 (1991), the Supreme Court rejected the defendants' argument that the use of the word "may" in the challenged statute implied only that the plaintiff could file an administrative claim or none at all. The Court stated:

Defendants argue, however, that even if it is permissive, use of the term “may” means that if a worker wants to claim retaliatory discharge, he or she may do so under the statute, but he or she may also choose not to pursue an action at all. Contrary to defendants’ contention, it is unlikely the Legislature used a permissive term simply to tell a worker he or she may choose *not* to seek redress for an alleged retaliatory discharge. Indeed, by extending defendants’ reasoning, a statute which provided that “[t]he following actions shall be commenced within six years” (RCW 4.16.040) would apparently require the filing of the action (as opposed to permitting plaintiff the choice). This is plainly nonsense.

Use of the term “may” in the same provision in which “shall” is used is strong evidence that the Legislature did not intend [the statute] to provide the exclusive procedure and remedies....Further, the statute contains no express language of exclusivity, nor does it even contain language strongly suggestive of exclusivity.

Id. at 55-56 (internal citations omitted). *See also Wilson v. City of Monroe*, 88 Wn. App. 113, 125, 943 P.2d 1134 (1997) (citing *Wilmot* and finding use of the terms “may” and “shall” in the same statute to be language indicating non-exclusivity). The legislature intended RCW 42.41.040 to contain permissive language and SMC 4.20.860 mirrors this language. In *Martini v. Boeing Co.*, 137 Wn.2d 357, 365-68, 971 P.2d 45 (1999), the Court noted that one should look first to the plain, unambiguous language of the statute in interpreting its meaning.

Chief Woodbury does not dispute that the Office of Administrative Hearings (“OAH”) has jurisdiction over his claims, but there is no reason to believe, especially considering the permissive language of the statutes,

that the administrative forum was meant to have exclusive original jurisdiction. In *Ledgerwood v. Lansdowne*, 120 Wn. App. 414, 420, 85 P.3d 950 (2004), the Court of Appeals explained that *original jurisdiction* does not mean the same thing as *exclusive original jurisdiction*. The court stated: “If a court has original jurisdiction, an action may be filed there. If it has exclusive original jurisdiction, the action must be filed there and nowhere else....When the legislature means exclusive original jurisdiction, it says exclusive original jurisdiction.” *Id.* The City can point to no language in either SMC 4.20.860 (or RCW 42.41.040 if it were to apply) that supports a legislative mandate that exclusive original jurisdiction rests with the OAH. Indeed, the language of the statutes states “if” and “may,” rather than “shall.” Chief Woodbury was entitled to bring his claim either with the OAH or in superior court, and he chose superior court. *Sales v. Weyerhaeuser Co.*, 163, Wn.2d 14, 19, 177 P.3d 1122 (2008) (“A plaintiff has the original choice to file his or her complaint in any court of competent jurisdiction”). The City has no basis to assert that there is no jurisdiction in the trial court until Chief Woodbury completes the adjudicative process in the OAH.

In *Keenan v. Allan*, 889 F.Supp. 1320, 1366 (1995), the court held that the plaintiff’s “failure to exhaust her administrative remedies does not bar her whistleblower claim” filed under the local county statute.

Both SMC 4.20.860 and RCW 42.41.040 give Chief Woodbury the option of seeking relief in either the administrative forum or in trial court.

2. *Korlund's Wrongful Discharge Analysis is Not Applicable Here*

In *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005), the Supreme Court explained the framework for analyzing the common law tort of wrongful discharge in violation of public policy. Plaintiffs Korlund and Miller alleged that they were constructively discharged from Dyncorp, a subcontractor of Fluor, the primary contractor at the Hanford Department of Energy site, in retaliation for raising health and safety concerns. *Id.* at 172-73. The Court stated: “To satisfy the elements of the cause of action [for wrongful discharge in violation of public policy], the ‘plaintiff must prove:

- (1) the existence of a clear public policy (*clarity* element);
- (2) that discouraging the conduct in which [he or she] engaged would jeopardize the public policy (*jeopardy* element); and
- (3) that the public-policy-linked conduct caused the dismissal (*causation* element).”

Id. at 178 (quoting *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002)). With respect to the jeopardy element, “the plaintiff has to prove that discouraging the conduct that he or she engaged in would jeopardize the public policy” and “that other means of promoting the public policy are inadequate.” *Id.* at 182. The *Korlund* plaintiffs relied on

the public policy protecting them from whistleblower retaliation found in the Energy Reorganization Act of 1974 (ERA). *Id.* at 182. After looking to the ERA, the Court found that the ERA was sufficient to protect the public policy identified by the plaintiffs and thus the plaintiffs could not satisfy the jeopardy element. *Id.* The plaintiffs urged the Supreme Court to adopt the reasoning of the Court of Appeals, which found the ERA’s provisions were permissive and not mandatory. *Id.* However, after noting that the Court of Appeals “confused two distinct legal issues,” the Court stated that “the question is not whether the legislature intended to foreclose a tort claim but 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.” *Id.* at 183.

The *Blumhoff* case cited by City, which the trial court essentially relied on, correctly follows the *Korslund* analysis. The *Blumhoff* court found that the plaintiff could not satisfy the jeopardy element of her wrongful discharge in violation of public policy claim because the provisions of RCW 42.41 adequately protected the rights of whistleblowers. *Blumhoff v. Tukwila School Dist. No. 406*, 2008 Wn. App. LEXIS 2704 (Div. I, 2008). *Blumhoff* did not bring a statutory claim under RCW 42.41 and the court did not analyze whether RCW 42.41 creates an original cause of action in the trial court. Although the court

explained that RCW 42.41 “provides for a hearing before an independent administrative law judge,” the court never touched on the issue of whether this was a permissive or mandatory forum for an individual asserting a claim under the statute since the plaintiff was not asserting a claim under the statute.

The trial court here mixed “two distinct legal issues” in the opposite way as the Court of Appeals in *Korlund*. There, the Court of Appeals looked to whether or not the legislature intended the ERA to be mandatory and exclusive, when it should have analyzed whether the public policy was adequately served by the ERA (the jeopardy element of a wrongful discharge analysis). *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 183, 125 P.3d 119 (2005); 121 Wn. App. 295, 321, 88 P.3d 966 (2004). Here, the trial court analyzed whether the statutes adequately protect the public policy (the jeopardy element of a wrongful discharge analysis), and not whether the legislature intended the statute to be mandatory or permissive, which is the real issue at stake, which was clearly analyzed in *Eklund*.

Blumhoff was properly decided as a wrongful discharge in violation of public policy claim, but it is not applicable to Chief Woodbury’s SMC 4.20 statutory tort claim, and the trial court erred by utilizing that analysis.

3. Under RCW 49.60, a Retaliation Plaintiff Is Not Required to Exhaust Administrative Remedies Prior to Seeking Relief in Trial Court

During oral argument and in the pleadings, the City implied that state employee whistleblowers are required to first file a complaint in the administrative forum and that they are limited in the amount of emotional distress damages they can receive. However, RCW 49.60.230 also uses permissive language; it states that a complaint “may” be filed with the Human Rights Commission. RCW 49.60.030(2) states that a plaintiff is entitled to bring a cause of action under the statute in a court of competent jurisdiction and that the plaintiff is entitled to actual damages. Both the statutes applicable to state government whistleblowers, RCW 49.60.230, and local government whistleblowers, RCW 42.41.040, use permissive “may” language, which provides a cause of action in either the administrative forum or trial court. Even without RCW 49.60.030(2)’s express grant of a cause of action, state government whistleblowers would still be entitled to file in the superior court based on RCW 49.60.230’s permissive language.

The Court in *Smith v. Bates Technical College*, 139 Wn.2d 793, 808, 991 P.2d 1135 (2000), stated that “the court will not intervene and administrative remedies must be exhausted when: (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.” SMC 4.20 fails this test because the permissive language of the statute does not hold that the “claim is cognizable in the first instance by an agency alone” and the administrative remedies cannot provide for the relief sought because the administrative forum does not provide for emotional distress damages for this statutory tort.

Based on the language used, the legislature and the City of Seattle intended the claims to be cognizable in either the administrative or trial court forum. Furthermore, *Bates Technical College* noted that if the plaintiff were required to seek administrative exhaustion and did not prevail, she would be collaterally estopped from bringing the same claims in a civil suit, thus “the administrative remedy could be the *only* available remedy,” which “goes beyond the usual understanding of exhaustion as a *prerequisite* to seeking judicial relief.” *Id.* at 811; *compare Reninger v. State, Dept. of Corrections*, 134 Wn.2d 437, 454, 951 P.2d 782 (1998) (finding that the plaintiffs were collaterally estopped from asserting claims based on the same operative facts in superior court after an unsuccessful attempt in the administrative forum).

B. Chief Woodbury is Entitled to Tort Remedies for his Statutory Tort Claims

Employer whistleblower retaliation is a statutory tort like wrongful discharge of whistleblowers is a tort. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 440, 191 P.3d 879 (2008). The Washington legislature created this tort as it applies to state and local government workers to include retaliatory conduct short of discharge. RCW 42.40.050, RCW 42.41.020.

The City of Seattle adopted its own codification this tort, which applies to retaliatory conduct short of termination, and provides a cause of action for City employees who are victims of a wide range of retaliatory conduct for whistleblowing. The City code defines retaliation as:

“Retaliate,” and its kindred nouns, “retaliation” and “retaliatory action,” mean to make, because of an activity protected under Section 4.20.810, any unwarranted adverse change in an employee’s employment status or the terms and conditions of employment including, but not limited to, denial of adequate staff to perform duties; frequent staff changes; frequent and undesirable office changes; refusal to assign meaningful work; unsubstantiated letters of reprimand or unsatisfactory performance evaluations; demotion, reduction in pay; denial of promotion; transfer or reassignment; suspension or dismissal; or other unwarranted disciplinary action.

SMC 4.20.850. Appendix 1.

The common law tort of whistleblower retaliation resulting in discharge includes damages for emotional harm, as do torts in general.

Brundridge, 164 Wn.2d at 439. To obtain tort damages, a plaintiff must

file an administrative claim and wait sixty-days before filing a lawsuit. SMC 5.24.005, RCW 4.96.020(4). It is uncontested that Chief Woodbury fulfilled his requirements under the law for filing this lawsuit.

The City would like the Court to read into and ignore the plain language of the City's ordinances, a practice which was soundly rejected in *Martini v. Boeing Co.*, 137 Wn.2d 357, 364, 971 P.2d 45 (1999). In *Martini*, the Supreme Court addressed whether the damages of a plaintiff in a discrimination case brought under RCW 49.60 could be cut off because the employee quit, rather than was fired, unless the employee could prove that he was constructively discharged. *Id.* at 363. The Court admonished that one should read the statute and, if the limiting language was not present, then the limitation was not viable. The Court read the statute, which provided for actual damages, and said, "[t]his plain statutory language makes it clear that a person who suffers from *any* violation of the statute shall have a claim for damages." *Id.* at 367. The Court further stated:

It is significant that there is nothing in the plain language of the statute which conditions an award of damages for front or back pay for a violation of RCW 49.60.180(3) upon a separate and successful claim for wrongful discharge under RCW 49.60.180(2). The statute does not in any way limit the type of compensation that can be claimed for discrimination violating RCW 49.60.180(3), but the usual rules which govern the elements of damage for which compensation may be awarded apply.

Id. at 368. The same analysis applies here.

“The Washington legislature waived sovereign immunity as to the political subdivisions of the State and its municipalities in 1967.” *Medina v. Public Util. Dist. No. 1*, 147 Wn.2d 303, 312, 53 P.3d 993 (2002). Since then, tort victims have been able to sue local governments for tort damages. The City of Seattle codified whistleblower retaliation as a tort, which is thus susceptible to tort damage claims. Additionally, as was the case in *Martini*, SMC 4.20.800, *et seq.*, “does not in any way limit the type of compensation that can be claimed.” *Martini*, 137 Wn.2d at 368. The purpose of the Seattle whistleblower code is to “provide City employees a process for reporting improper governmental action and protection from retaliatory action.” SMC 4.20.800. There would be no protection if there were no tort remedies.

Despite the fact that the City chose not to limit damages in SMC 4.20.800, *et seq.*, the City argued that Chief Woodbury’s damages should be limited to the damages what an administrative law judge could award at a hearing under RCW 42.41.040. CP 1359. However, the language of RCW 42.41.040 does not support the City’s argument because the damages listed in that section, which includes back pay, but not emotional harm damages, applies only as a limitation to the “Relief that may be granted by

the administrative law judge.” RCW 42.41.040(7). It does not purport to limit the relief in cases tried by a jury. As discussed above, the language of the SMC is permissive. The reference in SMC 4.20.860 to RCW 42.41.040 only applies if the plaintiff seeks a hearing under that provision, and then, it is simply a procedural guide.

C. Chief Woodbury Did Not Waive His Physician-Patient Privilege by Asserting a Claim for Emotional Distress Damages

The standard of review for pretrial discovery orders is abuse of discretion. *Gillett v. Conner*, 132 Wn. App. 818, 822, 133 P.3d 960 (2006). “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” *Id.*

Although Chief Woodbury acquiesced to the production of unredacted copies of certain medical records arguably related to his emotional harm damages claim, he did so only while maintaining his objection to their production based on physician-patient privilege and the fact that he is asserting only “garden variety” emotional harm damages. CP 558. Chief Woodbury agreed to the release of his relevant medical records due to a recent ruling by the same trial judge that assertion of a claim for emotional harm damages constitutes waiver of the physician-patient privilege in a discrimination case. CP 551, CP 558.

CR 26(b)(1) allows a party to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...” RCW 5.60.060 creates the statutory physician-patient privilege. *Phipps v. Sasser*, 74 Wn.2d 439, 444, 445 P.2d 624 (1968) (noting the statutory origin of the privilege). RCW 5.60.060(4) states, in relevant part: “a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient.”

Chief Woodbury did not make any claims for bodily injury or claim any psychological disorder as a result of the City’s actions. Chief Woodbury plans to seek emotional distress damages such as those identified in *Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. CA. 2003), where the plaintiffs did not intend to rely on the testimony of a treating physician or expert to establish their claims for emotional harm damages, did not allege that the defendant caused any specific disabilities or mental abnormalities, and did not claim that any pre-existing conditions were exacerbated by the defendants’ conduct. Chief Woodbury makes no separate claim for intentional infliction of emotional distress, does not plan to use his medical records at trial to establish his emotional distress

damage claim, and does not intend to call on medical providers as trial witnesses.

In *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 180-81, 116 P.3d 381 (2005), the Court held that emotional distress damages were properly awarded to a plaintiff in a discrimination case brought under state law, even though the plaintiff did not have medical testimony supporting the award. The Court stated:

The county argues that Bunch never consulted a healthcare professional, and no one close to him testified about his anxiety. That is true, but such evidence is not strictly required; our cases require evidence of anguish and distress, and this can be provided by the plaintiff's own testimony.

Bunch, 155 Wn.2d at 181. Like Bunch, Chief Woodbury intends to prove his emotional distress damages without the use of medical records or medical testimony.

In Washington, Evidence Rule 501 acknowledges the existence of various privileges, but does not guide the courts on how to address the psychologist-patient privilege. Our appellate courts have not addressed this issue. The United States Supreme Court has held that the psychotherapist-patient privilege protected a police officer from having to disclose the content of therapy sessions with a licensed clinical social worker under Federal Rule of Evidence 501 in a 42 U.S.C. § 1983 claim

by the estate of a police-shooting victim. *Jaffee v. Redmond*, 518 U.S. 1, 3-4, 18, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). In *Jaffee*, the Court reasoned:

The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.

Id. at 11. Significantly, the *Jaffee* Court refused to balance the interests of the plaintiff against those of the police officer. The Court stated, “[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.” *Id.* at 17.

Jaffee recognizes the need to protect communications during therapy because, “[t]he entire community may suffer if police officers are not able to receive *effective* counseling and treatment after traumatic incidents, either because trained officers leave the profession prematurely or because those in need of treatment remain on the job.” *Jaffee*, 518 U.S. at 11 n.10. This Court should recognize the parallel need in the whistleblower retaliation context because providing for automatic waiver of the privilege based on a claim for emotional harm damages would force

plaintiffs to reveal private and sensitive counseling information or force them to forego treatment during litigation for fear that their therapy session will be made public.

This Court should adopt the analysis of *Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. CA. 2003), which outlines the three approaches taken by federal courts since *Jaffee*, and which adopted the narrow approach to waiver in a housing discrimination case involving emotional harm claims similar to those asserted in this case.

In *Fitzgerald*, the plaintiffs sought damages for emotional harm, based on lay testimony, for depression, anger/irritability, discouragement, nervousness, sleep loss, withdrawal, relived experience, low self-esteem, and arguing with his partner. *Id.* at 633. The *Fitzgerald* court examined federal cases in which courts had adopted a broad approach (mere allegation of emotional distress waives privilege), a middle ground approach (allegations of non-garden-variety emotional distress waives privilege), and a narrow approach (need affirmative reliance on the psychotherapist-patient communications before the privilege will be deemed waived). *Id.* at 636-639. The Court ruled that since *Jaffee* does not permit a balancing of interests, the narrow approach is the most consistent with *Jaffee*'s intent. *Id.* at 638.

The narrow approach holds that general medical records are not relevant; psychological records are relevant, but protected by the psychotherapist-patient privilege. *Id.* at 634-635. The *Fitzgerald* court quashed the subpoenas which had been served on plaintiffs' doctors because, like Chief Woodbury, those plaintiffs did not intend to use medical records or medical testimony at trial. *Id.* at 636. The court held that given the need to protect the privileged conversations between a patient and his doctor, in order to encourage an unrestrained exchange of information to facilitate treatment, this privilege outweighs the defendants' need for medical records, "particularly in civil rights cases where Congress has placed much importance on litigants' access to the courts and the remedial nature of such suits." *Id.* at 639. Just like in *Fitzgerald*, here, waiver should be narrowly construed so that Chief Woodbury could continue to receive mental health counseling, as needed, without the need to compromise the effectiveness of that counseling by bringing it into the litigation.

The narrow approach will not disarm defendants. While the privilege may bar access to medical records, the defendant may cross-examine the plaintiff, as was done in the instant case, about other stressors or contributing factors that may explain or have contributed to the alleged emotional distress. The occurrence and dates of any psychotherapy including that which occurred before the incident is not privileged and subject to discovery. The defendant can examine percipient witnesses or find other

evidence to show, for example, that plaintiff's description of his or her distress is exaggerated. It may elicit from the plaintiff the fact that the plaintiff did not seek and obtain treatment or therapy for the alleged distress. These examples illustrate that the defendant has numerous avenues through which it can make its case without delving into the plaintiff's confidential communication with his or her therapist.

Id. at 638 (citations omitted). Without violating the privilege, the City may pursue other avenues of proof. The Court should remand with an order to return all medical records to the appellant, and to delete such records from the court file because Woodbury did not waive his physician-patient privilege.

D. The Court Abused its Discretion in Granting the City's Motion for a CR 35 Examination Because the City Failed to Satisfy the "Good Cause" and "In Controversy" Requirements of CR 35

The standard of review for pretrial discovery orders is abuse of discretion. *Gillett v. Conner*, 132 Wn. App. 818, 822, 133 P.3d 960 (2006). For many of the same reasons as stated above, the trial court abused its discretion when it granted the City's Motion for a CR 35 mental health examination.

CR 35(a)(1) requires that the mental or physical condition of the party sought to be examined be placed "in controversy" in the matter. The Rule also states that "[t]he order may be made only on motion for good cause shown." Chief Woodbury's mental state was not placed "in

controversy” through his mere assertion of a claim for emotional harm damages. Chief Woodbury did not intend to present his medical records, expert witnesses, or his treating physician at trial to prove his emotional distress damages claim, nor was he required to. *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 180-81, 116 P.3d 381 (2005). Chief Woodbury alleges garden-variety emotional harm damages. In *Fitzgerald v. Cassil*, 216 F.R.D. 632, 637(N.D. CA. 2003), the court noted that “Garden-variety emotional distress has been described by one court as ‘ordinary or commonplace emotional distress,’ that which is ‘simple or usual.’ In contrast, emotional distress that is not garden variety ‘may be complex, such as that resulting in a specific psychiatric disorder.’”

In analyzing Fed. R. Civ. Pro. 35, the United States Supreme Court stated that the “in controversy” and “good cause” requirements “are not met by mere conclusory allegations of the pleadings – nor by mere relevance to the case – but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination....The ability of the movant to obtain the desired information by other means is also relevant.” *Schlagenhauf v. Holder*, 379 U.S. 104, 118, 85 S.Ct 234 (1964). *Matter of Welfare of Green*, 14 Wn. App. 939, 942-43, 546 P.2d 1230 (1976) (adopting *Schlagenhauf* in

Washington). The Court went on to state that the trial judge must carefully examine, on a case-by-case basis, whether the party requesting the examination “has adequately demonstrated the existence of the Rule’s requirements.” *Id.*

Chief Woodbury testified in detail as to his emotional harm during his deposition and provided the City with charts describing his emotional harm. The City deposed Chief Woodbury’s treating physician, Dr. Fine, in order to obtain additional discovery. Chief Woodbury alleged non-complicated emotional harm damages. The trial court abused its discretion when it allowed for a three and a half hour CR 35 mental health examination when the City failed to meet the “in controversy” or “good cause” requirements for a CR 35 exam; the City stated nothing more than “mere conclusory allegations” and “mere relevance” to obtain the examination. The Court should remand with instructions to strike all evidence from the CR 35 examination.

E. The Court Erred in Refusing to Allow Discovery of Personnel Files Related to Disciplinary Issues

The standard of review for pretrial discovery orders is abuse of discretion. *Gillett v. Conner*, 132 Wn. App. 818, 822, 133 P.3d 960 (2006). CR 26(b)(1) allows a party to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in

the pending action....” The parties in this case have agreed to a Protective Order with regard to discovery. CP 421.

The trial court abused its discretion in not allowing for discovery of personnel files of Chief Woodbury’s comparators, those involved in the decision to demote him, and individuals who were the subject matter of his whistleblower complaint. Although Chief Woodbury has no documented performance problems, Chief Dean criticized his performance in discussions with the City Labor Relations department and during the meetings with the assistant chiefs when deciding which deputy chief to demote in the planned abrogation. Chief Dean used Chief Woodbury’s alleged performance problems as a reason for selecting him for demotion. Chief Woodbury should have been permitted to compare his own performance against those of his comparators.

As to substantiated claims of misconduct, those documents are available to any person under the Public Records Act (“PRA”), RCW 42.56. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn. App. 199, 206, 189 P.3d 139 (2008). In *Bellevue John Does*, the court found that personnel files of the public employee teachers, which contained *substantiated* claims of performance deficiencies, must be produced in response to a public records request. *See also Dawson v. Daly*, 120 Wn.2d 782, 800, 845 P.2d 995 (1993) (personnel file that

concerned specific instances of misconduct was of legitimate public concern and must be produced in response to a public records request).

In the instant case, The Seattle Times requested the personnel files of certain SFD employees related to the allegations in Chief Woodbury's whistleblower complaint. CP 208-09. After the SFD first gave notice to the employee and opportunity to object, it let The Seattle Times inspect the personnel files, subject only to redaction for financial information, social security numbers and the like. *Id.* Chief Woodbury's request was relevant and not privileged. CR 26. The trial court abused its discretion when it repeatedly denied discovery of documents with a protective order in place that could have been obtained through a PRA request. CP 419, 531, RP 10/29/10 at 104-07. There was no legitimate reason that discovery should have been denied.

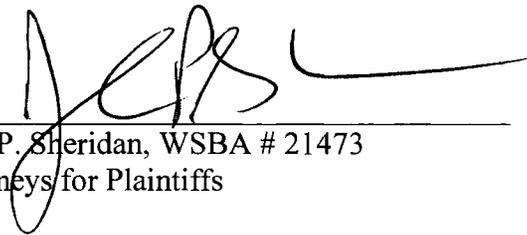
V. CONCLUSION

Chief Woodbury respectfully requests that this Court find reversible error in the trial court's dismissal of his statutory whistleblower claims, that Woodbury did not waive his physician-patient privilege by seeking emotional harm damages, that the trial court erred in ordering production of his medical records, and ordering a CR 35 examination. The Court should also find that Woodbury is entitled to all tort remedies under the statutes and to discovery of personnel files.

Respectfully submitted this 8th day of March, 2011.

The Sheridan Law Firm, P.S.

By:



John P. Sheridan, WSBA # 21473
Attorneys for Plaintiffs

DECLARATION OF SERVICE

Courtney Jordt states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, and am a legal assistant for Appellant's attorney of record. I make this declaration based on my personal knowledge and belief.

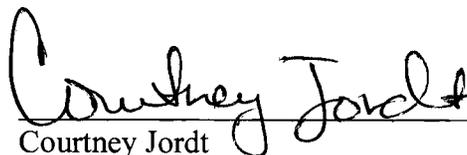
2. On March 8, 2011, I caused to be delivered via legal messenger to the following attorneys:

Frederick E. Wollett
Erin L. Overbey
Seattle City Attorneys Office
P.O. Box 94769
Seattle, WA 98124-4769
Attorneys for Respondent

a copy of FIRST AMENDED BRIEF OF APPELLANT.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of March, 2011, at Seattle, King County, Washington.


Courtney Jordt
Legal Assistant

APPENDIX 1



City of Seattle Legislative Information Service

Seattle Municipal Code

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Title 4 - PERSONNEL

Chapter 4.20 - Compensation and Working Conditions Generally

Subchapter III Reporting -- Whistleblower Protection

SMC 4.20.800 Policy -- Purpose.

Unless prohibited by state law, City employees are encouraged to report on improper governmental action to the appropriate City or other government official, depending on the nature of the improper governmental action. To assist such reporting and to implement Sections 42.41.030 and 42.41.040 of the Revised Code of Washington ("RCW"), Sections 4.20.800 through 4.20.860 provide City employees a process for reporting improper governmental action and protection from retaliatory action for reporting and cooperating in the investigation and/or prosecution of improper governmental action in good faith in accordance with this subchapter.

(Ord. 117039 Section 1(part), 1994: Ord. 116368 Section 90, 1992: Ord. 116005 Section 9, 1991: Ord. 115464 Section 1(part), 1990.)

[Search for ordinances](#) passed since the last SMC update (ordinances effective through November 15, 2010, Ordinance 123441) that refer to and that may amend Section 4.20.800 . *(Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances.)*

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Title 4 - PERSONNEL

Chapter 4.20 - Compensation and Working Conditions Generally

Subchapter III Reporting -- Whistleblower Protection

SMC 4.20.810 Reporting improper governmental action -- Employee protection.

A. Right. Every City employee shall have the right to report, in good faith and in accordance with this subchapter, to a City official, another government official or a member of the public, information concerning an improper governmental action.

B. Limitations.

1. This section does not authorize a City employee to report information that is subject to an applicable privilege against disclosure at law (e.g., RCW 5.60.060 privileged communications), unless waived, or to make disclosure where prohibited at law. The only purpose of this subchapter is to protect and encourage employees who know or in good faith believe improper governmental action has occurred to report those actions in good faith and in accordance with this subchapter.

2. Except in cases of emergency where the employee believes in good faith that substantial damage to persons or property will result unless a report is made immediately to a person or entity who is not the appropriate auditing official listed in Section 4.20.850 A, an employee shall, before making a report to a person who is not the appropriate auditing official, first make a written report of the improper governmental action to the appropriate auditing official. No emergency under this subsection exists where prompt attention and reporting under this subchapter by the employee could have avoided the perceived need to report immediately to a person not the appropriate auditing official.

An employee making a written report as required by this subsection is encouraged to wait at least thirty (30) days from receipt of the written report by the appropriate auditing official before reporting the improper governmental action to a person who is not an appropriate auditing official.

3. An employee's reporting of his or her own improper action does not grant an employee immunity from discipline or termination under Section 4.04.230

or 4.08.100 insofar as his or her improper action would be cause for discipline.

C. Employee Protections and Protected Conduct.

1. The following conduct by employees is protected if carried out in good faith under this subchapter:

a. Reporting sexual harassment to the employee's supervisor, EEO officer, department head, or other government official as set out in the City's adopted procedure for reporting sexual harassment complaints; reporting violations of the Fair Employment Practices ordinance to the Office for Civil Rights; reporting police misconduct to the Police Department's Internal Investigation Section; reporting violations of the Code of Judicial Conduct by Municipal Court judges to the Washington State Commission on Judicial Conduct; reporting violations of criminal laws to the appropriate county prosecuting attorney; and reporting violations of the Elections Code or the Ethics Code, and any actions for which no other appropriate recipient of a report is listed in this subsection, to the Executive Director of the Seattle Ethics and Elections Commission;

b. Cooperating in an investigation by an "auditing official" related to "improper governmental action"; and/or

c. Testifying in a proceeding or prosecution arising out of an "improper governmental action."

2. No City officer or employee shall retaliate against any employee because that employee proceeded or is proceeding in good faith in accordance with this subchapter.

D. Penalty. Any City officer or employee who engages in prohibited retaliatory action is subject to discipline by suspension without pay, demotion or discharge or, pursuant to Section 4.20.840, a civil fine up to Five Hundred Dollars (\$500.00), or both discipline and a fine.

E. Annual Restatement. Upon entering City service and at least once each year thereafter, every City officer and employee shall receive a written summary of this chapter, the procedures for reporting improper governmental actions to auditing officials, the procedures for obtaining the protections extended, and the prohibition against retaliation in this section. The Executive Director of the Ethics and Elections Commission shall ensure that such summaries are distributed and that copies are posted where all employees will have reasonable access to them.

(Ord. 118392 Section 20, 1996; Ord. 117039 Section 1(part), 1994; Ord. 116368 Section 91, 1992; Ord. 116005 Section 10, 1991; Ord. 115464 Section 1(part), 1990.)

Search for ordinances passed since the last SMC update (ordinances effective through November 15, 2010, Ordinance 123441) that refer to and that may amend Section 4.20.810 . *(Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances.)*

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Title 4 - PERSONNEL
Chapter 4.20 - Compensation and Working Conditions Generally
Subchapter III Reporting -- Whistleblower Protection

SMC 4.20.820 Confidentiality.

To the extent allowed by law, the identity of an employee reporting information about an improper governmental action shall be kept confidential unless the employee in writing waives confidentiality.

(Ord. 117039 Section 1(part), 1994; Ord. 115464 Section 1(part), 1990.)

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Title 4 - PERSONNEL
 Chapter 4.20 - Compensation and Working Conditions Generally
 Subchapter III Reporting -- Whistleblower Protection

SMC 4.20.830 Investigation.

A. Referral or Retention. The Executive Director of the Ethics and Elections Commission, upon receiving a report alleging improper governmental action, shall refer the complainant to the appropriate auditing official listed in Section 4.20.850 A if the Executive Director is not the appropriate auditing official. If the Executive Director is the appropriate auditing official, and the report alleges a violation of the Elections Code or the Code of Ethics, the Executive Director shall handle that allegation according to the ordinances and rules applicable to the code alleged to have been violated. If the Executive Director is the appropriate auditing official and the report alleges improper governmental action that does not fall within the prohibitions of the Ethics Code or the Elections Code, the Executive Director may refer the report to the chief elected official of the branch of government implicated in the allegation, who shall ensure that the appropriate officer or agency responds to the complainant in writing within thirty (30) days of receipt of the report by the appropriate auditing official, with a copy of the response to the Executive Director. If the Executive Director does not refer the report to another official, or if the other official's response is not timely or satisfactory to the Executive Director, the Executive Director may conduct an investigation. The procedures in subsections B through E of Section 4.20.830 shall apply only to the Executive Director of the Ethics and Elections Commission when he or she is investigating an improper governmental action that does not fall within the prohibitions of the Ethics Code or the Elections Code and that should not have been referred to another auditing official under the first sentence of this subsection; other auditing officials investigating allegations of improper governmental action appropriately referred to them are not bound by these procedures.

B. Executive Director's Investigation. At any stage in an investigation of an alleged "improper governmental action," the Executive Director of the Seattle Ethics and Elections Commission may issue subpoenas, administer oaths, examine witnesses, compel the production of documents or other evidence, enlist the assistance of the City Attorney, the City Auditor, or the Chief of Police, refer the matter to the State Auditor or law enforcement authorities, and/or issue reports, each as deemed appropriate.

Within thirty (30) days after receiving information about an "improper

governmental action" from a City employee, the Executive Director shall conduct a preliminary investigation, and provide the complainant with a written report of the general status of the investigation which may include matters for further research or inquiry.

C. Completion and Reports. Upon completion of the investigation, the Executive Director shall notify the complainant in writing of any determinations made. If the Executive Director determines that an improper governmental action has occurred, the Executive Director shall report the nature and details of the activity to the complainant; to the head of the department with responsibility for the action; and if a department head is implicated, to the Mayor and City Council; and to such other governmental officials or agencies as the Executive Director deems appropriate. If satisfactory action to follow up the report is not being taken within a reasonable time, the Executive Director shall report his or her determination to the Mayor and advise the City Council.

D. Closure. The Executive Director may close an investigation at any time he or she determines that no further action is warranted and shall so notify the complainant.

E. Decisions of the Executive Director under this section are not appealable to the Ethics and Elections Commission.

(Ord. 117039 Section 1(part), 1994; Ord. 116368 Section 92, 1992; Ord. 116005 Section 11, 1991; Ord. 115464 Section 1(part), 1990.)

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Chapter 4.20 - Compensation and Working Conditions Generally

Subchapter III Reporting -- Whistleblower Protection

SMC 4.20.830 Investigation.

A. Referral or Retention. The Executive Director of the Ethics and Elections Commission, upon receiving a report alleging improper governmental action, shall refer the complainant to the appropriate auditing official listed in Section 4.20.850 A if the Executive Director is not the appropriate auditing official. If the Executive Director is the appropriate auditing official, and the report alleges a violation of the Elections Code or the Code of Ethics, the Executive Director shall handle that allegation according to the ordinances and rules applicable to the code alleged to have been violated. If the Executive Director is the appropriate auditing official and the report alleges improper governmental action that does not fall within the prohibitions of the Ethics Code or the Elections Code, the Executive Director may refer the report to the chief elected official of the branch of government implicated in the allegation, who shall ensure that the appropriate officer or agency responds to the complainant in writing within thirty (30) days of receipt of the report by the appropriate auditing official, with a copy of the response to the Executive Director. If the Executive Director does not refer the report to another official, or if the other official's response is not timely or satisfactory to the Executive Director, the Executive Director may conduct an investigation. The procedures in subsections B through E of Section 4.20.830 shall apply only to the Executive Director of the Ethics and Elections Commission when he or she is investigating an improper governmental action that does not fall within the prohibitions of the Ethics Code or the Elections Code and that should not have been referred to another auditing official under the first sentence of this subsection; other auditing officials investigating allegations of improper governmental action appropriately referred to them are not bound by these procedures.

B. Executive Director's Investigation. At any stage in an investigation of an alleged "improper governmental action," the Executive Director of the Seattle Ethics and Elections Commission may issue subpoenas, administer oaths, examine witnesses, compel the production of documents or other evidence, enlist the assistance of the City Attorney, the City Auditor, or the Chief of Police, refer the matter to the State Auditor or law enforcement authorities, and/or issue reports, each as deemed appropriate.

Within thirty (30) days after receiving information about an "improper

governmental action" from a City employee, the Executive Director shall conduct a preliminary investigation, and provide the complainant with a written report of the general status of the investigation which may include matters for further research or inquiry.

C. Completion and Reports. Upon completion of the investigation, the Executive Director shall notify the complainant in writing of any determinations made. If the Executive Director determines that an improper governmental action has occurred, the Executive Director shall report the nature and details of the activity to the complainant; to the head of the department with responsibility for the action; and if a department head is implicated, to the Mayor and City Council; and to such other governmental officials or agencies as the Executive Director deems appropriate. If satisfactory action to follow up the report is not being taken within a reasonable time, the Executive Director shall report his or her determination to the Mayor and advise the City Council.

D. Closure. The Executive Director may close an investigation at any time he or she determines that no further action is warranted and shall so notify the complainant.

E. Decisions of the Executive Director under this section are not appealable to the Ethics and Elections Commission.

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Title 4 - PERSONNEL
Chapter 4.20 - Compensation and Working Conditions Generally
Subchapter III Reporting -- Whistleblower Protection

SMC 4.20.840 Civil penalty.

A violation of subsection C of Section [4.20.810](#) is a civil offense. A person who is guilty thereof may be punished in the Seattle Municipal Court by a civil fine or forfeiture not to exceed Five Hundred Dollars (\$500.00).

(Ord. 117039 Section 1(part), 1994; Ord. 115464 Section 1(part), 1990.)

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Title 4 - PERSONNEL

Chapter 4.20 - Compensation and Working Conditions Generally

Subchapter III Reporting -- Whistleblower Protection

SMC 4.20.850 Definitions.

As used in Sections [4.20.800](#) through [4.20.860](#), the following terms shall have these meanings:

A. "Auditing official" means, each in connection with a report of improper governmental action within his, her, or its respective jurisdiction, the Executive Director of the Seattle Ethics and Elections Commission; a person to whom sexual harassment was properly reported according to City policy; the Office for Civil Rights; the Washington State Commission on Judicial Conduct; the Police Department's Internal Investigations Section; the county prosecuting attorneys of the State of Washington; and any authorized assistant or representative of any of them in cases within their respective appropriate jurisdictions.

B. "Employee" means anyone employed by the City, whether in a permanent or temporary position, including full-time, part-time, and intermittent workers. It also includes members of appointed boards or commissions, whether or not paid.

C. 1. "Improper governmental action" means any action by a City officer or employee that is undertaken in the performance of the officer's or employee's official duties, whether or not the action is within the scope of employment, and:

a. Violates any state or federal law or rule or City ordinance, and, where applicable, King County ordinances, or

b. Constitutes an abuse of authority, or

c. Creates a substantial or specific danger to the public health or safety, or

d. Results in a gross waste of public funds.

2. "Improper governmental action" excludes personnel actions, including but not limited to: employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, reprimands, violations of collective bargaining or civil service laws, or alleged violations of agreements with labor organizations under collective bargaining, or any action that may be taken under Chapter 41.08, 41.12, 41.14, 41.56, 41.59, or 53.18 RCW or RCW 54.04.170 and 54.04.180.

3. A properly authorized City program or activity does not become an "improper governmental action" because an employee or auditing official dissents from the City policy or considers the expenditures unwise.

D. "Retaliate," and its kindred nouns, "retaliation" and "retaliatory action," mean to make, because of an activity protected under Section 4.20.810, any unwarranted adverse change in an employee's employment status or the terms and conditions of employment including, but not limited to, denial of adequate staff to perform duties; frequent staff changes; frequent and undesirable office changes; refusal to assign meaningful work; unsubstantiated letters of reprimand or unsatisfactory performance evaluations; demotion, reduction in pay; denial of promotion; transfer or reassignment; suspension or dismissal; or other unwarranted disciplinary action.

E. "Executive Director" means the Executive Director of the Seattle Ethics and Elections Commission.

(Ord. 118392 Section 21, 1996; Ord. 117039 Section 1(part), 1994; Ord. 116368 Section 93, 1992; Ord. 116005 Section 12, 1991; Ord. 115464 Section 1(part), 1990.)

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Chapter 4.20 - Compensation and Working Conditions Generally

Subchapter III Reporting -- Whistleblower Protection

SMC 4.20.860 Reporting and adjudicating retaliation.

A. Complaint. In order to seek relief, an employee who believes he or she has been retaliated against in violation of Section 4.20.810 C must file a signed written complaint within thirty (30) days of the occurrence alleged to constitute retaliation. The complaint shall be filed with the Office of the Mayor and must specify the alleged retaliatory action and the relief requested.

B. Investigation and Response. The Mayor's office shall forward the complaint to the head of the executive office or department in which the retaliation is alleged to have occurred, or, at the Mayor's option, to the President of the City Council or the Presiding Judge of the Municipal Court if their respective branches are implicated in the complaint. The head of the department, office, or branch to which the complaint was referred shall ensure that the complainant is sent a response within thirty (30) days after the filing of the complaint. If the head of an executive office or department is alleged to have retaliated in violation of Section 4.20.810, the Mayor shall ensure that the complainant is sent a response within thirty (30) days after the filing of the complaint.

C. Hearing. 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.

(Ord. 117039 Section 2, 1994.)

Search for ordinances passed since the last SMC update (ordinances effective through November 15, 2010, Ordinance 123441) that refer to and that may amend Section 4.20.860 . (Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances.)

See also [Recent Legislation](#) and [Council Bills and Ordinances](#).

For research assistance, contact the Seattle City Clerk's Office at (206) 684-8344, or by e-mail, clerk@seattle.gov.

For interpretation or explanation of a particular SMC section, please contact the relevant City department.

