

Case No. 73751-1-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

HENRY TANG, individually

Appellant/Cross-Respondent,

v.

CITY OF SEATTLE, a Washington Municipality;
SEATTLE PUBLIC UTILITIES, a division of the City of Seattle

Respondents/Cross-Appellants

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant Henry Tang “Tang” seeks reversal of a summary judgment dismissal of his claims against Respondents City of Seattle and Seattle Public Utilities (collectively “SPU”). (CP 995-996.) Tang will show that summary judgment dismissal was improper because Tang meets the burden of establishing a prima facie case of retaliation under RCW 49.17.160.

Tang will show that it is undisputed that the design work assigned to Tang involved issues of public and worker safety, and that SPU had knowledge of the safety issues; that, given Tang’s specific training and experience at SPU, Tang was not “competent, qualified, or knowledgeable” to perform engineering and design services SPU was requiring him to perform, which would constitute a violation of WAC 196-27A-020; that requiring Tang to perform engineering and design services for which he was not competent, qualified and knowledgeable would have constituted an illegal act, opening Tang up to criminal liability, a gross misdemeanor under RCW 18.43.120 and 18.235.130(4); and that the April 2013 demotion of Tang was specifically related to issues raised by his supervisor in September 2012 and not related to other issues raised by SPU on summary judgment in an effort to support a separate valid cause of demotion.

Finally, Tang will show that SPU violated RCW 49.17.160 by sanctioning, and ultimately demoting, Tang in retaliation for Tang's refusal to perform multi-discipline engineering and design work Tang was not qualified to perform. Prior to demotion, Tang was sanctioned and humiliated by Enrico, which included such disparate treatment as increased scrutiny and micro-management of Tang by Enrico (CP 215, 401); allegations of insubordination and discipline for insubordination (CP 399 at ¶ 18); false allegations of tardiness and lack of work performance and discipline for these false allegations (Id.); false manipulating of time records to reflect additional administrative time taken by Tang and less time allocated to projects (Id.); having his work area moved to a less-desirable location, an act that was humiliating to Tang (Id.; CP 185); refusal to allow Tang to change departments (Id.); decreased work responsibilities (Id.); and poor performance evaluations (Id.). In the trial court, SPU claimed that it had abundant non-discriminatory reasons for demoting Tang. (CP 132) The ultimate demotion of Tang resulted in a significant reduction of pay and benefits. (*Compare* CP 344 with CP 339-340, CP 761).

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Assignment of Error No. 1: Whether the summary judgment order dismissing Tang's claims should be reversed.

Issue No. 1 Pertaining to Assignment of Error No. 1:

Whether SPU's conduct contravenes the requirements of WAC 196-27A-020(2) governing professional engineers.

Issue No. 2 Pertaining to Assignment of Error No. 1:

Whether Tang objectively believed that in requiring him to performing the design and engineering services for which he was not competent, qualified, or knowledgeable, SPU was violating WAC 196-27A-020.

Issue No. 3 Pertaining to Assignment of Error No. 1:

Whether Tang's refusal to perform work for which he was not competent, qualified or knowledgeable was the basis for his demotion.

Issue No. 4 Pertaining to Assignment of Error No. 1:

Whether there was overriding justification for the demotion of Tang that precludes Tang's claim for retaliation under WAC 196-27A-020(2).

III. STATEMENT OF THE CASE

A. Background

The following facts are supported by the record on review as specifically referenced and were not disputed by SPU within its Reply in support of its motion for summary judgment dismissal of Tang's claims. (CP 693-710.)

On January 2, 1991, the City of Seattle defined the position of Senior Civil Engineer, which includes: "Positions in this senior level class work under limited supervision, independently resolving most routine problems but informing the supervisor of unusual or controversial problems." (CP 344.)

Tang graduated from the University of Washington with a Bachelor of Science in Civil Engineering in 1994. (CP 393 at ¶ 2.) In 1994 he began working for SPU and subsequently took and passed the professional engineer's exam. (Id.) Tang's work was primarily in the area of the administration of dam safety regulations including monitoring and recording the health, conditions and updates of emergency action plans for dams; he was in that position for approximately five years. (CP 392-393 at ¶ 2.)

On May 5, 2008, Tang applied for reclassification of his employment status from Associate Civil Engineer to Senior Civil Engineer. (CP 452-467.) In his application, Tang noted that his experience as a professional civil engineer had included hybrid hydroelectric and reservoir dam facilities, as well as safety issues and regulatory compliance for reservoir dams. (CP 452-453.)

Effective November 11, 2008, Tang's employment was reclassified to Senior Civil Engineer. (CP 449-450.) A reclassification recommendation noted that that Tang was an expert in dam safety and that

the subject position was most similar to the Civil Engineer, Senior level "in that it serves as the Project Manager/Engineer on technically complex and high priority projects in the area of dam safety, dam facilities and large reservoir operations in the Cedar River Watershed." (Id.) A January 21, 2009, employee review of Tang shows that Tang was meeting all standards of his employment between January 1, 2008 and December 31, 2008. (CP 678-685.)

Tang worked several more years in this dam safety and project management area until his then boss, Tom Fawthrop ("Fawthrop"), obtained a project that was different than any water issue Tang had ever worked on. (CP 396 at ¶ 3.) The project was to design a space to dry out the spoils of the City of Seattle. (Id.) After dam safety, Tang had an opportunity to work with the hydraulic models group but instead was offered and accepted a project management role. (Id.) As a Project Manager ("PM"), the role, as defined, did not include design work. (Id.) Thus, Tang was managing projects in new areas in which he had little or no expertise, but he was not designing those projects; he was the PM. (Id.; CP 451-470.) In this continued employment, from January 1, 2009 to December 31, 2010, Tang continued to receive employee reviews showing that he met all standards of his employment as a PM. (CP 658-670.) After Tang was promoted in November 2008, each of the evaluations of Tang clearly show SPU's expectations that Tang pursue training in "decision

making”, “prioritizing and planning”, “leadership development”, and “project management.” (CP 664, 677, 682) And, in Tang’s March 10, 2011 review, performed by his supervisor Fawthrop and approved by Fred Aigbe (“Aigbe”), the Solid Waste & Alternative Contracting Manager for SPU, SPU stated Tang’s overall career goal to be, “Continuing development in the Project Management in the area [sic] [of] security implementation of critical assets.” (CP 664.) Moreover, SPU Management, clearly defined the “Project Management (Senior) Job Task Expectations” of Tang, which did not include design work. (CP 666-667) This is consistent with Tang’s employment history at SPU and stated overall career goal. (CP 664, 666-667)

As a Senior Level Civil Engineer for SPU, or “Project Management (Senior)” employee as defined by SPU in Tang’s March 2011 employee evaluation, and as part of its Project Delivery Branch (“PDB”), Tang was assigned to manage the project of installing perimeter push walls and a canopy cover to protect the drying area for the decanting spoils at the Halladay Decant Facility located within approximately 500 feet of the closed Interbay landfill. (CP 394 at ¶ 4.) In early 2011, Enrico learned that Fawthrop’s work on the Halladay Project was being criticized and he initiated essentially a “hostile takeover” of the facilities program which included the Halladay Project. (Id.) Enrico positioned himself to look good to SPU management in his attempt to take over the facilities

program. (Id.) Enrico made comments on the Halladay Project prior to even being part of the team. (CP 396 at ¶ 7.) Through the successful efforts of Enrico to claim Fawthrop's facilities program, Enrico became Tang's supervisor. (Id.) Until Tang came under Enrico's purview, Enrico had not worked in the facilities program to which Tang was already assigned. (CP 394 at ¶ 4, 555.) In addition, Enrico never looked into the areas of competency for Tang. ((CP 414-416.) Rather, Enrico relied solely upon the knowledge learned by Tang in undergraduate to complete the tasks he would assign. (CP 425-427.)

As with every other SPU project, the Halladay Project came with a team of individuals who brought very different roles related to the project, including "Specifiers", essentially the "clients" on the job, and other various team members. (CP 394 at ¶ 4.) For the Halladay Project, Sean McDonald ("McDonald") and Judith Cross ("Cross") were identified as the Specifiers. (Id.; CP 555.) The Specifiers were the individuals to whom Enrico and Tang answered on the Halladay Project. (CP 394 at ¶ 4.)

In early 2011, Tang became the PM on the Halladay Project. (CP 395 at ¶ 5.) The original scope of the Halladay Project was not provided to Tang until later in February 2012. (CP 274.) With the knowledge that significant levels of methane had been detected at the Halladay site and with the knowledge of Tang's work history, in addition to the work he was performing as PM, SPU, through Enrico, assigned Tang other civil

engineering tasks, which he accepted. (CP 395 at ¶ 5.) For example, Tang was assigned the job of regrading and resurfacing the site with asphalt and installing a drainage system in order to control and direct all liquid spoils to an existing decant pit on site. (Id.) In addition, Enrico assigned Tang to provide, among other things, the basis of design and permitting identification; a design package for a Street Improvement Permit (“SIP”) and applicable regulatory permits; the final design package; engineer’s estimate; Methane Mitigation Plan (“MMP”); support during Job Order Contract negotiation and award; and review of submittals and design support during construction phase. (Id.)

Tang disagreed with Enrico’s requirement that he perform multi-discipline engineering and design work on the project that was outside of the scope of his knowledge and expertise, in addition to his Project Management duties. (CP 395 at ¶ 6.) Thus, with the understanding that Enrico was seeking to have Tang perform multi-discipline design and engineering services work, including but not limited to civil, structural, and electrical, if required, the dispute between Enrico and Tang ensued. (Id.) Following Tang’s determination that he was not best suited for the multi-discipline design work, Tang first told Enrico about his concerns in writing in comments on an April 2011 memorandum to the Halladay project file Enrico could access at any time. (CP 396 at ¶ 7, 472-475, *see* 474) Tang discovered Enrico making comments on the Halladay Project

prior to even being part of the team. (Id.) In that memo (in regular font), Enrico suggested for the first time in an attempt to look good to the Specifier, McDonald, that Tang perform both the PM and the Civil Engineer duties to save costs. (Id.) Tang disagreed (in italics) with Enrico's position it would save costs because the civil engineering needed to be done by someone with experience in "inter-discipline," or multi-discipline, design. (CP 396 at ¶ 8, 472-475.¹)

Despite Tang's concerns, in the summer-fall of 2011 Enrico continued in his stance that he wanted Tang to be the designer for the Halladay Project. (CP 397 at ¶ 10.) Again, Tang pointed out that he had not calculated designs, drafted designs, or stamped designs at any time since he became a Senior Civil Engineer for SPU. (Id.) For the prior two years, Tang's assignments had been as a PM, and he had performed no design work in that role or previously since the time he was promoted from his employment designation as an associate engineer. (Id.) Due to his lack of expertise, Tang informed Enrico that design would be a challenge for him on the Halladay Project, particularly because it was landfill related, which inherently has methane and other chemical and combustible issues, a safety issue known to SPU. (Id.; CP 477-486.)

¹Font indications (italics) were provided to discern the author.

In late 2011 or early 2012, Enrico had a discussion with Cross, who was the Business Area Manager on a project which may have been the Halladay Project. (CP 417.) Cross was critical of Tang at that time and did not want Tang assigned as the PM when the Halladay Project entered its next phase in late 2011. (CP 214 at ¶ 6.) At that time Enrico defended Tang tenaciously, but Cross was unhappy with Enrico's defense of Tang. (Id.) At the same time Enrico continued to push Tang to perform the multi-discipline engineering and design work that Tang had not previously performed and did not feel competent to perform. (CP 397 at ¶¶11, 418.)

In November 2011, a document entitled, "Stage Gate 2 Approve Business Case" ("SG 2") that had been circulated in June 2011, was again circulated, approved, and finalized by the team, which included Tang but not Enrico. (CP 609, 554-572.) The SG 2 document identified various aspects of the project at the time. Most important is that Enrico was the author of the estimated costs for engineering (CP 566.) Yet, at this stage of the document, Tang was not designated as doing the multi-discipline design work. Tang was only listed as the PM and as the representative of the PDB, which now included Enrico, as having performed or reviewed the preliminary engineering. (CP 555, 557.) Tang sought to resolve the issue of competent engineering design by pursuing a consultant to perform the engineering design for the Halladay Project as recommended by the Specifier in the November 2011 SG 2 document. (CP 367 at ¶ 12.) To that

end, Tang sought and received approval from SPU for an outside engineering company to perform the design work related to construction of the Halladay Project to mitigate harm from the methane gas exposure and other toxic waste or chemicals. (CP 396 at ¶ 9) Thus, between April and November 2011, Tang continued to impress that it would not be him to complete the multi-discipline engineering and design work on the project, and he was not identified as doing the design work. At that point, Tang had won the battle between him and Enrico. (CP 401 at ¶ 24.)

However, Enrico continued to disagree with Tang as to the harm and to Tang's assessment of his ability to perform the work. When Tang pursued a consultant to perform the engineering design, Enrico did not like Tang's response and his treatment of Tang, as Enrico's subordinate, suddenly changed. Enrico seemed to be enraged, and beginning in February 2012, he began to sanction Tang with progressive retaliatory discipline specifically related to Tang's efforts to obtain what Tang believed was the proper and legally required protocol for the health and safety of workers and other City of Seattle employees. (CP 397-398 at ¶¶ 12 and 15, 222-223, 225-226.)

In addition to his concern for performing multi-discipline engineering and design work, Tang became increasingly concerned about his qualifications to prepare the MMP as part of the final design package. (CP 395 at ¶ 6.) Tang and Enrico disagreed on whether the MMP should

or should not require a licensed engineer who has specific knowledge and training as to the proposed project and the effect of the detected methane on health, life, and safety given the proximity of the proposed structure and the water system to the nearby closed landfill. (Id.; CP 419-420.) Tang made a professional assessment that the MMP was outside of his education, knowledge, experience and technical environmental field. (CP 398 at ¶14.)

When Enrico proposed that he would do the design work, with Tang signing off on the designs, Tang was also concerned about Enrico's own qualifications to perform the work. (Id.) To do so would violate the fundamental canons and guidelines for professional conduct and practice. (Id.) Enrico continued with his belief that Tang, as a licensed professional engineer, had the specific knowledge to prepare and sign off on a civil site design that included the MMP. (CP 413, 421-424.) Tang does not disagree that he was qualified to perform certain aspects of civil design on the project; however, as PM and as a licensed professional engineer, it was incumbent on Tang to assure that the persons with knowledge in the subject area were designing the plan to construct the decant facility with this aspect in mind. (CP 396 at ¶ 9.) Alongside assuring overall proper multi-discipline design and engineering on the Halladay Project, Tang determined in his professional capacity that a licensed engineer with experience in methane gas mitigation or landfill construction should be

consulted and should formulate the design that considered the gas issue and included the MMP, or at a minimum should be consulted regarding the adequacy of the MMP for the project. (CP 396 at ¶ 7.) The design work Enrico was seeking to have Tang perform was simply outside Tang's employment experience at SPU, outside the "overall career goal" stated in his prior year's employee review, and not within the defined expectations of Tang's employment as a Senior Project Manager. (CP 392-395 at ¶¶ 2-5, 664, 666-667)

In December 2011 and January 2012, Enrico and Tang's working relationship finally became irreconcilable, and Enrico began a pattern of increased scrutiny and micro-management of Tang at work, citing influence of Cross' resistance to Tang's involvement in the project. (CP 215 at ¶7, CP 401 at ¶ 25.) On March 6, 2012, Enrico issued two memoranda to Tang: 1) "Coaching Memorandum" related to performance standards; and 2) a memorandum regarding "Expectations for Senior CE/PM. (CP 222-223, 225-227.) These memoranda focused on Enrico's unhappiness with Tang's attendance, email protocol, and preparation and distribution of meeting agenda and minutes. (Id.) Tang refused to sign both of these memoranda. (CP 223, 227.) Enrico showed a general distrust of Tang, questioning whether Tang's time was accurately reported, and was requiring Tang to drop by Enrico's desk when Tang came into the office and call Enrico each afternoon to report what Tang had accomplished

during the day. (CP 225-227.) This kind of scrutiny and control was in direct opposition to the stated terms of Tang's employment whereby he was to "work with limited supervision." (CP 344.)

In response to Enrico's increased scrutiny and demands, Tang maneuvered to avoid confrontations with Enrico on the subject of obtaining approval for consulting engineers to perform the multi-discipline and MMP work. Exercising his ability as a senior level employee, Tang independently sought to obtain approval for consulting engineers to perform the MMP design work. (CP 397 at ¶ 12.) Tang ultimately succeeded in obtaining that approval on the project in May 2012. (CP 397-398 at ¶ 12.) In addition, later, in August 2012, a consultant was listed as the project engineer and lead design engineer on the Halladay Project, Tang was listed as the PM. (CP 574-583, *see* 575.)

Approximately three weeks after issuing his "best practices" memoranda to Tang, on March 26, 2012 Enrico issued Tang a poor performance evaluation, Tang's first ever, for the entire 2011 year. (CP 229-237, CP 394 at ¶ 4, 397 at ¶ 10.) Enrico cited that Tang should incorporate more design work into his expertise, but the only project where design work was being requested by Enrico was the Halladay Project. (CP 229-237, *see* 230-31.) However, it is clear that Enrico was well-aware of Tang's concern about safety, because within a performance review fraught with "Below Standard" ratings, Tang received a "Meets

Standards” rating in the area of “Safety”, indicating that he was contributing to and promoting a safe work environment. (CP 229-237, *see* 232.)

On April 5, 2012, Enrico was again enraged with Tang’s continued insistence that the design work be done by a consultant. (CP 401 at ¶ 27.) Tang’s ongoing safety concerns and conclusions were buttressed in April 2012, when test results confirmed methane readings that exceeded expectations. (CP 1031-1034, *see* 1033.) Tang assembled a meeting with in-house subject matter experts including Jeff Neuner, landfill specifier, and Gail Coburn (“Coburn”), the environmental section manager, who all affirmed that the requirement that the MMP be prepared by a licensed professional engineer with competency in the area of methane emissions. (CP 400 at ¶19, 585-586.)

On May 22, 2012, citing Seattle Municipal Code Section 25.09.220B, Coburn stated to Tang, among others, that “a methane mitigation plan needs to be developed and included with the building permit application.” (CP 810.) This was also discussed at a May 23, 2012, meeting, wherein the agenda included that the MMP needed to be stamped by a Professional Engineer. (CP 585-586.) In addition to the multi-discipline engineering and design work, in reliance of Seattle Municipal Code 25.09.220 cited by Cody Nelson on May 22, 2012, specifically referring to areas within 1000 feet of Methane-producing landfills and

accumulation levels related to enclosed spaces, Tang made a professional assessment that the structure being designed was within the health safety guidelines intended under this municipal code and should be considered in the MMP related to proper ventilation that may be required. (CP 398 at ¶ 15.) Tang made a professional assessment that if the structure was built in the proximity of the closed Interbay landfill that the methane gas levels, which reports already showed exceeded the lower explosive limit, would be dangerously high such that there would be a substantial probability that death or serious physical harm could result to any employee immediately or before the imminence of such danger could be eliminated. (Id.) Thus, Tang sought to ensure a licensed engineer with competency in the subject area of methane emission to prepare the MMP to assure that the structure could be built with the proper engineering to eliminate the risk of death or physical harm to employees from methane. (Id.)

Desiring to learn the extent of the potential danger, and having yet a deeper concern for the safety of the project, Tang obtained the services of Mr. Min Soon Yim (“Yim”), the Utility Manager for landfill operations at SPU, to conduct testing of the site, and sought additional support for further environmental review. (CP 403 at ¶ 28, CP 1023.) Yim maintained and checked the gas levels at various former landfills in the city on a weekly basis (CP 430-432.) The purpose of this maintenance and gas level checks is to protect the environment and to protect human health. (CP

432.) In the winter of 2011 and about 2012, Yim found levels at the nearby Interbay Landfill to be at levels that were higher than the 5% explosive limit. (CP 434-435) The Interbay landfill is surrounded on three sides by homes, businesses and a busy 15th Avenue connecting the Interbay area to Seattle, Magnolia and Ballard. (CP 435.) Thus, when the testing revealed that the levels were too high Yim was tasked with fixing the problem at the Interbay landfill. (Id.)

Of significance, the April 2012 high methane readings at the Halladay site exceeded the capabilities of Yim's equipment because the equipment he had with him at the time of the testing was not sufficient to read higher than 5%, which means that Yim could not exactly tell how high the methane readings were. (CP 436, CP 1024 at ¶ 7.) Thus, Yim supported Tang's concerns, indicating that the reading levels could have caused a "Kaboom." (CP 445-446.)

In June 2012 Tang worked with an environmental consulting company to understand the entire contaminant problem. (CP 403 at ¶ 28.) On June 28, 2012, the SPU Geotechnical Engineering department sent a memo to Tang stating:

A methane monitoring and mitigation plan should be developed and implemented. Since hydrogen sulfide can occur in areas that have high methane readings, consideration should be given to the potential for hydrogen sulfide and associated worker safety. (CP 488-534, *see* 495, *emphasis added*.)

A Risk Register related to the “Halladay Decant Facility” identified a risk of injury, although it did not specifically detail what types of injuries could be sustained, whether by explosion or by asphyxiation or by a worker passing out and hurting themselves in the process. (CP 477-486.) Thus, SPU had knowledge that the Halladay site had methane gas issues as well as lead and other toxic chemicals harmful to the public, including the workers for the project who would be constructing the decant facility. (CP 477-486.)

In response to the Geotechnical Engineering report, on July 17, 2012 Tang reported the environmental findings to the Department of Ecology (“DOE”) as provided by law. (CP 588-593.) After the environmental issues being identified and exposed, Tang found himself surrounded by persons that agreed the MMP should be accomplished by someone who had experience. (CP 403 at ¶ 28.) In addition, at that point at least, Cross agreed that environmental concerns needed to be handled by persons with knowledge and she approved a small contract for this work. (CP 611.²) To that end, Cross was continuing to work with Tang, communicating with Melina Thung that she was working with Tang on a Phase I Environmental Site Assessment to occur in September 2012, to be completed in eight weeks from the start time, or approximately November

²“Dan Enrico committed to having a design consultant hired by the end of Sept. 2012....” Notably, there was no indication that Cross was having any issues working with Tang.

2012. (Id.) Thus, Tang had won the express consent of the client, and Enrico had to agree in front of the client. (Id.) However, privately between Tang and Enrico, Enrico was enraged because once again, Tang solidified his position that he was not performing the multi-discipline design engineering for the Halliday Project, or the design work for the MMP, particularly with the environmental risks that had been identified. (Id., CP 408 at ¶11.)

As a direct result of a July 26, 2012 meeting between Enrico and Cross, Enrico immediately began monitoring Tang's attendance, which he had not done since early 2012. (CP 404 at ¶ 29.) Enrico noted that on July 31, August 1, and August 8, 2012, Tang was a few minutes late but made the time up at lunch-time, during breaks, or after work. (Id., CP 244.) However, Tang always made up time if he was late and sometimes he was early and still stayed to his regular departure time. (CP 404 at ¶ 29.) This was common practice for the professionals with whom Tang worked with at SPU. (Id.) In addition, it was in keeping with Tang's job description that he was to "work under limited supervision." (CP 344.) It was, however, not common practice for Enrico to monitor Tang's comings and goings on a daily basis. In addition, Tang had the understanding that there was flexibility with his schedule. (CP 404 at ¶ 29.)

On August 8, 2012, Enrico began a draft of a written reprimand of Tang. (CP 595-596.) Another draft of reprimand, discussing several times

with Tang including the requirement that he demonstrate that he is able to perform his job as a Senior Civil Engineer at the established standard, was provided to Tang by Enrico on August 13, 2012. (CP 244-245, 381.) The reprimand was yet unsigned, but Enrico was in a hurry to get it out because on August 16, 2012, Tang was submitting the Halladay Project for Stage Gate 3 (“SG 3”) approval, which would be a significant milestone for the project. (Id.)

The standards to which Enrico referred in his August 13, 2012, memo were standards that included multi-discipline design work and MMP work. However, this was a departure from the description of Tang’s employment upon promotion from Associate Engineer to Senior Engineer; Tang was promoted as the Project Manager/Engineer on technically complex and high priority projects in the area of dam safety, dam facilities and large reservoir operations in the Cedar River Watershed. (CP 381-382, 449-450.)

This time, however, Tang fought back against Enrico’s retaliation. (CP 381.) In response, on August 23, 2012, Tang filed a grievance against Enrico calling to attention the written reprimand as essentially pretext which “underscores a broader issue with our supervisor-employee conflict....In multiple incidents going back several months, you stated I should look for assignment outside your work group; [Enrico] had turned ‘excitable’ when I declined to perform engineering design; and asserted

removed from the job, Tang cited Washington Administrative Code 196-27A-020(2)(d) and (e) which provides that “the practicing engineer shall be competent in the technology and knowledgeable of the codes and regulations applicable to the services they perform; and must be qualified by education or experience in the technical field of engineering ... applicable to services performed.” (Id.) Enrico’s stance was confusing to Tang, since SPU had already approved outside consulting environmental engineers, and it made no logical sense to assign the work to Tang when another Civil Engineer was already approved. (CP 404 at ¶ 31, CP 611.) Regardless, Enrico gave Tang an ultimatum to accept the assignment. (Id.) When Tang refused, Enrico retaliated further. (CP 399 at ¶ 18.) Retaliation and discrimination by Enrico specifically included but was not limited to allegations of insubordination, false allegations for tardiness and lack of work performance, false manipulating of Tang’s time records to reflect additional administrative time taken by Tang and less time allocated to projects; moving Tang’s cubicle to a less desirable location, discipline for these false allegations, demotion, refusal to allow Tang to change departments; decreased work responsibilities; and poor performance evaluations. (Id.)

In September 2012, correspondence circulated between Cross and Tang (with Enrico copied) asking specifically why engineer consultants were performing 100% of the design work. (CP 602-603.) This question

shows that Cross and Enrico were in discussing at that time that possibly in-house engineers could complete the work. (Id.) Tang looked into this possibility and politely responded that no in-house designers were available to perform the “full” design on the project. (CP 400-401 at ¶ 22.) Tang was subtly attempting to make sure his supervisor, Enrico, knew that Tang was continuing to insist that he would not be performing the multi-discipline design work or MMP design, but also letting his “client”, Cross, know that the work needed to remain with an outside consultant. (Id.) In the next question and response, Tang was more forceful and transparent, indicated that both a PM and an engineer were typically required. (CP 602, *emphasis added*.)

After Enrico was warned by SPU Human Resources to respond to Tang’s August 23, 2012, grievance, on September 21, 2012, Enrico responded but failed to address Tang’s concerns and denied acceptance of his proposal to mediate the issue. (CP 330-331, 404 at ¶ 32) Most importantly, Enrico denied certain allegations Tang made, but not the allegation that Tang had declined multi-discipline engineering work prior to Tang officially declining the work on August 31, 2012. (Id.) And, even though Enrico was responding to Tang’s August 23, 2012 grievance, he included in his response a reference to Tang’s subsequent August 31, 2012, refusal to perform design work and request to allow it to be

33.) In an October 22, 2012 meeting, just prior to Tang's vacation, Cross discovered that Enrico had assigned the design work to Tang with Enrico himself assisting. (CP 615.) Cross questioned why this was done since a consultant had already been approved for the work. (Id.) However, the discussion was taken off-line and was only verbal between the Enrico and Cross. (CP 384.) As a result of the conversation, Cross apparently changed her mind and plans that had been the same for nearly two years and approved through significant processes were suddenly changed overnight to have the design work done by the PDB (Tang and Enrico). (*Compare* CP 611 and 615) It now appeared that Cross was on board with Enrico.

After Enrico had fought all of Tang's efforts to have the proper knowledgeable consultant prepare a proper plan for mitigating the methane, and while Tang was on vacation, Enrico took over the project and removed Tang from the project so that Enrico could perform the task he sought Tang to perform. (CP 398 at ¶ 13.) Enrico's plans were impeded while Tang was on vacation, during which time there was an attempt to begin construction on the site without the MMP or permits that consider toxic chemicals and harmful exposure. (CP 405 at ¶ 33.) Fortunately, Coburn, who had been working with Tang on the methane issue and was the environmental section manager, immediately caused the Halladay Project to cease all activity by alerting Enrico, McDonald and Cross because such action without a permit or a plan for the toxic materials and

gas would likely be harmful to workers or the public. (Id.) Tang had just returned from vacation when all of this occurred. (Id.) Although it may have appeared that Tang had something to do with thwarting the construction in December 2012, Tang did not. (Id.) But again, Tang's concerns about worker safety were bolstered.

Enrico had a single meeting with Yim regarding the methane gas and hydrogen sulfide. (CP 437-440.) However, Enrico failed to ask Yim to prepare a plan to protect human health risks. (CP 441.) Moreover, Yim did not have enough information about the project to prepare the MMP. (CP 442-443.) Yim would have needed more information to first determine whether it was something that he could do (CP 443.) He would need to run more tests with probes in order to formulate a solution or even know if he is competent to formulate a solution. (Id., CP 443-444.)

Following Tang's earlier July 2012 notification to the DOE, on November 20, 2012, the DOE conducted an investigation and issued a notification to Seattle Department of Transportation confirming that areas of contamination existed at the Halladay Project site. (CP 622-623.) Tang's concerns were once again supported.

Upon returning to work in December 2012, on December 6, 2012, Coburn addressed work that might be done at the Halladay Project site before the end of December and specifically addressed concerns for "worker safety", "potential for methane explosion, "and "worker exposure

to lead and/or causing lead soils to migrate.” (CP 627-628.) In response, Clayton Antieau expressed concern that “going to construction without conducting environmental review or having appropriate permits was not prudent.” (CP 627.) Tang’s concerns were once again supported.

On February 21, 2013, Tang again sought clarification of the role of the “project engineer” with respect to signing the SIP. (CP 289-292). Tang was not refusing to sign the SIP, but the SIP required the signature of the “Project Engineer,” a role that had not been defined or clarified within any Scope of Work or job assignment documentation. (Id.) However, Enrico viewed Tang’s inquiry as insubordination, of which Enrico notified Aigbe. (CP 283-284.)

In February 2013, Tang’s work-space cubicle was moved to a less desirable location, which Tang viewed as a downgrade putting him in a humiliating situation and causing harm to his reputation. (CP 405 at ¶ 34, CP 279.) In addition, in February 2013, prior to getting pulled off the Halladay Project, Tang was ready to submit the project to permitting with 30% design completion, which was reasonably on schedule with the SG 3 approved plan. (CP 406 at ¶ 34.) The primary difference with what was approved and what was done was the change that Enrico made in the design. (Id.) Of significant importance was that at 30% design review and permitting, environmental issues were discussed and determined with permitting. (Id.) This is exactly why Tang did not feel it was appropriate to

complete this work in-house and it should have been completed by a competent engineering consultant. (Id.) It was at that point that Tang was taken off the job. (Id.) Tang did his best to comply with Enrico's orders but he was not given the support he needed or that which was promised to him by Enrico. (Id.)

On February 26, 2013, Tang attended a Loudermill hearing regarding the issues raised by Enrico in his September 2012 recommendation for suspension. (CP 339.) SPU acknowledged that Tang had raised issues related to safety, but rejected Tang's position. (CP 340.)

Tang achieved each of the milestones in the Halladay Project up until he was finally demoted on April 2, 2013, from Senior Civil Engineer to Associate Civil Engineer. (CP 407 at ¶ 35, 339-340.) In its letter of demotion, SPU acknowledged that Tang had raised issues of safety. (CP 340.) The entire basis of Enrico's and Cross' allegations as to Tang's work product was undermined by Enrico's desire to have the multi-discipline design and MMP design work done in-house by Tang. (CP 407 at ¶ 35.) Cross had previously not been happy with Tang, and she let it be known in 2011. (Id.) Thus, when Enrico and Cross came together to oppose Tang, Cross' opposition was from earlier experiences and not from a supervisory position but rather that of a "client." (Id.)

Both before and after Tang worked with Enrico, Tang had good evaluations from his supervisors, his work experience was good, and he

was a productive employee. (CP 651-685.) Enrico could not point to specific assignments that did not get done, and there are no drafts showing the work that Tang submitted was deficient. (CP 407 at ¶ 35.)

Even after Tang's demotion, Enrico continued to diminish the importance of the presence of methane, but Yim did not support Enrico's position, indicating that there was more concern about methane explosion than Enrico previously stated. (CP 296, 298.)]

On May 2, 2013, Tang complained to the Washington Department of Labor and Industries ("L&I") through a WISHA complaint. (CP 193-194). On July 17, 2013, L&I issued a decision that there was insufficient evidence to substantiate discrimination, as defined by WISHA, had occurred. (CP 196.) In a subsequent decision, L&I affirming its earlier decision specifically with regard to Tang's issues about safety concerns. (CP 687.) As required by L&I, Tang filed his complaint against SPU in the King County Superior Court within 30 days of the decision on October 30, 2013. (CP 1-7.)

On January 31, 2014, for the period October 23, 2013 to January 31, 2014, after Tang was no longer supervised by Enrico, Tang received another employee review that showed Tang meeting all standards, that there were no problems with the interaction with any team members or other SPU staff, and that SPU was actively working with Tang about a schedule. (CP 652-657.) Thus, it was only during the time that Tang

worked with Enrico as his supervisor that any issues arose and retaliation occurred. (CP 229-237.)

IV. ARGUMENT

A. Standards of review.

Review of summary judgment is de novo. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000), *citing* Benjamin v. Washington State Bar Ass'n, 138 Wn.2d 506, 515, 980 P.2d 742 (1999) Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ellis, at 458, *citing* Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. Id. The court considers the facts and all reasonable inferences in the light most favorable to the nonmoving party, and if the Court can reach the conclusion that the sanction and demotion of Tang was retaliatory rather than justified, then summary judgment is not appropriate. Id.

To establish a prima facie case of retaliation under RCW 49.17.160, Tang must (1) prove the existence of a clear public policy (the *clarity* element); (2) prove that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element); (3) prove that the public-policy-linked conduct caused the dismissal (the *causation* element); (4) the defendant must not be able to offer the

overriding justification for the dismissal (the *absence of justification* element). Ellis, at 459, *citing Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 942, 913 P.2d 377 (1996).

B. The summary judgment order of dismissal must be reversed.

1. SPU's conduct contravened the requirements of WAC 196-27A-020(2) governing professional engineers.

"In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." Ellis v. City of Seattle, 142 Wn.2d at 459, *citing Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 232, 685 P.2d 1081 (1984). In Ellis, the plaintiff argued that because the Seattle Fire Code required certification from the Fire Department before an individual may service fire alarm systems, and because he had no such certification, the City's prospective orders to him to bypass the system were illegal. Ellis, 142 Wn.2d at 459, *citing* Seattle Fire Code, App. III B, at 496c.

Here, similarly, the City of Seattle, SPU, was requiring Tang to perform design and engineering services for which we was not competent, qualified, or knowledgeable, a clear violation of WAC 196-27A-020(2)(d) and (e) which provide:

(d) Registrants shall be competent in the technology and knowledgeable of the codes and regulations applicable to the services they perform.

(e) Registrants must be qualified by education or experience in the technical field of engineering or land surveying applicable to services performed.

In addition, if Tang was not competent, qualified, and knowledgeable to perform the services, Tang could have been found guilty of a gross misdemeanor, an illegal act. Under RCW 18.43.120, engineers may be found guilty of a gross misdemeanor if an engineer violates RCW 18.235.130(4), which provides:

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter: . . . (4) Incompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another;...

It is undisputed that Tang is professionally certified as a civil engineer. (CP 393-393 at ¶¶ 2, 3.) However, SPU, through Enrico, demanded that Tang perform multi-discipline design work and design of the MMP, which he had not previously done in his employment at SPU and which was not described in the March 4, 2009 SPU Classification Determination Report when Tang's employment was changed from Associate Level Engineer to Senior Level Engineer. (Id., CP 449-450⁵, 452-470.)

⁵In its Classification Determination Report, SPU noted: "The subject position is most similar to the Civil Engineer, Senior level in that it serves as the Project Manager/Engineer on technically complex and high priority projects in the area of dam safety, dam facilities and large reservoir operations in the Cedar River Watershed." (CP 450.)

On summary judgment, SPU argued that the Halladay Project civil site design work assigned to Tang at the end of August 2012 and beginning of September 2012 had precluded the MMP design element. (CP 149) This is not supported. Tang, in his last plea to Enrico on September 10, 2012, stated he did not have to competency to perform the Halladay design per a multi-disciplinary scope that explicitly included a MMP stamped by a Professional Engineer. (CP 251-252) This was well before the February 2013 Loudermill hearing and Tang's April 2013 demotion.

And, in January 2013, Enrico emphatically reiterated that Tang was the "lead and only" designer on the Halladay design, which clearly included the MMP. (CP 263-265) Only after legal actions had commenced did Enrico declare that the intended definition of the "civil site design" does not included the MMP. (CP 216-217 at ¶¶ 16, 17) The Court must reject SPU's post hoc rhetoric and rationalization.

The record is clear that the basis of Tang's demotion in April 2013 was his refusal to perform the design and engineering work. (CP 339-340.)

The April 2013 demotion letter specifically states:

The purpose of this letter is to inform you of my decision regarding your management's recommendation that you be disciplined for insubordination and continued failure to meet performance standards. In September 2012 you were notified that a recommendation had been made for disciplinary suspension for these reasons and in January, as

these issues persisted, you received a recommendation for demotion.” (CP 339, *emphasis added*.)

The September 21, 2012, recommendation memorandum from Enrico to DeBoldt specifically focused on the design work on the Halladay Project:

Henry has repeatedly refused to perform design work on an engineering assignment for the Halladay Project.

...Henry continued to coordinate with Grants and Contracts in processing the Halladay Design RDNC to hire a consultant to do the work he had been assigned [which had been previously authorized]...” (CP 330.)

In recommending Tang for a 3-day, unpaid disciplinary suspension from work, Enrico noted his wish to help Tang “recognize the severity of his actions...” (CP 331.) While Enrico mentions unacceptable and tardiness within his recommendation, the suspension recommendation clearly focuses on the engineering and design work. (Id.)

The *clarity* element, as set forth in Ellis, is met because it is clear that SPU, through Enrico, was willing to bypass the requirements of WAC 196-27A-020(2)(d) and (e) that a competent, qualified, or knowledgeable professional perform the design and engineering work where the public and workers may be at risk, and potentially subjecting Tang to personal criminal liability under RCW 18.235.130(4) and 18.43.120. Viewing the evidence in a light most favorable to the non-moving party, Tang, summary judgment was not appropriate and should be reversed. Ellis, at

458, *citing* Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c).

2. Tang objectively believed that in requiring him to performing the design and engineering services for which he was not competent, qualified, or knowledgeable, SPU was violating WAC 196-27A-020.

In the retaliatory context, Washington law has recognized a cause of action where an employee has an objectively reasonable belief an employer has violated the law. Ellis, 142 Wn.2d at 460, *citing* RCW 49.60.210 (retaliation for discrimination claim); Kahn v. Salerno, 90 Wash.App. 110, 130, 951 P.2d 321 (1998); Graves v. Department of Game, 76 Wash.App. 705, 712, 887 P.2d 424 (1994); *also citing* RCW 42.40.020(5) (state whistleblower statute--good faith belief improper governmental); RCW 42.41.040(1) (local whistleblower statute). This standard has an analog in federal antidiscrimination law, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Ellis, 142 Wn.2d at 460

A reasonable belief by the employee, rather than an actual unlawful employment practice, is all that need be proved to establish a retaliation claim. Ellis, 142 Wn.2d at 460, *citing* Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir.1994). In Ellis, to establish his retaliation claim under RCW 49.17.160(1), Ellis was not required to prove an actual WISHA violation. All he had to do was prove the City terminated him for making a WISHA complaint. Ellis, at 461, *citing* Wilson v. City of Monroe, 88 Wash.App. 113, 943 P.2d 1134 (1997). In Ellis, the court held:

In the case at bar, the facts are strikingly similar to those in Ellis, and it is compelling that the respondent is again the City of Seattle. The conduct in which Tang engaged was to refuse to perform design and engineering services system without competence, qualification, or knowledge of the specific engineering disciplines and in light of the issues related to methane present at the Halladay facility. His motive was protection of the public and workers at the site, and Tang's concern for safety was noted by Enrico in his March 2012 employee review of Tang. (CP 229-237, *see* 232) Similarly to Ellis, performing design and engineering work without competence, qualification, or knowledge would raise safety concerns in the mind of any conscientious individual, especially here, where both Tang and SPU were aware of the risks.

Contrary to SPU's position in the trial court that Tang "did not raise worker safety concerns before the City demoted him" (CP 694), the record shows both that SPU was aware of the safety issues and that Tang raised the safety issues prior to demotion. Meeting minutes from a May 23, 2012 meeting regarding "Methane and Hazmat Screening" for the Halladay Project noted that "a Methane Mitigation Plan stamped by PE would be required (for permitting). (CP 400 at ¶19, 585-586.) A June 2012 Risk Register and Consultant Contract Risk Management Checklist noted environmental and bodily injury hazards (CP 477-486, *see* 477, 482-483.)

And, on June 28, 2012, a memorandum to Tang from SPU's own Geotechnical Engineering department stated:

A methane monitoring and mitigation plan should be developed and implemented. Since hydrogen sulfide can occur in areas that have high methane readings, consideration should be given to the potential for hydrogen sulfide and associated worker safety. (CP 488-534, *see* 495.)

Finally, in his capacity as the Project Manager of the Halladay Project PDB, Tang notified the DOE of the hazardous substances at the site, and provided McDonald, the SPU Specifier with the notice. (CP 588-593.)

As for Tang, the record shows that as early as April 2011, Enrico was seeking to have Tang perform both as PM and as PE in order to keep costs down. (CP 474.) Tang recognized that the Project Engineer should be "an individual with strong experiences". (Id.) Enrico had access to Tang's written comments in April 2011, in which he expressed that he was not best suited for the multi-disciplinary work. (CP 396 at ¶7-8.) Regardless, throughout 2011, Enrico continued to push for Tang to perform the work as both the PM and designer. (CP 396 at ¶9.)

Thereafter, as recommended by the Specifier in the November 2011 SG2, Tang sought and received approval for an engineering company to perform the design work related to construction of the project to mitigate harm from the methane gas exposure and other toxic waste or

chemicals. (CP 396 at ¶ 9, 397-398 at ¶ 12.) Tang ultimately succeeded in obtaining that approval on the project. (CP 397-398 at ¶ 12.)

Later, in August 2012, a consultant was listed as the project engineer and lead design engineer on the Halladay Project, Tang was listed as the PM. (CP 574-583 at 575.) In his August 31, 2012 memorandum to Tang, Enrico stated that the common description of Tang's alleged insubordination was commonly described as: "...your inability to finalize the Halladay PMP is a prime overall example [of persistent insubordination]. Your major assignment in 2012, the original scope for the project (Halladay) was provided to you by the Specifier in Feb 2012. Substantially the scope has not changed..." (CP 247-249, *see* 247.) Thus, Enrico was clearly requiring Tang to perform work for which he was not competent, knowledgeable, or qualified, in direct violation of WAC 196-27A-020.

When Enrico persisted in his requirement that Tang serve as both the PM and PE on the Halladay Project, Tang raised his concerns about multi-discipline engineering and design work; on September 10, 2012, Enrico ignored Tang's concerns and took the position that his demands were reasonable and that Tang's refusal to do the work constituted "insubordination". (CP 251-257.) Tang was ultimately demoted based upon Enrico's September 21, 2012 recommendation, which specifically

The *jeopardy* element is clearly met. See Ellis, 142 Wn.2d at 464. Viewing the evidence in a light most favorable to the non-moving party, Tang, summary judgment was not appropriate and should be reversed. Ellis, at 458, *citing* Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c).

3. Tang’s refusal to perform work for which he was not competent, qualified or knowledgeable was the basis for his demotion.

In order to meet the third element of the *Gardner* test, a plaintiff must “prove that the public-policy-linked conduct caused the dismissal.” Ellis, at 464. In Ellis, the Supreme Court determined that Ellis met the causation element, stating:

There is no dispute the City fired Ellis because of his refusal prospectively to alter the fire alarm system. His dismissal letter from Seattle Center Director Anderson specifically referenced his "gross insubordination" with respect to his refusal. Id.

The record is clear that Tang was demoted for his refusal to perform the design and engineering work in violation of Washington law. As argued, *supra*, the record is clear that the basis of Tang’s demotion in April 2013 was his refusal to do perform the design and engineering work. (CP 339-340.) The September 21, 2012, recommendation memorandum from Enrico to DeBoldt specifically focused on Tang’s refusal to perform engineering and design work for the Halladay Project and continuing to coordinate with Grants and Contracts to hire a consultant. (CP 330-331.)

In recommending Tang for a 3-day, unpaid disciplinary suspension from work, Enrico noted his wish to help Tang “recognize the severity of his actions...” (CP 331, *emphasis added*.) While Enrico mentions unacceptable and tardiness within his recommendation, the suspension recommendation clearly focused on the engineering and design work. (Id.)

The element of *causation* is clearly met, and viewing the evidence in a light most favorable to the non-moving party, Tang, summary judgment was not appropriate and should be reversed. Ellis, at 458, *citing Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c), and summary judgment dismissal was not appropriate and should be reversed.

4. There is no overriding justification for the demotion of Tang.

Finally, in order to prevail on his retaliation claim under RCW 49.17.160, Tang must show that SPU is not able to offer an overriding justification for his demotion. *See, e.g., Ellis*, at 465.

The intent of the rules governing the professional conduct of engineers, as codified in WAC 196-27A *et seq.*, is to “safeguard life, health, and property and promote the welfare of the public. To that end, registrants have obligations to the public, their employers and clients, other registrants and the board.” (WAC 196-27A-020)

On summary judgment, SPU argued that: Tang did not exercise a statutory right prior to his demotion; when Tang objected to perform the

Halladay Project design work at the end of August and beginning of September 2012, Tang did not object based on worker safety grounds; and he only claimed it would be inappropriate under the engineering rules of professional conduct because he believed himself incompetent to do the assigned design work; Tang only raised a perceived ethical quandary about his obligation to his employer, the City. (CP 149, 694.)

In addition, on summary judgment, SPU argued that it had abundant reasons for demoting Tang. (CP 151-153.) SPU points to Tang's 2011 Performance Review, the March 2012 coaching and expectations memos, and the April 2012 verbal reprimand document, which it maintains pre-dates the discovery of methane at the Halladay site. (Id.) As set forth, *supra*, this statement is false, and the record does not support SPU's position.

SPU asserted that the demotion flowed from several things. First, it stated that "his sole client was 'consistently' providing negative feedback about his performance and had lost confidence in him. (CP 152.) This was referenced in Enrico's March 6, 2012 coaching memo, but the record simply does not support this contention. Rather, the client, Cross, approved the design and engineering work to be done by a consultant, and continued to work with Tang until a meeting with Enrico in October 2012 after which the approval was suddenly withdrawn. (CP 384, 396 at ¶ 9,

compare CP 611 and 615.) This does not establish a pattern of negative feedback.

Second, SPU pointed to a need for Tang to make “substantial improvements in the areas of attendance technical skills, quality assurance, client service and meeting deadlines. (CP 152.) Again, the record does not support this. Tang was doing his best to meet the requirements of the client within the limits of the law, which required a competent, qualified and knowledgeable engineer to perform the work. In the area of project management and specifically related to the specific work he had previously performed, all of Tang’s employee reviews prior to the one done by Enrico showed that he met all expectations. (CP 658-670.) It was only after Tang dug in his heels and refused to perform an unlawful act, thereby questioning the authority of his supervisor that suddenly he came under increased scrutiny by Enrico.

Third, SPU asserted a failure by Tang to follow protocols such as distributing agendas and meeting minutes. In his April 2, 2012 verbal warning citing insubordination, written evidence of which was placed in Tang’s file, Enrico pointed to one instance where an agenda and minutes were allegedly not prepared. (CP 239-240.) Other than that one instance, Enrico only generally referred to a “best-practices” policy of his in his March 6, 2012 “Expectations” memorandum. (CP 225-226.) There is no

evidence that Tang routinely failed to distribute agendas and meeting minutes.

The record is clear that Tang was demoted for his refusal to perform the design and engineering work in violation of Washington law. As argued, *supra*, the basis of Tang's demotion in April 2013 was his refusal to perform the design and engineering work. (CP 339-340.) Prior to Tang's 2011 Performance Review, which occurred on March 26, 2012, in the winter of 2011 and about 2012, Yim found levels at the nearby Interbay Landfill to be at levels that were higher than the 5% explosive limit. (CP 434-435) While the dispute with Enrico ensued later in 2012, SPU clearly had knowledge of the issues related to the presence of methane at the site prior to the first instances of retaliation, and most certainly prior to the ultimate retaliatory act of demotion.

In June 2012, SPU had knowledge that the Halladay site had methane gas issues as well as lead and other toxic chemicals harmful to the public, including the workers for the project who would be constructing the decant facility. (CP 477-486.) A Risk Register prepared by David Evans & Associates identified a risk of injury, although it did not specifically detail what types of injuries could be sustained, whether by explosion or by asphyxiation or by a worker passing out and hurting themselves in the process. (Id.) Mitigating the risk of explosion or latent

harm to persons from exposure to lead and other toxic chemicals such as hydrogen sulfide was one of the goals of the Halladay Project. (Id.)

The September 21, 2012, recommendation memorandum from Enrico to DeBoldt specifically focused on Tang's refusal to perform engineering and design work for the Halladay Project and continuing to coordinate with Grants and Contracts to hire a consultant. (CP 330-331.) In recommending Tang for a 3-day, unpaid disciplinary suspension from work, Enrico noted his wish to help Tang "recognize the severity of his actions..." (CP 331, *emphasis added*.) While Enrico mentions unacceptable and tardiness within his recommendation, the suspension recommendation clearly focused on the engineering and design work. (Id.)

There simply is no reason that overrides the reasons expressly stated in the April 2, 2013 demotion letter, which specifically references the suspension recommendation dated September 2012. Thus, Tang clearly meets the *absence of justification* element. Viewing the evidence in a light most favorable to the non-moving party, Tang, summary judgment was not appropriate and should be reversed. Ellis, at 458, *citing* Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c), and summary judgment dismissal was not appropriate and should be reversed.

complying with the federal act. Cudney v. AlSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011). The definitions of judicial review, agency action and fees and expenses both under the state statute and the federal statute are identical. Tri-State Construction Co., Inc. v. Herman, 164 F.3d 973 (6th Cir. 1999). There is no question that in this case, the employee is exactly the type of individual the EAJA was designed to protect and the public policy is met. The cases addressing this issue are not applicable here because they either relate to agency appeals under the Administrative Procedure Act or the plaintiff is not considered a smaller entity which the statute was designed to protect. Cudney v. AlSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011) and Tri-State Construction Co., Inc. v. Herman, 164 F.3d 973 (6th Cir. 1999). Therefore, attorney fees are appropriate.

In a general sense, on summary judgment SPU failed to adequately address the statutory intent in support of arguing that tort damages, a jury and attorney fees are not appropriate in this case by providing statements where the legislature specifically excluded language for a result or used certain language which was all encompassing but wanted it limited. For example, here, the legislature grants the court the discretion to order all appropriate relief, and defendants by seeking to limit remedies argue that “all” does not mean “all.” SPU failed to cite any authority for such a

position. There is nothing in any law cited that relates to WISHA questioning the legislature's intent to allow a court to decide what remedies were appropriate and allow all appropriate relief. To deny such remedies on summary judgment without authority is overreaching. Therefore, Tang should be awarded all attorney's fees and costs associated with his claims against SPU in the trial court and on appeal.

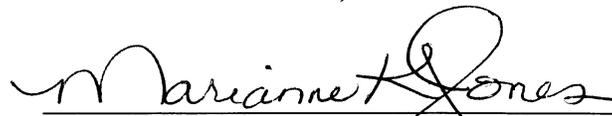
V. CONCLUSION

On *de novo* review, the summary judgment order dismissing Tang's complaint against SPU must be reversed and the matter remanded to the trial court for further adjudication with direction to set a new scheduling order.

Tang requests that the court enter an order finding that he is the prevailing party, and is entitled to an award of attorney's fees and costs under RCW 4.84.340 and 4.84.350.

RESPECTFULLY SUBMITTED this 1st day of October, 2015.

JONES LAW OFFICE, PLLC

A handwritten signature in cursive script that reads "Marianne K. Jones". The signature is written in black ink and is positioned above a horizontal line.

MARIANNE K. JONES, WSBA #21034
Attorney for Appellant