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No. ~~67472-6-1~~

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Donald Canfield, Appellant,

v.

Michelle Clark et al., etc., Respondent.

Donald Canfield, Appellant/Cross-Respondent,

v.

*Seattle Public Schools, a municipal corporation, Respondent
Cross-Appellant*

RESPONDENTS' BRIEF

Earl Sutherland, WSBA #23928
Mark F. O'Donnell, WSBA
#13606
Preg O'Donnell & Gillett PLLC
1800 Ninth Ave., Suite 1500
Seattle, WA 98101-1340
(206) 287-1775
Attorneys for Defendants
Michelle Clark and Seattle Public
Schools

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COURT OF APPEALS
STATE OF WASHINGTON


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I. INTRODUCTION

The stated policy of Washington courts is for schools to be hyper-vigilant about weapons and violence in schools, a wise policy in light of recent news headlines. This case arose from respondent Michelle Clark's legitimate concerns about her personal safety at her place of employment with the Seattle Public School District ("the District"). Ms. Clark had known the appellant Donald Canfield on a personal basis prior to coming to work at the District and also knew from this relationship that Mr. Canfield owned weapons. She had seen him carry a gun on his person. After coming to work for the District, an incident with Mr. Canfield frightened her and led her to share her concerns with the District's management.

In light of credible reports of a gun, coupled with escalating aggressive behavior by Mr. Canfield, the District was compelled to take action and investigate the complaint. Indeed Mr. Canfield has never denied access to or possession of guns, but rather quibbles that it was not during work hours, and not on school grounds but rather across the street from the property. Employees must be given some immunity for reporting such concerns; and Districts must be empowered to reasonably respond to them. Otherwise the safety of school children is at risk, leaving the door open for devastating consequences from inaction.

Ms. Clark's reports and those of a number of other employees of the District about Mr. Canfield in the workplace led to discipline against Mr. Canfield. The resolution of that discipline motivated lawsuits by Mr. Canfield against Ms. Clark and then against the District. None of Mr. Canfield's claims in those suits have merit.

As for the defamation claim Mr. Canfield brought against Ms. Clark, no genuine issue of material fact exists, and as a matter of law Ms. Clark is entitled to have her summary judgment of dismissal affirmed by this court. The statements she made were privileged. Her statements were made in the context of workplace concerns. They were substantially true. She did not abuse the conditional privilege. Mr. Canfield cannot carry his burden of proof on the elements of a defamation claim.

After a full airing of his claims against the District, the trial court properly concluded on the facts of the case that Mr. Canfield had no claim for retaliation against the District. The trial court had properly dismissed his claim for violation of the Prevailing Wage Act earlier as a matter of law on summary judgment. This Court should affirm the rulings of the trial court in favor of the District.

On its cross-appeal, the District seeks reversal of the trial court's denial of summary judgment as to Mr. Canfield's claim of retaliation based on RCW 49.52.050 and RCW 49.46.100, but only if the Court feels a need to address the issue. The trial court could

have avoided a needless trial if it had properly decided this matter of law.

II. ASSIGNMENTS OF ERROR

The District generally agrees with the substantive law issues posited by Mr. Canfield as they relate to his claims against the District:

1) This court must decide the propriety of the Trial Court's summary judgment dismissing Mr. Canfield's claim for violation of the Prevailing Wage Act considering the fact that as an employee of the District he is explicitly excluded from the act's coverage by RCW 39.12.020.

2) The court must decide whether Judge Heller was correct in ruling that Washington law does not provide a claim for retaliation under RCW 49.52.050 or under RCW 49.46.100 where there was no failure to pay in accordance with the laws governing minimum wage and overtime pay, when the employee has no common law claim for retaliation in violation of public policy because he was not terminated.

3) The court must decide whether a judge whose responsibility it is to try a case has the responsibility to ascertain and to apply correctly the law as he sees it, whether in response to a CR 50 motion for judgment as a matter of law procedure at the close of the plaintiff's case, or after a verdict is rendered, despite

prior contrary rulings in the case by a different predecessor trial court judge.

As for the summary judgment dismissal of Mr. Canfield's claims against Ms. Clark, the Court must resolve the following issues:

4) Whether Mr. Canfield failed to carry his burden of presenting evidence to satisfy all the elements of his defamation claim;

5) Whether the allegedly defamatory statements were conditionally privileged; and

6) Whether Clark's statements were substantially true or whether Ms. Clark abused her privilege and made any statements with knowledge of their falsity or in reckless disregard of the truth.

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Conflict has marked Mr. Canfield's tenure as an electrician with the District. As early as 1995, he was involved in an incident with a coworker, and reassignment was requested because of "incompatibility" between Mr. Canfield and that individual. CP 48. This was not the only run-in Mr. Canfield experienced with his coworkers. CP 50.

Mr. Canfield had become a foreman for the District's electricians in January 2001. CP 46. In 2006, a coworker

submitted a grievance with the District alleging that Mr. Canfield harassed him by falsely accusing the coworker of breaking into Mr. Canfield's desk, and telling other electricians that Mr. Canfield was going to "make me [coworker] retire before I can retire." CP 52-57; CP 84¹. This behavior was confirmed by coworkers. CP 74.

In September 2006, the District held a meeting among several electricians, two of Mr. Canfield's supervisors, and a union business representative, to discuss complaints about Canfield's interactions and management style as the foreman with the other electricians. CP 76-77. According to one electrician who attended the meeting, "[T]he whole session was in complaints about Don being vindictive, controlling, non-people person, treating the – minorities worse than he treated the white, middle-aged people." CP 75. One of Mr. Canfield's supervisors described a long list of problems with his management style that pervaded the entire shop. CP 80. The other supervisor present during the meeting met with Mr. Canfield a couple of weeks later to discuss the concerns raised by the other electricians during the September 2006 meeting. CP 77. That supervisor had several discussions and counseling sessions with Mr. Canfield. CP 78.

¹¹ The Transcript of Proceedings in the Clerk's Papers (CP 59-88) (authenticated at CP 42) is a transcript of testimony from District employees taken during an arbitration hearing conducted to address grievances submitted by Canfield contesting a demotion instated by the District after an investigation of worker complaints. The testimony was taken on September 30, 2009. The evidentiary foundation is established by the District's John Cerqui at CP 536-619.

1. The Relationship between Mr. Canfield and Ms. Clark

Michelle Clark and Donald Canfield had known each other for seven years through her work as a subcontractor to the District before she became an employee. CP 88. Over time, they found out they had mutual friends and interacted socially. *Id.* For example, Mr. Canfield helped her with some work on her kitchen and a fountain in her yard. *Id.*

Over the course of this relationship, Ms. Clark learned that Mr. Canfield owned firearms. CP 65. He had made her aware he was carrying a weapon on at least one occasion when they purchased a large pot for her yard. *Id.*; *see also*, CP 102.

The District hired Ms. Clark in August 2007 as a fire alarm technician. Mr. Canfield helped Ms. Clark get the job. CP 88. Ms. Clark immediately began experiencing difficulties with Mr. Canfield, which led to her complaint to the District in December 2007. *See* CP 90-98.

Ms. Clark reported that she had concerns for her safety after an incident involving desks that were delivered to the electrician's offices. CP 64. On that occasion, Clark had asked Canfield if the electricians who did not have desks could have desks, and Canfield responded that there was not time. *Id.* Thus, when Clark overheard Lynn Good dispatching some of his employees to move furniture to storage, she inquired whether there might be desks

available that could be delivered. CP 63. Good's response was, "absolutely," and to get what she needed. *Id.*

The desks were delivered while Canfield was on vacation, and when Canfield returned, he was clearly unhappy about the delivery of the desks. CP 64. Mr. Canfield then dispatched most of the employees and had an altercation with Ms. Clark behind closed doors. *Id.* Mr. Canfield was very angry, and he reportedly shoved a filing cabinet. *Id.* A co-worker, Jeff Hilliard confirmed this occurrence, adding that Mr. Canfield shoved the filing cabinet a "couple feet" during the incident. CP 69-70.

Ms. Clark reported to her carpool partner, Mr. Auki Piffath, Clark's co-worker, that she felt very distressed by this incident, particularly because she knew Mr. Canfield had carried a weapon. CP 64-65. Mr. Piffath initially reported Clark's concerns to Human Resources. CP 66. Human Resources then approached Ms. Clark and conducted an interview, which led her to submit a formal complaint. CP 66.

Mr. Canfield does not deny that he carried a weapon when he was with Ms. Clark on the occasion before she was employed at the District. CP 102. Canfield simply denies that he had the weapon on school grounds. CP 101-102. While Clark recalls Canfield was in the District's parking lot when she met Canfield, Canfield states she picked him up from his home. *Compare*, CP 65, 102.

Ms. Clark's allegation was not that Mr. Canfield had a gun on campus the day she reported her concerns about Canfield to the District, but rather that she was frightened by Mr. Canfield's behavior with her in the employment setting. CP 65; see also her complaint CP 90-96. She knew that Canfield had carried a gun on that previous occasion. CP 65. Her interactions with him at work made her nervous because she perceived Canfield as a very angry person. CP 95.

In her written December 2007 complaint, Ms. Clark alleged, among other items, that Canfield behaved in a way that was "deceitful" and "mean," and that he was not able to "control his argumentative and angry ways." CP 95. Ms. Clark reported feeling "fearful" for her safety, and more generally indicated a desire to work in a friendly environment. *Id.* Ms. Clark's complaints reflected concerns that her coworkers had expressed previously during the 2006 meeting to discuss Mr. Canfield's behavior. CP 77.

2. Disciplinary Proceedings Taken Against Canfield

a. Investigation of Mr. Canfield's Conduct

The District placed Mr. Canfield on administrative leave; and Jeannette Bliss, the District's HR manager, began investigating Clark's complaint. See, CP 105. Ms. Bliss in turn hired a neutral third party investigator, John Ellis, to review Clark's complaints. See CP 107-124. Mr. Ellis, along with Ms. Bliss, interviewed nine

witnesses, including a six hour interview of Canfield himself. CP 61-62; *see also* CP 107-124

In April 2008, Ellis provided a written report of his investigative finding. CP 107-124. Specifically, the investigation report concluded that Canfield engaged in behavior toward his staff that was "excessively controlling and harassing," and "demonstrated a lack of respect and trust toward the staff." CP 107, 108. The investigation further concluded Canfield treated members of his staff who were minorities or women worse than he treated white males, and that Canfield often became openly angry with his staff and engaged in other intimidating behavior toward them. *See* CP 123-124.

The investigation concluded Canfield often engaged in retaliatory behavior toward staff members who displeased him, and ultimately created a hostile working environment in the electricians shop. CP 122-124. The investigation reached this conclusion after consulting not just Ms. Clark, but numerous other co-workers who confirmed her allegations. *See*, report CP 107-124.

The investigator ultimately concluded that Canfield should be terminated. CP 124. The results of the investigation performed by an independent third party therefore supported the District's decision to permit Canfield to return to work but to demote him from his position as foreman and to issue a reprimand. *See* CP 126-128.

b. Arbitration of Mr. Canfield's Grievance of Discipline Decision of District

Mr. Canfield filed a grievance with his union. Arbitration was held. CP 59-88². Mr. Canfield's co-workers testified as to Canfield's harassing and controlling behavior. For example, Jeff Hilliard testified that when electricians called in sick, Canfield would "make a mockery of it. He'd put the phone on speaker. Everyone in the shop could hear it. He'd make a joke of it. Like, listen to this, can you believe this kind of thing?" CP 68. Hilliard specifically testified, "There was a lot of situations in the office where people didn't like to talk because you were belittled or harassed or tormented, or – you know." *Id.* Jeff Mulcahey and Mark Johnson, both fellow electricians, confirmed this behavior. CP 74; 82.

Hilliard also testified about Canfield directing Nam Chan in front of the rest of the electricians to return a four dollar screwdriver because Chan had not requested permission from Canfield to purchase the screwdriver first. CP 68.

Bill Wickersham testified during arbitration that he had called Canfield a "control freak, and clarified this statement by stating that Canfield "liked to control people. He has rules for other people and rules for himself." CP 71-72. Wickersham also testified that Canfield was "on [Michelle's] case a lot, all the time," and that he

² Nowhere in those proceedings is any mention of complaints by Canfield about any alleged failure to pay the prevailing wage by the District. *See also* CP 496

had witnessed Canfield reprimanding electricians in front of other employees "a lot." CP 72.

Mulcahey confirmed Canfield's habit of demanding that Clark call him every half hour, and that Canfield had called him personally multiple times, up to ten, during the day. CP 73. Mulcahey felt Canfield called frequently because he thought the electricians would get done with the work they were assigned early and "screw off the rest of the day." CP 73. Mulcahey also confirmed Wickersham's testimony that Canfield would reprimand Hilliard, Johnson, Chan, and sometimes Wickersham in front of the other employees. CP 73. Notably, Mulcahey testified that he overheard Canfield tell other electricians that "Nam will never make it to retirement. I will get him fired." CP 74.

In light of all this testimony, the arbitrator concluded that the District "had just cause to take corrective action with the grievant to address the unrest and discontent in the electrical shop." CP 149. The arbitrator found that the District "did not engage in progressive discipline," however, and did not have just cause to demote Canfield. *Id.* As a result, in December 2009, Mr. Canfield was reinstated, but he was given a documented warning for his behavior. See CP 152-153.

B. STATEMENT OF PROCEDURE

In December 2009 when Mr. Canfield was reinstated to his position, he filed his lawsuit against Ms. Clark for defamation and for outrage, and the lesser-included tort, the negligent infliction of emotional distress. CP 1-5. In July 2010 Canfield sued the District, alleging retaliation, violation of Washington's prevailing wage act, violation of Washington's wage payment act, civil conspiracy, negligent supervision, negligent hiring, and intentional infliction of emotional distress. CP 1033 – 1043. The cases were consolidated, and both defendants moved for summary judgment against Mr. Canfield. CP 13-37

On April 19, 2011, the trial court dismissed all claims against Ms. Clark. The court, however, entered only a partial summary judgment for the District leaving Canfield's claims for Civil Conspiracy and Retaliation based on RCW 49.52.050 and RCW 49.46.100. CP 943–945. Mr. Canfield and the District each moved for reconsideration of the adverse rulings, but Judge Craighead denied reconsideration. CP 700-701.

Thereafter, Mr. Canfield sought to appeal the summary judgment in favor of Clark. CP 702-710. Out of a sense of caution, the District also filed a notice of cross-review of the denial of its summary judgment motion. Docket No. 79, Supp CP____

This Court of Appeals denied review at that time because there was no final judgment as to all claims and all parties.

(7/28/11 Notation Ruling denying review) The court of appeals commissioner advised the parties that Clark would have to abide the outcome the trial before appealing, or move for discretionary review. *Id.*

Mr. Canfield went to trial on the remaining claims against the District, and a nine day trial was held to decide the claims of civil conspiracy and retaliation based on RCW 49.52.050 and RCW 49.46.100.

The District moved for judgment as a matter of law at the close of the plaintiff's evidence. CP 823-841, 7/21/11 RP 4. The court denied the motion without prejudice to renewal after the jury deliberations 7/22/11 RP 16-20. The court submitted two claims to the jury: civil conspiracy and retaliation.

The jury rejected the civil conspiracy claim but found that the District unlawfully retaliated against Mr. Canfield because of his complaints regarding the District's failure to pay prevailing wages. CP 870-871.

When asked in the special verdict form how the School District retaliated against Mr. Canfield, the jury listed: 1) unsubstantiated removal from School District property; 2) improper demotion from foreman position; 3) excessive periods of administrative leave and uncertainty of return. The jury awarded damages. CP 870-871.

The District renewed its motion for judgment as a matter of law and also moved for new trial or remittitur. CP 823-841. The trial court vacated the jury's verdict and entered judgment for the District as a matter of law CP 1028-1029; 8/26/11 RP 28-29.

Canfield appealed the entry of judgment for the District as a matter of law pursuant to CR 50 and the dismissal of the prevailing wage act claim against the District on summary judgment. CP 1002-1030. Canfield also revives his premature appeal of the summary dismissal of the defamation claims against Ms. Clark.

If necessary, the District seeks cross-review of the denial of summary judgment on the claim for retaliation based on RCW 49.52.050 and RCW 49.46.100. Docket # 79, Supp. CP ____.

IV. ARGUMENT

A. ARGUMENT OF RESPONDENT SEATTLE PUBLIC SCHOOLS

1. Summary of the District's Arguments

First, this Court should also affirm the summary judgment dismissing Mr. Canfield's claim for violation of the prevailing wage act. As an employee of the District, Canfield is explicitly excluded from the act's coverage by RCW 39.12.020.

Second, the Court should affirm the dismissal of Mr. Canfield claims he was the victim of retaliation for his complaints that he was entitled to the prevailing wage. The trial court, Judge Heller, was

correct in ruling that RCW 49.52.050 does not provide a basis for the retaliation claim. Mr. Canfield was not terminated; so he has no tort claim for retaliation in violation of public policy. As for a claim under RCW 49.46.100, Mr. Canfield did not complain the District failed to pay him in accordance with RCW 49.46. The District did not violate the laws governing minimum wage and overtime pay as to Mr. Canfield.

Finally, the fact that the trial court did not grant summary judgment for the District on this retaliation claim prior to the rendition of a verdict by the jury does not change this conclusion as a matter of law. The District properly moved for a directed verdict at the close of Mr. Canfield's case, but Judge Heller denied the motion during the trial. The District then renewed the motion after the jury verdict, and the trial court properly ruled that Washington law does not provide for a retaliation claim under the facts of Mr. Canfield's case.

Mr. Canfield conflates the court's post-trial decision on the CR 50 motion with a motion for reconsideration of the denial of summary judgment from six months earlier. His appeal posits that because the same legal issue was addressed post-trial it must be precluded as an impermissibly late motion for reconsideration of the trial court's ruling on summary judgment in April 2011; an argument with no merit.

Under Washington law, the judge whose responsibility it is to try a case also bears the responsibility to ascertain and apply correctly the law, whether in response to a CR 50 motion for judgment as a matter of law at the close of the plaintiff's case or after a verdict is rendered, despite a prior contrary ruling in the case by a predecessor trial judge. The trial court was obliged to apply the law to the undisputed facts as confirmed after trial and to grant the CR 50 motion on the facts of this case. The Court should affirm Judge Heller's ruling in favor of the District, on the law and procedure.

In a separate section Ms. Clark's arguments concerning Mr. Canfield's appeal against her are addressed.

2. The Prevailing Wage Act Does Not Apply to Canfield's Claims; Summary Judgment Was Proper

Mr. Canfield's Prevailing Wage Act ("PWA") claims were properly dismissed on summary judgment because the statute does not apply to individuals employed regularly by the District. The PWA provides:

The hourly wages to be paid to laborers, workers, or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed.

* * *

This chapter shall not apply to workers or other persons regularly employed by the state, or any county, municipality, or political subdivision created by its laws.

RCW 39.12.020 [emphasis added]. The unambiguous exception in the final sentence precludes any PWA claim by Mr. Canfield.

In *Berrocal v. Fernandez*, 155 Wn.2d 585, 121 P.3d 84 (2005), the court detailed how this Court should look at the issue:

We review petitioners' motion for summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts, as well as the reasonable inferences from those facts, in the light most favorable to respondents, the nonmoving parties. See *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary dismissal is granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). As with all questions of law, questions of statutory interpretation are reviewed de novo. *Enter. Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999). Where statutory language is "plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute." *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995) (quoting *Krystad v. Lau*, 65 Wn.2d 827, 844, 400 P.2d 72 (1965)). "In undertaking this plain language analysis, the court must remain careful to avoid 'unlikely, absurd or strained' results." *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) (quoting *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987)).

155 Wn.2d at 590. In that case, the court considered whether Berrocal's shepherding job fit the RCW 49.46.010 definition of "employee:"

(5) "Employee" includes any individual employed by an employer but shall not include:

* * *

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties.

The employee offered an interpretation that simply did not comport with the plain meaning of these words. On the undisputed facts of the case, the Court concluded that shepherd's job required that he sleep at his place of employment. The Court concluded that phrase about sleeping at the place of employment was not modified by the clause "and not engaged in the performance of active duties." 155 Wn.2d at 591. The Court found no basis for such a strained interpretation of the plain language. *Id.* at 592 ("In sum, the Employers' reading of RCW 49.46.010 (5)(j) is syntactically sound, while Berrocal and Castillo's proposed interpretation is not.")

Here Canfield's interpretation is strained at best; reasonably read, it is untenable. "There can be no doubt that the school district is a political or civil subdivision of the state." *Washington State Bd.*

Against Discrimination v. Bd. of Directors, Olympia Sch. Dist. No. 1, 68 Wn.2d 262, 269, 412 P.2d 769, 774 (1966) superseded on other grounds by statute, RCW 49.60.300, as stated in *Washington State Liquor Control Bd. v. Washington State Pers. Bd.*, 88 Wn.2d 368, 561 P.2d 195 (1977). Employees of political subdivisions of the state are expressly excluded from the coverage of the Prevailing Wage Act statute. Thus, the plain language of the act states it does not apply to employees of the District. Canfield's reference to WAC 296-127-010(7)(a)(iv), defining a "public work," is irrelevant to consideration of whether Canfield is an employee of a political subdivision of the state.

In addition, a number of attorney general opinions confirm this reading of the clear language of the statute. As early as 1959, the attorney general recognized the power of a school district's board of directors to utilize its own employees when repairing and maintaining its buildings. 1959 Op. Att'y Gen. No. 13. The attorney general confirmed that a school district was not subject to the Prevailing Wage Act by virtue of the final sentence of RCW 39.12.020.

In 1971, the attorney general issued an opinion that this chapter does not apply to non-certificated craft or trade union members directly hired by the district on a regular basis to perform work on school district property. 1971 Op. Att'y Gen. no. 1, "Question (2)".

A 1983 opinion mentioned again, in passing, that employees of school districts are simply not covered by RCW 39.12 (the attorney general also opined that bus drivers or like personnel employed by private companies providing transportation services to a school district by contract were not engaged in "public works.") See, 1983 Op. Atty' Gen. no. 13.

These opinions confirm the plain reading of the statute. The PWA does not apply to work performed by Canfield or other electricians employed by the District to help maintain or repair District buildings.

Mr. Canfield misinterprets *Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild*, 157 Wn. App. 304, 328, 237 P.3d 316 (2010) to hold generically that an employee covered by a collective bargaining agreement is not prohibited from lodging claims for violations of statutory rights. Canfield misses the holding of the case. *Yakima* allows individuals with discrimination claims based on RCW 49.60 to "vindicate their civil rights in court" without first exhausting collective bargaining agreement remedies; but only because it is statutorily permitted. *Yakima*, 157 Wn. App. at ¶328. The statute at issue in *Yakima* provides that anyone injured by a violation of chapter 49.60 "shall have a civil action . . . to enjoin further violations, or to recover the actual damages sustained by the person" RCW 49.60.030(2).

Quite simply, RCW 39.12.020, has no such provision. Instead it states the entire chapter "shall not apply to workers or other persons regularly employed by the state, or any county, municipality, or political subdivision" RCW 39.12.020. Mr. Canfield's remedy for a prevailing wage claim is through the Collective Bargaining Agreement; civil court is not the proper forum.³

3. Standard of Review for Post-Trial Decisions by the Trial Court

Mr. Canfield went to trial on his claim that the District retaliated against him for making prevailing wage complaints, on his theory that RCW 49.52.050 and RCW 49.46.100 supplied the basis for such a claim, and the jury returned a verdict for him. On post-trial motions, however, the judge reversed and entered judgment in favor of the District as a matter of law. The standard of review the appeals court should apply to this decision is well-settled:

"Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the

³ Additionally, there is only infinitesimal evidence, outside of Canfield's own self-serving declaration, that Canfield actually raised the issue of prevailing wages to the District. CP 496. The Union never submitted a grievance. The arbitration record is conspicuously silent on the issue. In the event the Court concludes that the Prevailing Wage Statute does apply in this matter, the District reserves the right to raise the issues of jurisdiction and availability of administrative remedies on remand. Any prevailing wage loss claims are statutorily precluded and preempted by the applicable collective bargaining agreement.

nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816, 819 (1997). “Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest.” *State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968).

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250, 254 (2001). The CR 50 motion required the trial court to apply the law to undisputed facts concerning Mr. Canfield’s employment situation. Matters of law are reviewed de novo. *Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 178 P.3d 936 (2008).

Civil Rule 50(a) provides that the court should enter judgment as a matter of law when “there is no legally sufficient evidentiary basis for a reasonable jury to find” for a party on a claim. The rule contemplates matters of law, as well as the facts, will be briefed and argued:

Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. . . .

Civil Rule 50 (b)(1)(C) clearly empowers the court to enter judgment as a matter of law on a renewed motion such as made by the District in this case. The District moved at the close of the presentation of all of Mr. Canfield’s witnesses. 7/21/11 RP 4. Because witnesses were taken out of order, this occurred very close in time to the jury’s deliberations. *See, id.* The trial court judge denied the motion for judgment as a matter of law, reserving

ruling until after trial. *Id.* After the jury returned a verdict, the court entertained the motion, as contemplated by CR 50(b) and ruled as a matter of law on the undisputed facts that governed the result. See, 8/26/11 RP 11-29.

In *Washburn v. City of Federal Way*, 66534-1-I, 2012 WL 2989192 (Wn. Ct. App. July 23, 2012), slip op. no. 66534-1-I (March 26, 2012), this Court emphasized the requirement in CR 50 that the motion for judgment as a matter of law must be renewed if not granted in order for the Court of Appeals to review. This was done properly by the District.⁴ There is simply no support for the novel theory that Canfield proffers to convert a CR 50 motion into a CR 59 motion for reconsideration of a denial of summary judgment; and then finding it untimely.

4. The Court had the Authority to Decide in Favor of the District

Mr. Canfield tries to avoid the rule allowing a motion for judgment as a matter of law at the close of the evidence and after verdict by claiming that the CR 50 motion was a disguised motion for reconsideration of the denial of the motion for summary judgment from April 2011 brought far too late to be considered by Judge Heller. The argument fails.

⁴ *Washburn, supra*, also stands for the proposition that matters of law on undisputed facts can be reviewed by this Court on appeal after a jury's verdict. See, cross-appeal at 48 *post*.

Long ago the Supreme Court provided several examples of cases where a subsequent judge was empowered to overrule a decision, prior to final judgment being entered.

For example, in *Shepard v. Gove*, 26 Wash. 452, 67 Pac. 256 (1901), the defendant demurred to the plaintiff's complaint on the ground that the action had not been commenced within the time limited by law. This demurrer the then presiding judge overruled. Afterwards there was a change in the personnel of the court, and the defendant renewed the objection before the succeeding judge, who sustained the objection. It was contended that the succeeding judge was without power to overrule a decision of his predecessor in office. The court denied the contention, using this language:

"It is insisted by the appellant that Judge Griffin had no right to overrule a decision made by Judge Jacobs in the case. But the succession of judges cannot be considered by this court; the office is a continuing one; the personality of the judge is of no legal importance. The action of Judge Griffin was in legal effect a correction of his own action, which he deemed to have been erroneous; and it were far better that he should correct it than to perpetuate an error which would have to be corrected by this court."

Beck v. Int'l Harvester Co. of Am., 85 Wash. 413, 415, 148 P. 35, 36 (1915).

In a similar vein, Mr. Justice Holmes stated:

In the absence of statute the phrase, "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.

Messinger v. Anderson, 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L. Ed. 1152 (1912).

The Ninth Circuit holds a similar view:

[T]he power of each judge of a multi-judge court is equal and coextensive; it permits one to overrule the order of another under proper circumstances, and where one judge has done so the question becomes one of the proper exercise of judicial discretion.

Castner v. First Nat'l Bank of Anchorage, 278 F.2d 376, 380 (9th Cir. 1960); cited in *Stepanov v. Gavrilovich*, 594 P.2d 30, 36 (Alaska 1979) (“[W]e think it entirely reasonable for a judge whose responsibility it is to try a case to reconsider and reverse an earlier ruling if convinced that that ruling was erroneous.”)

The proposition is elementary. The practice is approved in recent cases. See, e.g., *Teter v. Deck*, 174 Wn.2d 207, 216 n.7, 274 P.3d 336 (2012) (Where Judge Washington’s exclusion of Dr. Fairchild was error, Judge Gonzalez’s grant of new trial correcting that error was proper and did not invade the purview of the Court of Appeals, citing *Shephard, supra at 454*).

5. The Court Correctly Ruled for the District on the Merits

As a matter of law, the verdict for Mr. Canfield cannot be sustained on the following undisputed facts:

(1) “The jury rejected the civil conspiracy claim, but found that the School District unlawfully retaliated against Mr. Canfield

because of his complaints regarding the School District's failure to pay prevailing wages." 8/26/11 RP 24.

Canfield did not complain about violations of the Minimum Wage Act ("MWA") in that (2) he did not complain that he had not been paid overtime and (3) he did not complain that he had been paid less than minimum wage. See 8/26/11 RP 25-26.

(4) Mr. Canfield was not terminated so under the *White v State* case he had no common law claim for the tort of retaliation. See 8/26/11 RP 23-24.

On that set of facts, Judge Heller applied the law and reversed the statutory retaliation claims on which the jury found for Canfield. 8/26/11 RP 28-29. Mr. Canfield does not dispute these facts. The following discussion demonstrates that Judge Heller ruled correctly as a matter of law.

a. No Common Law Tort of Retaliation Here

"An employer can be liable in tort if he or she discharges an employee for a reason that contravenes a clear mandate of public policy." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081, 1089 (1984). In *White v. State*, 131 Wn.2d 1, 18-20, 929 P.2d 396 (1997), however, the Washington Supreme Court refused to extend this common law tort to wrongful transfers or to other adverse employment actions short of discharge.

While Washington has been characterized as a "pioneer" in ensuring payment of wages due to an employee, see *Champagne*, 163 Wn.2d at 76, it remains the law that Washington does not recognize a common law tort of wrongful retaliation in violation of public policy unless the Plaintiff was discharged from employment. *White* remains good law. See *Korslund v. Dynacorp Tri-Cities services, Inc.*, 121 Wn. App. 295, 88 P.3d 966 (2004); *Roberts v. Dudley*, 140 Wn.2d 58, 78, 933 P.3d 901 (2000).

The *White* court held that "recognizing a cause of action for employer action short of an actual discharge would not only open the flood gate to frivolous litigation, but would also substantially interfere with an employer's discretion to make personnel decisions." 131 Wn.2d at 19. "[T]his is particularly true in instances where an employee's rights are already protected by civil service rule, by a collective bargaining agreement, and by civil rights statutes". *White*, 131 Wn.2d at 20. Indeed, here, the Plaintiff availed himself of his collective bargaining agreement remedy and utilized that process and the remedies provided by it.

The trial court correctly ruled, based on that authority, that Mr. Canfield cannot bring a wrongful retaliation tort claim based on public policy.

b. No Statutory Basis for Retaliation Claim

The parties agreed that the prevailing wage statute, RCW 39.12, does not contain an anti-retaliation provision. Mr. Canfield relied instead on two other statutes, RCW 49.46.100 and RCW 49.52.050.

1) Well-Settled Statutory Interpretation Principles Apply

Statutory interpretation is a question of law reviewed de novo. *Serrano on California Condo. Homeowners Ass'n v. First Pac. Dev., Ltd.*, 143 Wn. App. 521, 525, 178 P.3d 1059, 1061 (2008). In interpreting statutes, the appellate court looks first to the plain meaning of the statute. *Id.*; *City of Lakewood v. Pierce Cnty.*, 106 Wn. App. 63, 70, 23 P.3d 1 (2001). Statutes must be read as a whole and the language placed in the context of the overall statutory scheme. *Serrano*, 143 Wn. App. at 525; *Subcontractors & Suppliers Collection Servs. v. McConnachie*, 106 Wn. App. 738, 741, 24 P.3d 1112 (2001). "When the same words are used in related statutes, we must presume that the Legislature intended the words to have the same meaning." *Serrano*, 143 Wn. App. at 525, quoting *State v. Keller*, 98 Wn. App. 381, 384, 990 P.2d 423 (1999).

2) Canfield Has No Retaliation Claim Under The Minimum Wage Act

As part of the MWA, RCW 49.46.100 regulates the payment of minimum wages and overtime. It provides in pertinent part:

Any employer who discharges or in any manner discriminates against any employee because such employee has made any complaints to his or her employer that he or she has not been paid wages in accordance with the provisions of this chapter . . . shall be deemed in violation of this chapter . . .

The trial court correctly ruled that the phrase “or in any manner discriminates against any employee” could encompass the acts of retaliation found by the jury, including demotion, being escorted off the property, and being placed on administrative leave for an excessive period of time. See, 8/26/11 RP at 29. The trial court recognized, however, that the provision only applies to an employee who complains that he has not been paid wages “in accordance with the provisions of this chapter.” 8/26/11 RP 29.

It is undisputed that Mr. Canfield did not complain about violations of the MWA. He did not complain that he had not been paid overtime. Nor did he complain that he had been paid less than minimum wage. Therefore, the trial court correctly concluded that RCW 49.46.100 did not apply because there was no connection between any District action and the protections of the MWA.

Canfield argues that the definition of wage under the MWA is broad: “compensation due to an employee by reason of employment.” RCW 49.46.010(7). While that is technically correct, it does not broaden the requirement that “the complaint to his or her employer” must be that “he or she has not been paid wages in accordance with the provisions of this chapter.” RCW 49.46.100

(2). Mr. Canfield never complained about the District's failure to pay overtime or minimum wage or retaliation for such complaints.

Mr. Canfield was at all times paid wages in accordance with the provisions of RCW 49.46 and never complained that the District was not doing so. Mr. Canfield cannot strain the anti-retaliation language to include an employer's failure to pay any kind of wage, including prevailing wages. "[P]aid wages in accordance with the provisions of this chapter" clearly refers to minimum wage or overtime, not prevailing wages which are governed by a different chapter.

To construe the term "wages" as broadly as Canfield urges would read out the phrase, "in accordance with the provisions of this chapter" and contravene fundamental principles of statutory construction. The provisions "of this chapter" concern (1) failure to pay minimum wages; or (2) failure to pay overtime. See, RCW 49.46.020; RCW 49.46.130. Those are the kinds of complaints about which retaliation is statutorily prohibited.

Plaintiff's characterization of the WMWA is impermissibly broad, including any "claim under WMWA for failure to pay wages owed." That is not the law. See, *Seattle Prof'l Emps. Ass'n v. Boeing Co.*, 139 Wn.2d 824, 834 n.5 (2000) (The MWA regulates minimum wage rates and overtime compensation; other statutes regulate other aspects of payment of wages owed).

3) Washington Rebate Act Does Not Provide For Any Retaliation Claim

The Plaintiff cannot cut and paste from various statutes to cobble together a remedy that simply does not exist under the statute, particularly one that is inconsistent with the underlying policy of the statutes. Plaintiff cannot borrow from another statute to create a remedy that does not exist under the Rebate Act statute.

RCW 49.52.050 applies whenever an employer willfully fails to pay an employee in accordance with any statute, including the Prevailing Wage Act. An employer found to have violated this statute is guilty of a misdemeanor and is liable for double damages plus attorneys' fees. The legislature has clearly placed great importance on employers paying their employees what they are owed. Despite that emphasis, Judge Heller noted that the legislature did not include an anti-retaliation provision in this statute. *See*, 8/26/11 RP 27.

The legislature included anti-retaliation provisions in other workplace laws, including the above-cited Minimum Wage Act, RCW 49.46.100. *See also*, RCW 49.60.210 ("Unfair practices -- Discrimination against person opposing unfair practice -- Retaliation against whistleblower"); Industrial Insurance Act, RCW 51.48.025 ("Retaliation by employer prohibited"). The trial court observed that the anti-retaliation language in these statutes is virtually identical to

that found in the Minimum Wage Act. See, 8/26/11 RP at 27. Each of these statutes prohibits employers not only from discharging employees who complain about violations of a particular statute, but from discriminating against them “in any manner.” RCW 49.46.100 (2); see also RCW 49.60.210 (1) (“otherwise discriminate”); RCW 51.48.025 (1) (“in any manner discriminate”).

The Washington Rebate Act simply contains no such language. Instead it provides misdemeanor liability, double damages and attorney fees when it is applicable; but no anti-retaliation language. “We presume that the Legislature intended different meanings by the use of different wording.” *Keller*, 98 Wn. App. at 384.

Other principles of statutory interpretation principles are not implicated in this situation. The wording that was used and the absence of any anti-retaliation provision in the Washington Rebate and Prevailing Wage Acts are equally clear. As the trial court observed, employees who complain about the non-payment of overtime have broader anti-retaliation protections than employees who complain about other types of non-payment.⁵

⁵ On this point Judge Heller stated: “From a public policy standpoint, this makes little sense. And, frankly, it is one of the reasons why this Court was not prepared to grant the School District’s motion for judgment during the trial.” 8/26/11 RP at 27-28. This is not a matter for the courts to decide. It must be resolved, if at all, by the legislature.

Mr. Canfield, however, implicitly asks this Court to remedy this “oversight” and broadly construe RCW 49.52.050 to imply anti-retaliation protection in light of the strong public policy of protecting workers’ rights articulated in Washington case law and other statutes. But it remains the function of the legislature, not the courts, to make public policy. The courts are bound to interpret the laws as passed by the legislature.

Mr. Canfield does not suggest that RCW 49.52.050 is ambiguous or subject to conflicting interpretations on this issue. Not only is the act not ambiguous, there is a corresponding difference in otherwise similar statutes that show a clear absence of legislative intent to provide for the retaliation remedy under RCW 49.52.050. There is clear legislative intent to protect employees from all forms of retaliation in the context of the Minimum Wage Act and complete silence on this issue in the other wage statutes, including the Washington Rebate and Prevailing Wage Acts.

Instead, Mr. Canfield offers up a novel expansion of otherwise clear language strictly on the basis that this Court should import its view of public policy despite clear statutory language. The case law does not support the expansion that Canfield seeks.

Hume v. Am. Disposal Co., 124 Wn.2d 656, 880 P.2d 988 (1994) cited by Mr. Canfield is distinguishable because the plaintiffs **had** raised complaints of overtime violations and triggered the protections of RCW 49.46.100. 124 Wn.2d at 660 (“The crux of the

employees' claims is that the Defendants retaliated against them for demanding overtime pay.”).

Champagne v. Thurston Cnty., 163 Wn.2d 69, 178 P.3d 936 (2008), also supplies no authority for this claim. In that case, the plaintiffs sued for delayed payment of wages. The issues for statutory interpretation did not include whether a retaliation claim existed under RCW 49.46.100 or RCW 49.52.050 or any of the statutes and regulations under scrutiny in that case.

This Court should endorse the reasoning of the trial court and affirm its conclusion:

The point is, even though Mr. Canfield was complaining about his employer's violation of extremely important workplace rights, this simply doesn't grant him statutory protections that have not been provided by the legislature. The Court, therefore, concludes that the retaliation claim upon which the jury based its verdict is not recognized in Washington.

8/26/11 RP 28-29. This ruling should be upheld and the judgment for the District affirmed on this appeal.

6. Canfield's Abandoned the Negligent Hiring and Supervision Claims and other Tort Claims Dismissed on Summary Judgment.

Mr. Canfield has not appealed the jury's finding for the District on the Civil Conspiracy claim. He has not appealed the dismissal of negligent hiring, supervision or infliction of emotional distress claims. These claims were simply derivative of the real gist

of the central claims against the District and Ms. Clark, and equally meritless.

The trial court's dismissal as a matter of law of his statutory claims of retaliation and violation of the prevailing wage act should be affirmed.

B. ARGUMENT OF RESPONDENT MICHELLE CLARK

1. Summary of Argument

Ms. Clark lodged a reasonable complaint with her employer the District when she felt threatened by her supervisor Mr. Canfield. She knew him before her employment with the District and knew he was someone who owned guns and carried them on his person. When she began working with him, she also learned that he had a volatile temper and demeanor.

Mr. Canfield does not deny that he carried a weapon when he was with Ms. Clark on the occasion before she was employed at the District. Canfield simply denies that he had the weapon on school grounds.

Ultimately, Clark lodged a complaint with the District. She alleged that Canfield behaved in a way that was "deceitful" and "mean," and that he was not able to "control his argumentative and angry ways." Ms. Clark reported feeling "fearful" for her safety, and more generally indicated a desire to work in a friendly environment. The complaint raised important concerns for a school district

charged with protecting the safety of its employees and the students for whom it is responsible. Once the disciplinary issues were resolved in the workplace setting, Canfield sued Clark for defamation and other related, derivative torts.⁶ Clark moved for summary judgment and won.

Mr. Canfield failed to carry his burden of presenting evidence to satisfy all the elements of his defamation claim. The allegedly defamatory statements were conditionally privileged, made in the context of employee relations and attempts to resolve interpersonal conflict in the workplace. The evidence does not show an abuse of the privilege. The statements were substantially true. No evidence supports the claim that Ms. Clark made any statements with knowledge of their falsity or in reckless disregard of the truth.

2. Standard of Review for Defamation Claim

A prima facie defamation case requires a showing by the plaintiff (1) that the defendant's statement was false, (2) that it was unprivileged, (3) fault of the defendant, and (4) that the statement proximately caused damage. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081, 1088 (1981); *Moe v. Wise*, 97 Wn. App. 950, 957, 989 P.2d 1148 (1999), *rev. denied*, 140 Wn.2d 1025, 10 P.3d 406 (2000). To avoid a defense summary judgment, the

⁶ Canfield has briefed only the dismissal of the defamation claim against Clark in this appeal.

plaintiff must raise an issue of fact as to each element. *Mark*, 96 Wn.2d at 486, 635 P.2d 1081.

Generally, in defamation cases, the standard of proof at trial also applies at summary judgment. *Haueter v. Cowles Publ'g Co.*, 61 Wn. App. 572, 581, 811 P.2d 231 (1991). See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Wood v. Battleground Sch. Dist., 107 Wn. App. 550, 567-68, 27 P.3d 1208, 1219 (2001).

Summary judgment plays a particularly important role in defamation cases: "Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms."

Mohr v. Grant, 153 Wn.2d 812, 821, 108 P.3d 768, 772-73 (2005).

Mr. Canfield must present more than conclusory statements and show a basis for his assertions by "more than a scintilla" of evidence. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249, 255 (1987). The "chilling effect" in this case, which the Supreme Court warns against in *Mohr*, is that employees and school districts will hesitate to act when provided less-than-certain information about a gun threat at a school for fear that they will be sued for acting protectively.

3. Ms. Clark's Statements Were Privileged

Preliminarily, Ms. Clark's statements cannot give rise to liability because they are protected by a conditional privilege under Washington law. Privilege may attach to statements made where the declarant can show a common interest is furthered between the declarant and the third-party recipient. Here privilege should attach to Clark's reports to the District and her supervisors and co-workers concerned with her complaint. See, Restatement (Second) Torts, §594 (1977):

An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important interest of the publisher, and

(b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

Ms. Clark's statements to the District should be entitled to conditional privilege because the District was not just reasonably entitled, but clearly entitled, to know about Ms. Clark's concerns about co-worker and supervisor Mr. Canfield's anger and incidents with firearms.

In *Hitter v. Bellevue Sch. Dist. No. 405*, 66 Wn. App. 391, 832 P.2d 130 (1992), a discharged public school employee who had been reinstated following an arbitrator's decision in his favor sought to recover damages from the school district for negligent

investigation and defamation. Hitter was accused of improper touching of a child named Jenny. The basis of the defamation claim was the school's principal's statement to Jenny's mother that Hitter had been accused of improperly touching the child. Hitter challenged the court's finding that the communication was conditionally privileged. This Court set out the relevant standard and holding:

An occasion is conditionally or qualifiedly privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter, correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know. See Restatement (Second) of Torts §§ 593-96 (1977). Here, Jenny's mother had a common interest in the subject matter of the investigation, the alleged improper touching of her daughter, and the principal's statement therefore was conditionally privileged. See Restatement (Second) of Torts § 595. The trial court did not err in so concluding.

Hitter, 66 Wn. App. at 400-01.

As suggested in *Hitter*, *supra*, section 595 of the Restatement provides additional authority for recognition of this important privilege:

- (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
 - (a) there is information that affects a sufficiently important interest of the recipient or a third person, and

(b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.

(2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that

(a) the publication is made in response to a request rather than volunteered by the publisher or

(b) a family or other relationship exists between the parties.

Restatement (Second) Torts, §595 (1977). The information affected a sufficiently important interest of the District. Clark had an obligation to report such conduct in the workplace setting, or certainly doing so was within “the bounds of decency” in the employment setting. The District investigated the complaint and asked her to formalize it. The disciplinary process essentially corroborated Ms. Clark’s concerns in general and her statements about Canfield in particular. All of this reasoning recommends recognizing that the *Mohr* case’s protection of free expression would be chilled by allowing defamation litigation in this case.

Washington courts have applied the qualified privilege to intra-corporate communications given for the purpose of an EEO investigation. *Woody v. Stapp*, 146 Wn. App. 16, 189 P.3d 807 (2008). Ms. Clark's statements to the District and to her co-workers before and after her complaint was filed were both truthful and made in the interest of furthering safety and productivity in the

workplace. Furthermore, the statements were never published outside the workplace setting.

Canfield's reliance on *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 701-04 24 P.2d 390 (2001) *rev'd on other grounds* 536 U.S. 273 (2002), is misplaced. In that case, the court found the employees were not acting in the ordinary course of their work and published the defamatory statements outside the reasonable scope of publication:

In the instant case, from the evidence presented at trial, it could reasonably be found that Julia Lynch was not acting in the ordinary course of her work as an office assistant when she told another student that John Doe had injured Jane Doe during a sexual relationship. It could also be found that Roberta League was not acting in the ordinary course of her work as a certificate specialist when she eavesdropped on Lynch's conversation and shared her concerns of possible misconduct with Susan Kyle. Likewise, it could be found that Roberta League and Susan Kyle were not acting in the ordinary course of their work when they questioned Lynch about alleged sexual assaults of Jane Doe by John Doe and then disclosed John Doe's identity and details about his sexual relations to Adelle Nore at OSPI.

143 Wn.2d at 702-03. Nothing so out of line occurred in this case. No communications outside the realm of co-workers and supervisors within the disciplinary process at the District were involved. Clark's statements to Piffath led directly to the complaint and investigation. Her statements to Logan were with a co-worker

during the pendency of the disciplinary proceeding which eventually and essentially corroborated what Clark had said about Canfield.

The privilege applies to Ms. Clark's statements before and during the disciplinary process initiated after she filed her complaint, since that process corroborated the complaint in significant respects. *Cf. Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 742, P.2d 1074, 1078 (1999) ("This is particularly true because the arbitrator did not find Mr. Corbally blameless, ruling instead that the District did not have just cause to terminate him.")

Ms. Clark did not abuse the privilege by the alleged publications to Piffath and Logan proffered by Mr. Canfield. Again, in *Hitter*, 66 Wn. App. at 401, this court set out the standard for review of this kind of evidence:

A conditional privilege may be abused and its protection lost if the person making the statement had knowledge of, or exercised reckless disregard for, the falsity of the defamatory matter. *Bender v. Seattle*, 99 Wn.2d 582, 600, 664 P.2d 492 (1983). The alleged defamed party has the burden of showing by clear and convincing evidence that the party making the statement knew of its falsity or acted with reckless disregard for its falsity. *Bender*, at 601.

Mr. Canfield's argument simply does not carry his burden to demonstrate an abuse of the privilege. *Lawson v. Boeing Co.*, 58 Wn. App. 261, 792 P.2d 545 (1990), cited by Mr. Canfield, presents starkly different facts. That case involved complaints of sexual harassment. The plaintiff who was accused of the harassment

sued investigating employees as well as the complaining employees. As to the complaining employees, the issue was whether the privilege was lost through abuse.⁷ The court found that the detailed accusations were matters of fact not subject to interpretation; they were either true or not. 58 Wn. App. at 267. The court took pains to note the gravity of a charge of sexual harassment; *id.* at 269, and compared the specificity of the complaints that Lawson made sexually explicit comments, propositioned them, and touched them in improper ways. *Id.* at 263. The court observed that if the charges were false, they were so recent and explicitly made as to have been knowingly false. *Id.* at 267. Mr. Lawson by declaration directly contradicted them. *Id.*

In contrast to *Lawson, supra*, in *Lambert v. Morehouse*, 68 Wn. App. 500, 507, 843 P.2d 1116, 1120 (1993), the Court reached the opposite conclusion in a similar setting:

[T]he complaints against Lambert were concrete statements of fact; the defendants complained that Lambert had engaged in specific unwanted acts. Lambert denied the ensuing conclusion, sexual harassment, but not the specific facts alleged: offensive sexual remarks, threats, and retaliation. Lambert's assertion that he never sexually harassed anyone may express his personal belief and conclusion that his conduct did not rise to the level of

⁷ The court reached a different conclusion as to the investigating employees. They had taken statements and interviewed witnesses and expressed their opinion that harassment had occurred. *Lawson*, 58 Wn. App. at 263. The Court of Appeals upheld summary judgment in their favor finding no showing of any malice or failure to examine facts. *Id.* at 267.

sexual harassment, but it is not a specific evidentiary fact. By disputing only the legal conclusion of sexual harassment, Lambert did not create a genuine issue as to the truth or falsity of the underlying factual allegations.

The *Lambert* court explained that in *Lawson* the plaintiff's specific denials created the issue of fact about the abuse of privilege. See 68 Wn. App. at 507-508.

This case is different. The statements made by Ms. Clark concern a wider array of behavior by Mr. Canfield. Moreover, Ms. Clark's statements were substantially true. Clark had known Canfield on a personal basis prior to coming to work at the District. CP 65. She knew from this relationship that Canfield owned weapons. *Id.* She had seen that he carried weapons on his person. *Id.*⁸

After coming to work for the District, an incident with Mr. Canfield frightened her and led her to share her concerns with the District's management. CP 64-66. Indeed Mr. Canfield has never denied access to or possession of guns but instead quibbles that it was not during work hours, and not on school grounds but rather across the street. CP 101-102. Her level of concern about Mr. Canfield, his demeanor and his behavior is reasonable and understandable.

Clark's statements were conditionally privileged in the setting in which they were made. The question becomes whether the

⁸ He does not deny this. CP 102.

evidentiary record really discloses any evidence on which this Court can say that the statements made by Ms. Clark were maliciously made, knowingly false or made with reckless disregard for their truth. Only if that can be said will the conditional privilege be lost and the Court obliged to reverse the summary judgment.

4. "Truth is a Defense:" Ms. Clark's Complaints were not false; nor were they made with Reckless Disregard for the Truth

In addition to its relevance as to whether Ms. Clark abused the conditional privilege, Canfield must show that the statements made were false to satisfy an element of the tort. For a statement to be defamatory, the communication must be a false assertion of fact or opinion that implies the existence of a false fact subjecting the plaintiff to hatred, contempt, ridicule, or obloquy. *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 82 P.3d 1199 (2004). Mr. Canfield bears the burden to prove Ms. Clark's statements were false. *Lambert*, 68 Wn. App. at 508.

In her motion for summary judgment, Ms. Clark did not have to come forward with evidence of "the literal truth of every claimed defamatory statement." *Mohr*, 153 Wn.2d at 825. A defamation defendant "need only show that the statement is substantially true or that the portion that carries the 'sting,' is true." *Id.*; *Woody v. Stapp*, 146 Wn. App. at 21; *Mark*, 96 Wn.2d at 494.

"The 'sting' of a report is "the gist or substance of a report when considered as a whole." *Mohr*, 153 Wn.2d at 825. In this case, Clark's reports, including that Canfield had guns, were substantially true. Mr. Canfield admits he was "irritated" at Ms. Clark during the desk incident, see CP 119, and Clark's peers confirmed her reports that he was angry. See CP 69-70; see *generally*, Statement of Facts A.2.b., *ante*, at 10-11.

Mr. Canfield takes particular exception to Clark's representation that Canfield carried a gun. But the fact that Canfield carried a gun and/or owned guns was confirmed by Messrs. Piffath, Hilliard, and Wickersham. CP 620-636; see also, CP 113, 114, 116 (investigative report). The court should conclude that Ms. Clark's statements that Mr. Canfield carried a gun were substantially true. In any event, Mr. Canfield was disciplined not because of allegations that he had a gun, but because of harassing, intimidating, controlling behavior. See, CP 123-124. Her statements to co-workers about Mr. Canfield's behavior were substantially true in the gist of what she was conveying, based on her experiences, as corroborated during the District investigation and subsequent disciplinary process.

5. Mr. Canfield's Claims are barred by the Anti-SLAPP Statute

Ms. Clark's comments regarding Canfield are also protected under the anti-SLAPP statute. The act is designed to prevent

individuals who make a complaint to a government entity from being sued for civil damages arising from that complaint. The statute provides:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

RCW 4.24.510.

The purpose of RCW 4.24.510 is to protect individuals who come forward with information that will help make law enforcement and government more efficient and more effective. Courts have interpreted the term "efficient operation of government" broadly. *Bailey v. State*, 147 Wn. App. 251, 191 P.3d 1285 (2008).

"Immunity applies under RCW 4.24.510 when a person (1) communicates a complaint or information to any branch of federal, state, or local government . . . that is (2) based on any matter 'reasonably of concern to that agency.'" *Bailey*, 147 Wn. App. at 261 (emphasis added).

Ms. Clark's complaints to the District qualify for protection under RCW 4.25.510 because they were made for the purpose of ending what she perceived as harassment by Mr. Canfield, as well as a dysfunctional relationship between Mr. Canfield and electricians he supervised, both matters "reasonably of concern" to the District.

V. CONCLUSION

The trial court properly granted summary judgment for Ms. Clark. Mr. Canfield has appealed only the dismissal of the defamation claim. The trial court's decision on the claims against Ms. Clark should be affirmed in all respects.

CROSS-APPEAL OF SEATTLE PUBLIC SCHOOLS

I. ASSIGNMENT OF ERROR

If the court somehow concludes that the trial court was powerless to rule on the validity of the claims against the District after the rendition of the jury verdict, this Court should review the denial of the District's motion for summary judgment as it relates to the claim for retaliation based on RCW 49.52.050 and RCW 49.46.100 and conclude that the trial court erred in denying summary judgment for the District on those claims.

II. STATEMENT OF THE CASE

The District incorporates by reference its statement of the case above.

III. ARGUMENT ON CROSS-APPEAL

Where the issue is purely an issue of law with no dispute of fact implicated, the court will review the denial of a motion for summary judgment after a jury verdict. *Washburn v. City of Fed. Way, supra*. As a matter of law, the verdict for Mr. Canfield cannot be sustained on these undisputed facts:

(1) Mr. Canfield was not terminated so under the *White v State, supra*, he had no common law claim for the tort of retaliation.

(2) Canfield did not complain about violations of the Minimum Wage Act in that

(a) he did not complain that he had not been paid overtime and

(b) he did not complain that he had been paid less than minimum wage.

This set of facts was not in dispute. Accordingly, the trial court should have granted summary judgment to the District prior to trial. The District's argument above sets out the pertinent law. While Judge Heller ruled correctly and the case against the District ultimately was dismissed, if the trial court had ruled correctly on summary judgment pre-trial, a needless trial might have been avoided.

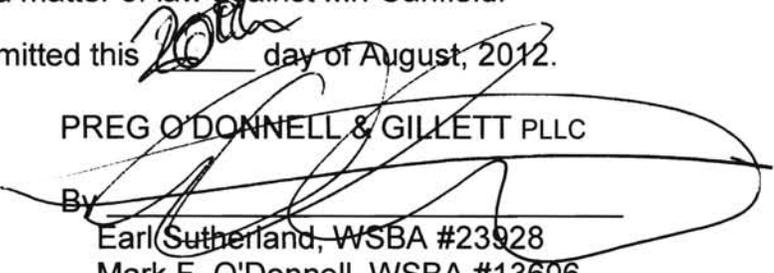
IV. CONCLUSION

If the court does not affirm the dismissal of the claim for retaliation based on RCW 49.52.050 and RCW 49.46.100 as a matter of law under CR 50, the court must review the trial court's denial of the District's motion for summary judgment and reverse, and dismiss the claim on the basis that the trial court erred. On the undisputed facts of this case, no claim for retaliation based on

RCW 49.52.050 and RCW 49.46.100 exists and the District is entitled to judgment as a matter of law against Mr. Canfield.

Respectfully submitted this 20th day of August, 2012.

PREG O'DONNELL & GILLETT PLLC

By 

Earl Sutherland, WSBA #23928

Mark F. O'Donnell, WSBA #13606

Attorneys for Defendants Michelle Clark
and Seattle Public Schools

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing

1. Respondents Brief;

to be served on the following parties in the manner indicated below

on the 20th of August, 2012:

Counsel for Appellant Donald Canfield:

Chellie Hammack, Esq.

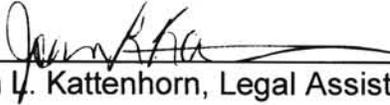
CM Hammack Law Firm

1001 Fourth Ave Suite 3200

Seattle, WA 98154

Via Messenger

DATED this 20th day of August, 2012.

By 

Joan L. Kattenhorn, Legal Assistant