

No. 73751-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

HENRY TANG,

Appellant / Cross-Respondent

v.

CITY OF SEATTLE, SEATTLE PUBLIC UTILITIES,

Respondent / Cross-Appellant

**RESPONDENT / CROSS-APPELLANT CITY OF SEATTLE'S
ANSWERING BRIEF & OPENING BRIEF ON CROSS-APPEAL**

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I. INTRODUCTION

Henry Tang, a current employee of City of Seattle, was formerly a Senior Civil Engineer at Seattle Public Utilities—a position that requires extensive knowledge and ability to perform civil engineering design. After repeatedly attempting to support him in that position, the City demoted Tang to Associate Engineer because he was unable to handle a full workload and perform even the most basic tasks of the Senior Engineer position. Tang brought this lawsuit under RCW 49.17.160—a statute that protects employees who make complaints about workplace safety issues—alleging he was demoted in retaliation for refusing to perform a task for which he believed he was unqualified.

The trial court correctly granted summary judgment in favor of the City. *First*, Tang failed to establish a prima facie case of retaliation because he did not engage in a protected activity before the demotion. Tang refused to do the civil site design work—grading, paving, installing a drainage system, moving a water meter—on a small project because he claimed he was incompetent to do so. He did not raise worker safety issues in refusing to do the work. Rather, his refusal was, at best, based on his own understanding of engineering rules of professional conduct. But the statute under which he sued protects *only* employees who complain of workplace safety issues. Moreover, even assuming there were protected activity before his demotion, Tang did not establish a causal link between the two.

Second, the City had abundant non-discriminatory reasons for demoting Tang. Serious performance issues pre-dated Tang's refusal to complete the design work. He had already received a poor performance evaluation, a coaching memorandum, an expectations memorandum, a verbal reprimand, and a written reprimand before he refused the design work assignment. And months before that, Tang's client had "called into question" his ability to provide "value, efficiency, and communications" on projects. In any event, Tang's own claim that he was incompetent itself demonstrates his inability to fulfill the stated job requirements of a Senior Civil Engineer, which include "*extensive knowledge and ability to perform civil engineering design.*"

The City has filed a cross-appeal of an earlier order denying its motion for partial summary judgment regarding whether emotional distress damages are available under RCW 49.17.160. But the Court need not reach that issue if it affirms the order dismissing Tang's case.¹

II. ISSUE PERTAINING TO TANG'S APPEAL

Should this Court affirm summary judgment in the City's favor when (1) Tang did not (a) engage in a protected activity before his demotion, or (b) establish a causal connection between any supposed protected activity and his demotion, and (2) the City had legitimate, non-retaliatory reasons for his demotion?

¹ Tang named both the City of Seattle and Seattle Public Utilities as the Defendant. SPU is not an independent entity subject to suit. *See* Charter of City of Seattle, Art. 1., Sec. 1.

III. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUE ON CROSS-APPEAL

Assignment of Error: Did the trial court err in denying the City's motion for partial summary judgment?

Issue pertaining to Assignment of Error: Are emotional distress damages unavailable under RCW 49.17.160 because the statute permits the trial court to award certain equitable relief but says nothing about emotional distress damages?

IV. STATEMENT OF THE CASE

A. Tang joins SPU.

Tang joined Seattle Public Utilities ("SPU") as an Assistant Civil Engineer in 1994, fresh from the University of Washington. CP 168-69 (Tang Dep. 13, 18-19). In that role, he worked primarily on hydrologic and hydraulic modeling. CP 168 (Tang Dep. 13). He became a licensed professional engineer ("P.E.") in 2000, which requires an engineer to have four years of experience and pass a test. CP 169 (Tang Dep. 19). His next role at SPU was in construction management, and then he went into the design division, where he did drainage and wastewater engineering design work. CP 168, 171-72 (Tang Dep. 14, 28-29). After that, Tang joined the dam safety group. CP 168 (Tang Dep. 15).

B. Tang becomes a Senior Civil Engineer.

In 2008, Tang applied to have his position reclassified to a Senior Civil Engineer, which involved higher pay and responsibility. CP 349-64. The Senior Civil Engineer position is considered an "advanced level" position that requires "extensive knowledge of the principles, practices

and procedures of civil and construction engineering” and “*extensive knowledge and ability to perform civil engineering design,*” as well as “to read and interpret plans, specifications, [and] codes.” CP 344 (emphasis added). Senior Civil Engineers “serve as project engineers/managers on the most technically complex, visible and/or high priority projects or programs” at SPU. *Id.* Such projects “require a high level of technical proficiency as well as coordinative/administrative responsibility” and “the ability to coordinate the efforts of a multi-discipline, multi-agency project team to complete a defined assignment.” *Id.*

In Tang’s application for the Senior Civil Engineer position, he wrote that, as a licensed P.E., he had “progressively undertaken increasingly complex engineering work assignments,” including “perform[ing] the role of project manager/*engineer* on some of SPU’s most technically complex, visible and high priority projects.” CP 349 (emphasis added). He also wrote that he had performed “with limited supervision, independently resolving most routine problems.” CP 350. His supervisor at the time noted that Tang was performing “*design* and project management work.” CP 362-63 (emphasis added). Tang also cited his ability to use AutoCAD, an engineering design software program, and said that he used it “*regularly* in [his] job.” CP 353; CP 218 ¶38.

C. Tang joins Enrico’s group.

Tang joined Dan Enrico’s group in Solid Waste & Alternative Contracting in early 2011. CP 214 ¶3. During the events at issue, Enrico was a Supervising Civil Engineer who supervised five other engineers. CP

213 ¶1. He reported to Fred Aigbe. *Id.* Enrico has a P.E. license and years of engineering experience, both at SPU and in the private sector. *Id.* ¶2. Enrico held a “kick off” meeting with Tang in which he welcomed Tang to the group and explained his expectations, including email protocols and distributing agendas and meeting minutes. CP 214 ¶3.²

One of Tang’s assignments in 2011 was to support the initial “options analysis” phase for the Halladay Decant Facility Project. *Id.* ¶4. The options analysis is the first phase of a project, in which various options are reviewed and one is selected based on financial, community, and environmental impacts. *Id.* ¶5. The Halladay Facility receives sediment from storm drains and dries the material to reduce its weight before taking it to a landfill. *Id.* It covers an area about 70 feet long and 70 feet wide. *Id.* The project was considered a small project, with a \$350,000 construction budget. *Id.* It primarily involved installing a canopy over the pit into which the sediment is deposited so that rainwater would not fill the pit and cause overflow, plus grading, paving, removal of contaminated soils, and installing a drainage system and fence. *Id.*

Judith Cross, the Director of Facilities & Real Property services at SPU, was the client—or Specifier—on the Halladay Project. CP 214 ¶6. Based on Tang’s past performance, Cross did not want Tang assigned as

² Tang asserts that he came to work under Enrico because Enrico initiated a “hostile takeover” of the facilities program. Op. Br. 6. There is no evidence for that nonsense assertion. Enrico had layers of management above him that made organizational decisions. His supervisor, Aigbe, assigned Tang to Enrico’s group. CP 734-35, 736-37 (Enrico Dep. 41-42, 53-54).

the Project Manager when the Halladay Project entered its next phase in late 2011. *Id.* She was critical of Tang in a group meeting, and Enrico defended him. *Id.* Cross was unhappy with Enrico's defense and complained to Enrico's supervisor. *Id.* Nevertheless, Enrico continued to support Tang and convinced Cross to keep Tang on the project. *Id.* Tang was assigned the Project Manager role on Halladay in February 2012. CP 172 (Tang Dep. 31-32).

D. Tang's poor performance results in coaching and expectations memoranda and a verbal reprimand.

Cross's criticisms regarding Tang's shortcomings caused Enrico to start paying closer attention to his performance and attendance. CP 215 ¶7. Like Cross, Enrico observed sufficient deficiencies, which led to Tang receiving a **coaching memo** and an **expectations memo**, both dated March 6, 2012. CP 222, 225. The **coaching memo** noted that Tang's "work production is lacking and does not meet section expectations for a full time Senior Civil Engineer;" over the past few months, Tang was frequently not in his cubicle working when he should have been; he is "often late and unprepared" for meetings; he was rarely circulating agendas and meeting minutes; and the Facilities group—Tang's only client—has "consistently" provided "unsatisfactory feedback" on Tang's "timeliness and quality assurance." CP 222.

Enrico wrote that he had spoken with Tang at least three times already regarding Tang's performance, conveying that Tang's "performance is not up to par of a Senior Civil Engineer" and that Enrico

was “willing to provide support ... to correct the situation.” CP 223. In sum, Tang’s “job execution is deficient, and *needs substantial improvements* in the areas of attendance, technical skills, quality assurance, client service and meeting deadlines.” *Id.* (emphasis added).

The **expectations memo**, which was designed as “a roadmap to make improvements over the next year,” included the possibility of relocating Tang’s cubicle closer to Enrico and his team, which would “help in coordination and overall production within” the group. CP 225. The memo directed Tang to stop by Enrico’s cubicle each morning and leave a message on Enrico’s phone each day when he left. *Id.* (All the engineers in Enrico’s group were expected to leave him a voicemail at the end of the day. CP 215 ¶10.) The memo also reminded Tang to distribute agendas before meetings and minutes afterwards and copy Enrico on project-related emails (CP 226-27), as all other engineers in Aigbe’s section were expected to do (CP 214 ¶3).

The expectations memo further provided that Tang “must maintain a work quality and be able to handle a workload complexity consistent with the Job Class Specification for a Senior Civil Engineer.” CP 226. It invited Tang to suggest training sessions that would help him fulfill his job duties and made clear that the purpose of the memo was “to be positive and to provide all the support [Tang] need[ed] to be successful.” CP 227. In the hope of getting Tang’s input on ways to improve his performance, Aigbe and Enrico met with Tang to discuss the memos. CP 215 ¶11. Tang

did not provide input and refused to sign them. *Id.* He instead wrote a rebuttal memorandum. CP 183.

Tang received his **2011 Performance Review** on March 26, 2012, in which he had “below standard” rankings for all categories except Safety. CP 229. The Review noted that Tang “is hesitant when asked to perform any design;” needs to “work on his communication with both his Supervisor and Clients;” has a light workload compared to other Senior Civil Engineers; has trouble “maintaining budget;” and that the feedback from his client has been “mixed, with value, efficiency and communications called into question.” CP 230-31. As an example, on one of his projects “the documentation was incomplete,” and “the Specifier”—i.e., the client—“was unhappy with the soft-costs and the end-product, which created an element of mistrust.” CP 231.

The Review noted that Tang “had been coached throughout the year on maintaining proper communications via e-mail and documenting concurrence with his Specifiers,” but despite “numerous requests, Henry did not communicate and document properly.” *Id.* Thus, in 2012 Tang “will need to work hard to repair some personal and professional relationships damaged in 2011.” CP 232. Enrico wrote that Tang’s performance had improved over the past month, and he hoped Tang would use the Review “in a positive manner” and “continue[] to progress throughout 2012 and beyond.” CP 233. Aigbe concurred and assured Tang that “SPU Management is prepared/readied to provide him with the resources/tools he needs to succeed. The intent of our coaching is to

position Henry for success!” CP 234; *see also* CP 786-87 (summary of meeting between Tang and Enrico).

Unfortunately, Tang’s performance did not improve. He received a **verbal warning for insubordination** on April 2, 2012, for repeatedly refusing to leave a voicemail at the end of his day and distribute agendas and meeting minutes. CP 239-42. Enrico again said that Tang needed “to begin to demonstrate that [he is] able to perform [his] job at the established standards, be at work as scheduled, and use [his] work time productively.” CP 242. Again, Tang refused to sign the verbal warning. *Id.* He wrote a rebuttal memo explaining that he did not leave voicemails at the end of the day as instructed because doing so would have put him in an “undignified position” and been “humiliating.” CP 185.

E. Tang’s work as Project Manager on Halladay.

Starting as the Project Manager on Halladay in February 2012, Tang testified in his deposition that his first task was to refine the scope of the project, assemble a project team, and, together with the team, put together a cost estimate, schedule, and an assessment of any risks to the budget and schedule. CP 170-71 (Tang Dep. 24-26). He would then assemble that information into a Project Management Plan (“PMP”). CP 173 (Tang Dep. 33-34). Having a PMP means the project is “baselined,” which is the official start of the project. CP 171 (Tang Dep. 26). The design work on a project comes *after* it is baselined. *Id.* Once a project is at 30 percent design completion, the work of getting the necessary permits begins. CP 171 (Tang Dep. 26-27). The project is subject to further

refinement and goes to 60 percent design; 90 percent design; and then 100 percent design. *Id.* At that point, the design drawings are sealed and stamped, and the project goes into the contracting phase. *Id.*

On April 11, 2012, Min-Soon Yim, a SPU Utility Manager experienced with methane issues, conducted soil testing in three locations at the Halladay site. CP 1023-24 ¶¶ 1, 3, 5; CP 1028. Cody Nelson, of SPU Geotechnical Engineering—not Tang (Op. Br. 16)—organized the testing. CP 1033-34. Nelson worked with Gail Coburn, of SPU Environmental Compliance, to determine the kind and scope of testing. CP 807-08.

Yim reported his findings to the Halladay team, including Coburn, Nelson, and Jeff Neuner, another SPU methane expert (CP 1024 ¶6), that the methane readings exceeded the lower explosive limit (“LEL”) at two of the three testing locations. CP 1030, 1032-33. Methane, or Ch₄, is explosive in concentrations between 5% (the LEL) and 15%. CP 1024 ¶5.

Methane can be naturally occurring in soils, as well as present at landfills. CP 1023 ¶2. The Halladay site is near the Interbay Landfill, which had long been closed and is now covered by a golf course. CP 1024 ¶4. The methane levels at the landfill itself are frequently monitored. CP 431-32. It was somewhat of a surprise that methane above the LEL was discovered at Halladay because groundwater separates the site from the former landfill, and methane does not travel through water. CP 1024 ¶4; CP 176 (Tang Dep. 100 (methane level was a surprise)); CP 808 (Coburn

noting pre-testing that a “ditch and Metro pipe, located between the landfill and the railroad area, act as barriers to methane gas movement”).³

Because Yim was not expecting to find methane above the LEL at Halladay, for the first soil test he used a tool that could not read precise levels above 5%, but rather would simply indicate if the level was above or below that amount. CP 1024 ¶5; CP 745-46 (Yim Dep. 16-19). After getting the first reading, which indicated a level above 5%, Yim switched to a more sensitive tool that allowed for precise readings at levels above and below 5%. He recorded 6.2% (above the LEL) and between 0.5 and 1.5% (below the LEL) in other testing locations. CP 1024 ¶5; CP 1030. Coburn worked with Nelson to interpret the results. CP 795, 799.

In May 2012, at one of their normally scheduled meetings, the Halladay project team determined that “a methane mitigation plan stamped by a PE would be required (for permitting).” CP 190. Enrico was copied on the meeting notes that included that conclusion. CP 189. Tang testified that it was Coburn and Neuner—not himself—who decided that a methane mitigation plan was required. CP 720 (Tang Dep. 52). The project team also agreed that reporting the findings to the Department of Ecology would be necessary and Juan Carlos Ramirez, of SPU Geotechnical Engineering, should prepare a geotechnical report. CP 191.

³ It is grossly misleading to suggest that Yim told Tang that the levels at Halladay “could have caused a ‘kaboom.’” Op. Br. 17. In response to questions from Tang’s counsel, Yim testified generally about methane’s potential risks when it accumulates in a confined space. CP 445-46.

F. Tang's poor performance continues.

Tang's performance issues did not improve. On August 13, 2012, Tang received a *draft written reprimand for insubordination and frequent tardiness* for tardiness in reporting to work, failing to prepare agendas and meeting minutes, and failing to copy Enrico on project-related emails. CP 215 ¶14; CP 244-45. Tang filed a grievance. CP 187.

The draft reprimand later turned into a *formal* written reprimand on August 31 that included the problems outlined in the August 13 draft, plus Tang's "inability to finalize the Halladay PMP" (Project Management Plan) despite having months to do so. CP 247-49. The "poor showing on the Halladay project is *in addition to* failing to deliver [Tang's] other very small task of completing the CIP Roofing Program 2012 scope during the summer months. Both the Halladay PMP and the CIP Roofing Scope should have been completed without a doubt by May or June 2012 at the latest." CP 247 (emphasis added). The reprimand recommended that Tang job shadow another Senior Civil Engineer and asked him to suggest one. CP 249. Tang refused to sign it. *Id.*

G. Tang is assigned—and refuses—the civil site design work on Halladay.

On August 31, 2012, in a meeting in which Aigbe was present, Enrico assigned Tang the civil site design work for Halladay, and Tang refused it. CP 215 ¶16; CP 721 (Tang Dep. 55). Civil site design covers basic tasks to get a site's surface ready for construction; it does not include electrical, structural, or mechanical engineering. CP 215-16 ¶17. For

Halladay, the civil site design included grading, paving, soil removal, a water meter relocation, and installing a drainage system and a fence. *Id.*

Enrico and Tang met again on September 6, and Tang again refused the assignment. CP 216 ¶19. Their meeting is summarized in an email exchange, *in which Tang said he lacked “the background design experience and competency to perform the engineering design [and] it would be inappropriate to do so.”* CP 250-57 (emphasis added). Enrico responded and “offered to work side by side with [Tang] and complete the design together as a team” and said that Tang had “the background to perform the civil site work,” especially given that “the knowledge/skills required to perform this Halladay design are covered in college level engineering courses and on the PE exam.” CP 251-52.

Tang refused the assignment based on his perceived incompetency to “perform the engineering design,” and he cited the Washington Administrative Code, which provides that an engineer’s “obligation to employer” includes being “qualified by education or experience in the technical field of engineering or land surveying applicable to services performed.” *Id.* Tang did not mention methane or any worker safety issue as grounds for refusing to do the design work.

A few days later, Enrico responded to Tang’s grievance regarding the August 31 written reprimand, saying that Enrico’s “primary issues” with Tang “continue to be related to poor attendance and poor performance.” CP 259. He noted that he had repeatedly assured Tang the

necessary support to successfully complete the design work on Halladay, but that Tang nevertheless continued to refuse the assignment. *Id.*

On September 21, 2012, SPU management recommended a **three-day suspension** of Tang for insubordination and poor performance, including “repeated refusals to accept a task as a Senior Civil Engineer.” CP 327-31. “The assignment is to perform a simple civil site design and is within the work scope for a Senior Civil Engineer.” CP 330. Moreover, Tang had continued to try to hire a consultant to do the work *he* had been assigned, despite Enrico’s clear instruction to not do so. CP 330-31. Four levels of SPU management concurred in the recommendation. CP 329-30.

On September 26, Tang met with two SPU directors to discuss his grievance of the August 31 written reprimand. CP 823. When asked what rule Tang felt had been violated, he said that attendance standards were not applied evenly. *Id.* He did not mention worker safety concerns.

H. Tang ultimately accepts the design work, but makes scant progress despite repeated inquiries and coaching sessions.

Tang left for a month-long vacation in November. CP 216 ¶21. Before he left, Enrico requested that he complete six tasks, including to present to the Specifier a strategy for getting the Halladay project baselined and a workplan for completing the design stage of the Halladay project. CP 261. Enrico wrote, “As I have stated previously regarding your current and future design assignments, I am willing to mentor, perform QA/QC [quality assurance/quality control] on your work and even stamp if necessary until you are comfortable with the process.” *Id.* Tang

ultimately accepted the design work in late October before he left on vacation. CP 216 ¶21; CP 913 (Enrico Dep. 126). While Tang was on vacation, *Enrico* completed the Halladay PMP, i.e., got it baselined. CP 216 ¶21.

After Tang returned, he did little work on Halladay—or any other project—despite Enrico’s repeated inquiries. CP 216 ¶23. Enrico had numerous meetings with Tang in which he talked through the design component of the Halladay project, drew examples on a white board, and repeatedly asked for work product. *Id.* Tang’s response was to fight any suggestion that he was the “lead designer”—again stating that he did “not have the design background experience” to do the necessary work—and engage in a childish back-and-forth with his supervisor about who was supposed to do what. CP 263-64, 266-69, 283-84. Nor did Tang do much actual work on the project. Enrico further documented repeated meetings and interactions with Tang from January to March 2013 in which Tang was unprepared and simply not getting work done. CP 271-73; *see also* CP 912 (Enrico Dep. 122-25). Tang did not mention methane or worker safety issues in any of those interactions.

In mid-January 2013, Cross—the head of Tang’s only client—said Tang could not work on Facilities projects going forward because of his poor performance. CP 275. She wrote a detailed memo explaining her decision: “Currently no one in the Facilities group desires to work with Henry Tang if he is assigned as the Project Manager. This lack of trust and credibility with the Facilities group comes as the result of Henry Tang’s

poor performance in working as Project Manager on several projects over the last three years.” *Id.* She then described her experience working with Tang and listed over a page of skills and tasks on which Tang’s performance was unacceptable, including: incomplete deliverables that require extensive review and revisions by others; unprepared for team meetings; failure to report and define problems to management in a clear and factual manner; and not consulting with subject matter experts or following expert direction in technical areas. CP 275-77.

On February 1, as previewed in the expectations memo he received almost one year earlier (CP 225), Tang was told that his cubicle would be moved closer to Enrico and the rest of his team. CP 217 ¶28; CP 279. Tang objected strongly, calling it a “humiliating situation.” CP 279.

By the end of February 2013, Tang still had not provided a workplan for getting the Halladay Project to the 30% design stage. CP 217 ¶29; CP 286; *see also* CP 272, 283-84. Aigbe ultimately weighed in and told Tang that his back-and-forth argument with Enrico—instead of actually doing work—was “severely undermining” the “collective business mission/efforts to provide quality and timely service to our internal client.” CP 282. As Aigbe told Tang, Tang was insisting that his supervisor “take and accept a role that he feels belongs to you. That I find unprecedented. ... [Enrico] has clearly delegated a role that is *clearly in your classification*, and you haven’t accepted what he delegated.” *Id.* (emphasis added). Finally, Aigbe invited Tang to state, in writing, why he believed the assigned task fell “outside the duty/responsibility” of the

classification for Senior Civil Engineer. *Id.* Tang did not do so. CP 179 (Tang Dep. 155-56).

I. Tang is demoted.

In early February 2013, SPU management recommended that Tang be demoted to Associate Civil Engineer based on his “continued failure to perform the responsibilities required of a Senior Civil Engineer.” CP 333. The Associate position would be “commensurate with [his] demonstrated skills at present.” *Id.* His work unit could not “continue to absorb the impact of [his] failure to perform,” especially considering Facilities’ refusal to work with him. CP 335. That was a “significant problem because Henry occupies a position upon which the Division relies to get critical projects done.” *Id.* And he has “shown no improvement in his performance despite increasing disciplinary action.” *Id.* Again, four levels of SPU management concurred in the recommendation. CP 333-36.

Both Tang and his union representative appeared at the *Loudermill* hearing for the demotion on February 26, 2013. CP 339-340. The Director of SPU, Ray Hoffman, upheld the recommendation of demotion, and Tang was demoted in April. *Id.* At the *Loudermill* hearing, Tang argued that he had been directed to take an action he believed was “unethical or unsafe.” CP 340. Hoffman considered that argument and reviewed the documents provided by Tang. He concluded that the work Tang was “being asked to do was neither unethical nor unsafe, but did require the ability to manage a project, identify resources and to collaborate with others to get various aspects of a project completed.” *Id.* But Tang “repeatedly refused to do the

work that was needed.” Whether that “refusal was due to a lack of ability, or simply unwillingness to do your job, there has been no appreciable work product from you over the last 2 years to establish you have been performing as a Senior Civil Engineer.” *Id.*

J. Enrico and an Associate Civil Engineer complete the second phase of the Halladay Project.

After Tang was demoted, Enrico worked with another Associate Civil Engineer, Patricia Nagy, to complete the second phase of the Halladay Project and get it to the contracting stage. CP 217 ¶32. As part of that work, in June 2013, Enrico and Nagy met with Yim, the methane expert who did the soil samples at Halladay, to discuss how to properly address the existence of methane at the site. *Id.*; CP 1024 ¶7. Enrico summarized their conversation in an email, which he sent to Yim to review and edit. CP 294, 1036. Yim sent a few edits. CP 296, 1038. Enrico accepted all of Yim’s edits and circulated a revised summary in which Yim concurred. CP 298, 1040.⁴

They concluded there was no methane concern for surface work (i.e., grading, asphalt replacement work, and block installation) at Halladay, and that the risk of an explosion when the contractor began moving soils was “very low.” *Id.* Any risk to worker safety due to methane was not related to an explosion, but rather that the air in a

⁴ It is disingenuous for Tang to assert that “Yim did not have enough information about the project to prepare the MMP.” Op. Br. 27. Yim’s testimony (CP 442-44), which Tang cites, makes clear that he was describing the kind of information he looks at *generally* when dealing with methane issues. With respect to Halladay, Yim testified that prior to meeting with Enrico in June 2013, he asked Enrico for project drawings, and Enrico provided them. CP 438-39.

confined space—i.e., a trench—might lack sufficient oxygen and a worker could pass out. *Id.*; CP 218 ¶34. That risk would be mitigated by requiring the contractor to have a “competent person” (which is a term of art) monitoring the air in any confined space. CP 218 ¶34; CP 298, 1040. Finally, “methane accumulation under the proposed open-ended canopy” was a “very low possibility because of the sufficient air flow” through it. CP 298, 1040. Enrico shared those conclusions with Coburn, Cross, and Aigbe. CP 803, 805.⁵

Yim’s recommendations were incorporated into the final design drawings for the Halladay Project, which provided that “any trenching, excavation, or other work below grade that is subject to methane gas infiltration from the soil should be monitored by a competent person. The contractor should consider excavating with ‘non-spark’ emitting tools and excavating methods along with intrinsically safe equipment. Vactor truck or other non-spark emitting equipment should be considered as well as other safety precautions as outlined in the contractor’s health and safety plan.” CP 218 ¶36; CP 302. Enrico stamped the drawings in which those instructions were given. *Id.* Construction is now complete; there were no explosions or other methane-related injuries. CP 218 ¶37.

K. Tang transfers to a new group.

Tang was transferred to a new group with a new supervisor, Glenn Hasegawa, in October 2013. CP 181 (Tang Dep. 185). Tang received a

⁵ Yim and Enrico also noted that the project could include explosion-proof lighting fixtures in the canopy as an added improvement. CP 298, 1040. Lighting inside the canopy was ultimately not included as part of the project. CP 218 ¶36.

partial evaluation in January 2014, that covered about three months of work under Hasegawa. Tang received a “meets standard” or no ranking for the categories, and the review makes clear that it is based on a limited time period, which did not allow for a complete evaluation. CP 649-56. The review also notes that it “occurs too often” that Tang arrives late and that Hasegawa “need[s] [Tang] to be on time,” as well as an expectation that Tang will be able to “increase [his] productivity” soon. CP 654. Hasegawa testified that Tang’s performance under him has been “average.” CP 750 (Hasegawa Dep. 10).

Tang requested, and the City approved, a one-year, unpaid sabbatical that began in June 2014. CP 167 (Tang Dep. 10), CP 181 (Tang Dep. 186).

L. Tang files a complaint with the Department of Labor & Industries.

Tang filed a complaint with the Department of Labor and Industries (“L&I”) in May 2013. He alleged that he had been demoted for refusing to prepare a methane mitigation plan and that his preparing the plan “could have put the public and workers at risk of an uncontrolled gas explosion.” CP 193-94.

L&I investigated, including gathering documents from the City and interviewing Tang. It made a non-merit determination, finding “insufficient evidence to substantiate” Tang’s allegations. CP 196. A lengthy report supported that conclusion. CP 198-210. Tang appealed, and L&I affirmed the non-merit determination. CP 212.

M. Tang sues the City.

Tang then filed this lawsuit alleging a single claim—that he was retaliated against in violation of RCW 49.17.160 for refusing to prepare a methane mitigation plan. CP 1-7. While not requested in his Complaint, Tang claimed emotional distress damages in his responses to the City’s discovery requests. CP 761-62. The City moved for partial summary judgment on the question whether emotional distress damages are available under RCW 49.17. CP 53-62. The trial court (Judge Tanya Thorp) denied that motion in November 2014. CP 1063-64.⁶

The City later moved for summary judgment on the merits. CP 128-59. The trial court (Judge Judith Ramseyer) granted that motion in June 2015 and dismissed the case with prejudice. CP 1057-58. This appeal followed. CP 1055. The City cross-appealed the earlier order denying its motion for partial summary judgment on emotional distress damages (CP 1059), but the cross-appeal need not be resolved if this Court affirms the June 2015 order dismissing the case.

Attached as Appendix A is a timeline that details the factual background of this case. Appendix B includes relevant provisions.

V. ARGUMENT

A. Standard of Review.

The City is entitled to summary judgment if “there is an absence or insufficiency of evidence supporting an element that is essential to

⁶ Tang moved to amend his complaint to add emotional distress damages, which the trial court granted. CP 1064. But Tang did not actually file an amended complaint.

[Tang's] claim" because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Tacoma Auto Mall v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 118, 279 P.3d 487 (2012) (quotations omitted). "A material fact is one upon which all or part of the outcome of the litigation depends." *Hill v. Cox*, 110 Wn. App. 394, 402, 41 P.3d 495 (2002).

Tang, the nonmoving party, must "properly relate specific facts indicating an issue for trial," and not simply "respond[] with conclusory allegations and/or argumentative assertions regarding the existence of unresolved factual issues." *Id.* An affidavit submitted in response to a summary judgment motion "does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion." *Johnson v. REI*, 159 Wn. App. 939, 954, 247 P.3d 18 (2011) (quotations omitted).

B. The statutory scheme of RCW 49.17.160.

Tang's Complaint alleged that his demotion violated RCW 49.17.160. That statute protects employees from discrimination "because such employee has filed any complaint" or exercised "any right afforded by" the Washington Industrial Safety and Health Act ("WISHA"), which is intended to make the workplace safe. RCW 49.17.160(1). An employee who believes he "has been discharged or otherwise

discriminated against” can file a complaint with L&I within 30 days. RCW 49.17.160(2). L&I must investigate the complaint. *Id.*

If L&I determines that the statute has been violated, L&I “shall bring an action in the superior court.” *Id.* If L&I determines there has been no violation, the employee may sue in court. *Id.* “In any such action the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay.” *Id.*

C. Tang did not—and cannot—plead a tort claim for demotion in violation of public policy.

Tang’s Complaint asserted a single claim against the City: that his demotion violated RCW 49.17. CP 5-6. But Tang now devotes the entire legal section of his brief to arguing the elements of a claim that he *did not* and *cannot* assert. Specifically, he argues that the elements of his claim for retaliatory demotion under RCW 49.17 mirror the elements of the common law tort for wrongful discharge in violation of public policy, as set forth in *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000). Op. Br. 31-32. Tang’s reliance on *Ellis* as establishing the factors for analyzing *his* claim is baffling and wrong.

First, under Washington law, there is no such thing as a common law tort for *demotion* in violation of public policy. Rather, the tort is limited to claims based on alleged unlawful *terminations*. *Woodbury v. City of Seattle*, 172 Wn. App. 747, 753, 292 P.3d 134 (2013) (“there is

no common law tort for disciplinary action less severe than termination”) (citing *White v. State*, 131 Wn.2d 1, 20-21, 929 P.2d 396 (1997) (declining to extend tort beyond terminations)).⁷

Second, Tang did not plead a claim for demotion in violation of public policy. CP 5-6. Nor did Tang argue at the summary judgment stage that the *Ellis* factors should apply or that the City’s recitation of the elements of a RCW 49.17 claim (CP 149, 151, 153)—which are the same as the City asserts in this brief—were erroneous. CP 365-92. Arguments, and certainly claims, not raised below are waived on appeal. *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 541 n.1, 269 P.3d 1038 (2011).

Third, *Ellis* did not address the elements of a claim under RCW 49.17. The Supreme Court noted that the *only* issue before it was the public policy tort claim, not a statutory claim under RCW 49.17. 142 Wn.2d at 458. Although the Court made passing references to RCW 49.17, it did so as part of the case’s procedural history: the trial court dismissed the RCW 49.17 claim, while the Court of Appeals reinstated it. *Ellis v. City of Seattle*, 98 Wn. App. 1006 (April 19, 1999) (unpub.). But because the employer did not petition for review of the decision reinstating the RCW 49.17 claim, the Supreme Court had no reason to analyze the elements of a claim under that statute.

⁷ Three recent decisions from the Supreme Court addressed common law tort claims, and all involved terminations. *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015); *Becker v. Community Health Sys.*, 184 Wn.2d 252, 359 P.3d 746 (2015); *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015).

When reviewing a statutorily based claim of retaliation, the Supreme Court applies this framework, which is the framework under which summary judgment was decided below:

- (1) a plaintiff must make a prima facie case of retaliation, which means (a) that he exercised a statutory right, (b) suffered an adverse employment action, and (c) there was a causal connection between the exercise of a legal right and the adverse action;
- (2) if the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nonpretextual reason for the adverse action; and
- (3) if the employer produces evidence of a legitimate basis for the adverse action, the burden shifts back to the plaintiff to establish that the employer's articulated reason is pretextual.

Wilmot v. Kaiser Aluminum & Chem., 118 Wn.2d 46, 68, 70, 821 P.2d 18 (1991) (statutory claim of retaliation for pursuing workers' benefits). That is the proper framework here. Tang has the burden of establishing "specific and material facts to support each element of his prima facie case." *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992) (emphasis in original).

D. Tang did not engage in protected activity before his demotion, and the City had legitimate, non-retaliatory reasons for demoting him.

Tang makes many misstatements of fact. The City has addressed a number of them, and the rest are quickly refuted by checking the citation he offers. None of those misstatements give rise to a material issue of fact on the essential elements of his claim, as the trial court correctly found.

Tang's claim of retaliatory demotion under RCW 49.17 fails for

three reasons. *First*, Tang did not engage in a protected activity before his demotion. He did not raise worker safety issues in refusing to do the civil site design work on Halladay. Rather, his refusal was, *at best*, based on his understanding of his obligation to his employer to competently perform his job. It was only when Tang reached the *Loudermill* hearing—after his management recommended a demotion—that he claimed that he had been raising workplace safety issues related to methane at Halladay. Tang has nothing but his own after-the-fact spin to support his version of events.

Second, Tang cannot establish a causal connection between a supposed protected activity and the demotion because they were not in close proximity and there was no evidence of his satisfactory work performance.

Third, the City had multiple, non-retaliatory reasons for demoting Tang, which were documented *before* he refused to do the design work and even before testing at Halladay revealed the presence of methane. Tang's attendance and work performance were poor; he failed to follow clear instructions about email protocols; he resisted repeated efforts at coaching; and he claimed that he was unable to perform a simple design task that was well within the job specifications for his position. Because of that, Tang is now an Associate Engineer, the job specifications of which more closely align with his self-described abilities.

1. Tang did not engage in a protected activity.

Tang did not exercise a statutory right prior to his demotion. When Tang received the assignment to do the civil site design work on the

Halladay Project at the end of August and beginning of September 2012, Tang did not object based on worker safety grounds. Rather, he claimed it would be inappropriate under the engineering rules of professional conduct for him to complete the task because he believed himself incompetent. CP 252.

The rules of professional conduct are set forth in the Washington Administrative Code. The provision that Tang invoked provides that a licensed Professional Engineer's "*obligation to employer and clients,*" includes being "competent in the technology and knowledgeable of the codes and regulations applicable to the services they perform" and "qualified by education or experience in the technical field of engineering ... applicable to services performed." WAC 196-27A-020(2)(d)&(e) (emphasis added).

Tang thus, at most, raised a perceived "ethical" quandary about his obligation to his employer, the City—not an issue about workplace safety. The City resolved any such quandary by repeatedly telling Tang that it wanted him to complete the civil site design work; that based on his experience and education, it should be well within his competency to do so; that his supervisor would mentor him each step of the way; and that, as a Senior Civil Engineer, this was the kind of work he was expected to do. Ultimately, the demotion about which Tang complains offered a direct resolution to his ethics-based concern: unable to competently perform the work of a Senior Civil Engineer, the City removed him from the position.

L&I recognized the mismatch between an engineer raising “ethical” concerns about his perceived incompetence and raising a worker safety issue, and found that Tang had not engaged in a protected activity. CP 205 (L&I “does not enforce statutes regulating engineering design.”). And so did the trial court: there “is no objective evidence” that Tang’s claim of incompetence “relate[s] to the presence of methane gas or other toxic substances.” Verbatim Report of Proceedings (“VRP”), at 33.⁸

In his deposition, Tang admitted that in saying he lacked competency, he “*did not specifically point out safety concerns,*” but thought “that should be *inherent* when [he] brought up the competency issue.” CP 174, 180 (Tang Dep. 66, 159-60) (emphasis added). Tang’s it-was-inherent argument is wrong. *First*, Tang’s refusal to do the civil site design work and claims of incompetence occurred in late summer 2012, still months if not a year or more before construction would actually begin. There is not a clear link between his claim of incompetence and future concerns for construction workers a year later. That is not an obvious assumption for an employer to make.

Second, Tang’s claims of incompetence did not single out methane. Rather, he was claiming incompetence to do all the civil site

⁸ For the *first* time, Tang now asserts that his performing design work would have “constituted an illegal act” and exposed him to criminal liability. Op. 1, 33. He is wrong. RCW 18.43.120 gives rise to criminal liability for practicing engineering without a license or for other violations of *that chapter*, RCW 18.43. The other statute Tang cites, RCW 18.235.130, which is in a *separate* chapter, lists acts that “constitute unprofessional conduct for any license holder” under RCW 18.235. It does not speak of criminal liability.

design work. There was no reason to think that incompetence and, for example, designing a fence installation, invokes worker safety concerns.

Third, a claim of incompetence can reasonably be received as a request for help. Taking Tang at his word that he was incompetent to prepare a methane mitigation plan or do the design work on his own, he was part of a team of folks, including three individuals (Yim, Coburn, Neuner) who were experts on methane issues. CP 795, 799, 817, 720 (Tang Dep. 52). SPU engineers are expected to consult with other engineers and subject matter experts to fulfill their job responsibilities. CP 216 ¶18. And he had the support of his manager, who offered to mentor him and help him through the process. CP 251, 259, 261, 271-73, 727 (Tang Dep. 88). It is perfectly reasonable to respond to a claim of incompetence by offering help. Or such a claim could be received as an expression of concern that, if he moved forward with the project, he would be disciplined by the engineering body that sets the ethical rules. Or as a request for clarification from his employer, since the WAC speaks of an engineer's obligation to *the employer*. Tang's claim of incompetence could be received as all of those things—*not* as raising a worker safety concern for something that might happen a year later.

In his deposition, Tang was asked if he cited his perceived ethical obligations *before* his email to Enrico in early September 2012. He testified that he raised it twice orally in June or July 2012 in one-on-one conversations with Enrico because Enrico had been making informal suggestions that Tang do the design work. CP 722 (Tang Dep. 59-60).

Even taking that as true, Tang also testified that in those oral conversations, he did *not* mention worker safety concerns or methane. CP 725-26 (Tang Dep. 80-83). Thus, they also would not constitute protected activity.

Moreover, Enrico and Tang had many exchanges about the Halladay Project, particularly Tang's refusal to perform needed project tasks. In none of them did Tang raise worker safety issues as a reason why he was refusing to do work. CP 251-52, 262-73, 282-92. Nor did Tang raise worker safety issues in any of his earlier "rebuttal" memos. CP 183, 185, 187; *see also* CP 823.

It was at the *Loudermill* stage—*after* the recommendation to demote him and after he obtained union representation—that Tang claimed that what he had refused to do was the methane mitigation plan and that he did so because of worker safety concerns. It was also at the *Loudermill* stage that he invoked for the first time, as he admitted in his deposition (CP 175 (Tang Dep. 92)), a provision of the Seattle Municipal Code, which says that "areas within 1000 feet of methane-producing landfills may be susceptible to accumulations of hazardous levels of methane gas in enclosed spaces." SMC 25.09.220(B). Not only was the Halladay team already well aware of its obligations under that provision (CP 494 (June 2012 Geotechnical Report prepared by Ramirez and Nelson)), it does not address worker safety. Nor did the Halladay Project involve an "enclosed space." The only structure was a tall canopy over the

decanting pit. It is open on both sides and air flowed freely through it. CP 218 ¶35.

In short, Tang's refusals to do work, and his reasons for refusing, are well documented, including by Tang himself. As even he acknowledges, he did not raise worker safety concerns as his reason for refusing until *after* he was demoted.

At summary judgment, and now again on appeal, Tang argued that he engaged in a protected activity as far back as April 2011. First, he asserts that he became the project manager on Halladay in early 2011. Op. Br. 7. That is wrong. In his deposition, Tang accurately testified that he became the project manager in February 2012, after budgetary approval of the Project in late 2011. CP 172 (Tang Dep. 31-32); *see also* CP 554, 607 (documents showing budget approval sought in late November 2011).

Then, Tang argues that an April 2011 memo he wrote to "file" was the protected activity. Op. Br. 8-9, 39. Tang said *nothing* about that memo in his deposition. To the contrary, when asked *when* he raised what he believed to be safety concerns, he testified that he raised such concerns orally in the summer of 2012 and in writing on September 6, 2012, by way of claiming his incompetence. CP 722, 725-26 (Tang Dep. 59-60, 80-83).

Tang's claims about the April 2011 memo should be disregarded. "Self-serving affidavits contradicting prior depositions cannot use be used to create an issue of material fact." *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (2000). "When a party has given clear answers to unambiguous deposition questions which negate the

existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” *Id.* (quotations omitted).⁹

In any event, the April 2011 memo does not constitute a protected activity. It is stamped “DRAFT” and addressed to “file”—not to Enrico or anyone else. CP 472-75. Tang asserts that with this memo to “file,” he “first told Enrico about his concerns in writing.” Op. Br. 8. But he does not claim to have actually given the memo to Enrico, or even told him about its existence—indeed, there is no evidence in the record that he did so. Rather, the memo was simply saved in a file that Enrico allegedly “could access at any time.” *Id.* In the memo to file, Tang purports to respond to an email Enrico wrote suggesting that “anything the project team can do to reduce soft costs will be helpful Henry Tang is the PM [Project Manager] and he is also a PE [Professional Engineer]. The design issues on this site are fairly straight forward and I would suggest that he could limit the need of a civil designer and perform this work in parallel with the PM duties.” Tang then wrote underneath that: “The Project Engineer will be responsible for the inter-discipline design integration. An individual with strong experiences would probably keep the costs down.” CP 474.

That is not a refusal to do work—let alone a refusal to do work on

⁹ In response to the City’s interrogatory asking about “any statutorily protected activities” that Tang engaged in, he identified nothing in 2011. CP 32-36. Instead he said that he took a “stance that a mitigation plan was necessary” in *mid-2012*. CP 34.

worker-safety grounds—and there is no mention of methane. Indeed, methane above the limit was not discovered at the site until April 11, 2012, and the design phase did not start until September 2012. Tang’s attempt to make an issue of when and whether he allegedly engaged in protected activity fails.

Finally, Tang asserts on appeal that his safety concerns flowed from having to do *all* the civil site design work—not just the methane mitigation plan. Op. Br. 11, 15. That is new and should be disregarded. His Complaint alleges repeatedly that he was demoted for claiming incompetence to do a methane mitigation plan—nothing else. CP 2 ¶ 3.2 (“This complaint results [from] the requirement that Mr. Enrico placed on Mr. Tang to prepare the Methane Mitigation Plan ...”); CP 3-5 ¶¶ 3.3, 3.4, 3.5, 4.2. His complaint to L&I was limited to methane. CP 183. Same thing in his summary judgment brief. CP 369, 373, 385.

2. There is no causal connection between any alleged protected activity and Tang’s demotion.

To make a prima facie case of retaliation, Tang must not only show that he engaged in a protected activity, but also that there was a causal connection between the activity and the adverse employment action. *Wilmot*, 118 Wn.2d at 68-69. A prima facie case of a retaliatory motive may consist of close proximity in time between the events, *coupled with* evidence of satisfactory work performance and supervisory evaluations. *Id.* at 69; *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 491, 84 P.3d 1231 (2004).

Even if Tang's citing the WAC's professional rules for engineers on September 10, 2012 (CP 251-52), is seen as a protected activity, Tang cannot establish a causal connection between that and his demotion. The recommendation for demotion came five months later, and Tang cannot point to "evidence of satisfactory work performance" during the relevant time period. *Wilmot*, 118 Wn.2d at 69. To the contrary, months before Tang had received a poor performance review, a coaching memo, an expectations memo, and a verbal reprimand. And he had also received a written reprimand before his refusing the design work. It was thus well established and well documented that even before refusing the civil site design work on Halladay, Tang was not performing at the required level for a Senior Civil Engineer.

Moreover, accepting Tang's assertion that he engaged in a protected activity by writing a memo to the "file" in April 2011, means the "protected activity" occurred almost *two years* before the recommendation for demotion in February 2013. An adverse action "some length of time after the employee's filing of a claim will be less likely to reflect an improper motive...." *Wilmot*, 118 Wn.2d at 69. An almost *two-year* separation breaks any inference of a causal connection. *See Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862-63, 991 P.2d 1182 (2000) (15-month separation between protected activity and adverse action).¹⁰

¹⁰ In Tang's Statement of the Case, he suggests there were other acts of "retaliation and discrimination," such as moving his cubicle "to a less desirable location" and "false allegations for tardiness." Op. Br. 23. But at summary judgment, Tang made clear that the only retaliation "claimed by Mr. Tang is the demotion." CP 376. Indeed, a retaliation claim based on those other allegations would be time barred. CP 147-48.

3. The City had abundant legitimate reasons for demoting Tang.

If Tang makes a prima facie case of retaliation, the City must “articulate a legitimate nonpretextual nonretaliatory reason” for the demotion. *Wilmot*, 118 Wn.2d at 70. Significant evidence of legitimate reasons exists here.

As described above, Tang’s 2011 Performance Review, March 2012 coaching and expectations memos, and April 2012 verbal reprimand document serious issues with his performance, and all *pre-date* the discovery of methane at the Halladay site. As set forth in those documents, Tang was not performing at the Senior Civil Engineer level (CP 222, 226, 230-31, 242); his sole client was “consistently” providing negative feedback about his performance and had lost confidence in him (CP 222, 230-31); he needed to make “substantial improvements in the areas of attendance technical skills, quality assurance, client service and meeting deadlines” (CP 223); he was not following clear protocols—and best practices—of distributing agendas and meeting minutes (CP 226-27, 231, 239-42); and he was resisting the efforts of his management to coach and mentor him (CP 223, 227, 231). Moreover, the August 2012 written reprimand pre-dates Tang’s raising his perceived ethical duties on September 10, 2012. That reprimand further documents Tang’s tardiness and failure to follow clear instruction to distribute agendas and meeting minutes. CP 247 (incorporating earlier draft written reprimand (CP 244)).

The demotion flowed from all that, as well as continued underperformance. As the trial court found, “emails and other

documentation ... show that during this relevant period where they are arguing over whether Mr. Tang should be performing this work or not, he continued to underperform in other ways that [were] documented.” VRP, at 34.

Tang makes the remarkable assertion that he had “achieved each of the milestones in the Halladay Project up until he was finally demoted” and was ready to submit the project to permitting with 30% design completion (behind schedule) in February 2013. Op. Br. 28-29. The only “evidence” he cites for support is his own Declaration. Tang did circulate draft drawings on February 21, 2013, but they were “in such disorganization” that Enrico would not stamp “them until they are presentable.” CP 286. Enrico continued to ask Tang to provide a “workplan indicating a due date on each sheet for the 30% design.” *Id.* The drawings were finalized *by others* in mid-March 2013, who told Tang that “given the level of effort that was required to modify” Tang’s draft drawings, he should “allow the CADD tech’s [sic] to attach the PE seal to the drawings and not alter their work.” CP 635. If Tang wanted to review the updated drawings, he should do so in PDF or hard copy—in other words, do not touch the work completed (correctly) by others. *Id.*

As for the general assertion that Tang completed all the project milestones, there is overwhelming contemporaneous evidence to refute that, including documents that detail Tang’s repeated refusals and failures to do his work. One such example is a running account of Enrico’s weekly meetings with Tang from January to March 2013 (CP 271-73), which

Enrico started to provide guidance to Tang and track his progress, but “each and every week his list to do got longer and longer, ... he may have done one or two items.” CP 738 (Enrico Dep. 123-25). There are many more examples of Tang’s failure to complete necessary tasks on Halladay and other projects. CP 247, 263-64, 266-69, 289-92, 283-84, 286.

Tang’s refusal of the civil site design work on Halladay and his continued resistance and inability to complete other basic tasks to move the project forward confirmed his inability to perform the tasks of a Senior Civil Engineer. Indeed, shortly before the recommendation for demotion, Tang’s *only* client explained in a detailed memo that she would refuse to have Tang assigned to any of her projects going forward because he had performed so poorly over the past *three years*. CP 275-77. The job requirements for a Senior Civil Engineer include “extensive knowledge and ability to perform civil engineering design work.” CP 344. The assignment Tang refused was a task that any Senior Civil Engineer at SPU should be able to perform. CP 215-16 ¶17.

Tang’s after-the-fact focus on methane is a red herring. By May 2012, the Halladay project team—including Enrico—was well aware that methane was present and appropriate mitigation measures would be necessary for permitting. CP 189-91, 218 ¶39. No one was sweeping methane issues under the rug. Worker safety was very much a priority. As the trial court found, “the evidence does show that everyone involved in the project was concerned and took seriously any issues related to safety.” VRP, at 33.

Indeed, the people talking about worker safety were Enrico and Coburn, SPU Geotechnical Engineering (specifically Nelson and Ramirez), Aigbe, and Cross. CP 314-17, 495, 625-26, 628, 632.¹¹ And it was Enrico, together with one of SPU's methane experts, who prepared the mitigation plan in July 2013 and stamped the design drawings that incorporated protections for construction workers. In fact, the person who is *not* documented as speaking about worker safety issues is *Tang*.¹²

Finally, a methane mitigation plan was not necessary until later in the design process. There was additional work on the project that Tang could have and should have done, including the civil site design work: grading, paving, removal of contaminated soils, and installing a drainage system and fence. None of that work hinged on having a methane mitigation plan in place. CP 215-16 ¶17; *see also* CP 255 (methane mitigation plan part of 60% design stage). Tang nevertheless refused to do it. Indeed, even if inherently raising a worker safety issue were enough (and it is not), Tang refused the *entire* assignment—not whatever part of it

¹¹ Tang says while he was on vacation there was an attempt to begin construction on the Halladay site without the necessary permits. Op. Br. 26-27. That is false and he knows it. There was no attempt to begin construction in December 2012, but there was an urgent need to move concrete blocks off a portion of the site that did not belong to the City, but rather to the Port of Seattle. The City had been using the property without permission. CP 739-40 (Enrico Dep. 739-40). Coburn initially thought that work would involve construction, which prompted her email (CP 316-17), but she was mistaken (CP 740 (Enrico Dep. 155-56), CP 218 ¶39). Documents confirm that. CP 314-15, 561. Indeed, Tang *himself* told Coburn that “no construction activities associated with the interim plan to vacate off the Ports [sic] property have occurred.” CP 623.

¹² Tang describes a “risk register” related to Halladay as identifying a “risk of injury.” Op. Br. 18, 46. That is wrong. The risk register described the risk from methane as a potential “delay in project schedule and increase in costs.” CP 477.

he might have thought related to methane and not singling out that as the basis for his refusal. For that reason, and many others, his demotion was entirely justified.

4. Tang cannot show that the City's legitimate reasons are pretext for retaliation.

After the City offers a legitimate reason for the demotion, the burden shifts to Tang to show that the City's reasons for the demotion are pretextual or that his raising a workplace safety issue was a substantial factor motivating the City in demoting him. *Wilmot*, 118 Wn.2d at 73.

Again, Tang's performance issues pre-dated both the discovery of methane at Halladay and his refusal to perform design work. Indeed, in his deposition, Tang said that he *did not believe* that the March 2012 coaching and expectations memos or the April 2012 verbal reprimand were in retaliation for anything. CP 177-78 (Tang Dep. 101-02, 103-05).

Moreover, Tang did not refuse to perform the work because of worker safety issues involving methane, but rather his own admitted lack of competence, which he perceived as creating an "ethical" issue vis-à-vis his employer. The City disagreed with his assessment that an "ethical" issue permitted him to refuse appropriate work assignments and gave him multiple opportunities—with significant support—to perform. Tang simply would not or could not do so, either one of which, together with his history of performance issues, provide a sufficient—and non-retaliatory—reason for the City's decision to demote him.

Many layers of management concurred in the recommendation to

demote Tang, and human resources professionals were involved in each of the disciplinary process steps. No one at SPU was “enraged” or even conflicted about the presence of methane at the Halladay site and the need to do something about it.

Tang now suggests he was the only one concerned about methane, as *he* determined “in his professional capacity that a licensed engineer with experience in methane gas mitigation or landfill construction should be consulted.” Op. Br. 12. But he testified that *other* team members—not himself—concluded that a methane mitigation plan was necessary. CP 720 (Tang Dep. 52). Their conclusion was that “a Methane Mitigation Plan stamped by PE would be required (for permitting).” CP 190. Tang is a PE. So is Enrico, who had offered to stamp the plans. CP 261.

Tang suggests something nefarious in SPU’s having considered hiring consultants for the design work, but ultimately deciding to do it in-house. Assigning design work to a Senior Civil Engineer at SPU, instead paying an outside consultant, is not a retaliatory act. Rather, it is being a good steward of ratepayer funds. CP 251 (“this is a win-win for SPU in that not only do you gain valuable design experience, but the Utility would save many thousands of dollars in consultant fees”).

Tang apparently wanted to do only “project management” on dam-related projects. But that is not the job Tang applied for or received. A Senior Civil Engineer must have “extensive knowledge and ability to perform civil engineering design.” CP 344. And even though Tang says his job did not require design work (Op. Br. 5), the job for which he

applied and was given required him to be responsible for “*senior-level professional civil engineering work in the planning, design, [and] construction ... of municipal Public works, utilities and services projects.*” CP 450 (emphasis added). That the position did not mesh with his personal preference or his “overall career goal” (Op. Br. 13) is irrelevant.

E. Tang is not entitled to attorneys’ fees under the EAJA.

Tang seeks an award of attorneys’ fees under the Equal Access to Justice Act (“EAJA”), RCW 4.84.350. That statute permits an award of fees to plaintiffs who prevail in a “judicial review” of an “agency action,” unless the agency’s actions were “substantially justified” or other “circumstances make an award unjust.” RCW 4.84.350(1). That statute does not apply here. The statute defines “judicial review” as review under RCW 34.05, *the Administrative Procedure Act*. RCW 4.84.340(4). Tang did not file this action under the APA. Indeed, the City has not found any decisions in which a public employee was awarded fees under the EAJA for employment-related claims, and Tang cites no such authority. Similarly, no court has interpreted “agency action” to mean “employment discipline.” To make that reach would profoundly impact public entities and subject them to sweeping liability in every employment case.

At any rate, Tang did not give the City notice of his intent to seek fees under the EAJA until he opposed the City’s motion for summary judgment in May 2015, well after discovery closed. CP 389-90, 698. He did not seek fees under the EAJA in his complaint. CP 1-7. The City thus was denied an opportunity to conduct discovery as to whether he is a

“qualified party” under that statute. The EAJA defines a “qualified party” to be “an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed.” RCW 4.84.340(5). (Again, Tang has not filed a “petition for judicial review.”) There is no evidence in the record regarding whether Tang qualifies. Thus, even if the EAJA applied here—and it does not—there is insufficient evidence in the record to support an award of fees to Tang.

CITY’S CROSS-APPEAL

A. Tang may not seek emotional distress damages under RCW 49.17.160.

The Court need not reach the City’s cross-appeal if it affirms the trial court’s order granting summary judgment and dismissing the case. But, out of an abundance of caution, the City has cross-appealed the denial of its earlier motion for partial summary judgment, which was limited to the legal question whether emotional distress damages are available under RCW 49.17. Because emotional distress damages are not included in the list of available remedies provided in the statute, if this case does move forward to trial, Tang should be precluded from seeking such damages.

1. Because RCW 49.17.160 lists specific equitable remedies—but not damages for emotional distress—Tang may not seek emotional distress damages.

In determining whether emotional distress damages are available under a statute, the Court starts with the language of the statute at issue. A court’s “fundamental objective is to ascertain and carry out the Legislature’s intent.” *Wash. Dep’t. of Ecology v. Campbell & Gwinn*,

LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Here, the statute provides that the Court has jurisdiction “to restrain violations of subsection (1) of this section”—which prohibits retaliation against an employee for filing a complaint with WISHA—“and order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay.” RCW 49.17.160(2). The statute lists specific forms of relief, and says nothing about emotional distress damages.

Where—like RCW 49.17.160—a statute “enumerates several forms of relief, but does not reference emotional distress damages,” that “indicates an intent *not* to provide emotional distress damages.” *Woodbury v. City of Seattle*, 172 Wn. App. 747, 754, 292 P.3d 134 (emphasis added), *rev. denied*, 177 Wn.2d 1018, 304 P.3d 14 (2013). In *Woodbury*, the Court held that a similar whistleblower statute, which prohibited retaliation against local government employees who disclosed improper government actions, did not provide for emotional distress damages because the statute expressly provided for certain forms of relief but did *not* mention emotional distress damages. *Id.* at 754. The statute permitted an award of “reinstatement, with or without back pay, and such injunctive relief as may be found to be necessary in order to return the employee to the position he or she held before the retaliatory action and to prevent any recurrence of retaliatory action” and “reasonable attorneys’ fees.” *Id.* (citing RCW 42.42.040(7)).

The Court contrasted the relief available under the Local Government Whistleblower statute with the relief available under the State

Government Whistleblower statute, which specifically allowed an aggrieved employee to “recover damages for mental suffering not to exceed \$20,000.” *Id.* The difference between the two whistleblower statutes demonstrated that had the Legislature intended to allow emotional distress damages under the first statute, it would have said so expressly. *Id.* “A statute that enumerates several forms of relief, but does not reference emotional distress damages, indicates an intent not to provide emotional distress damages.” *Id.*

Similarly, here, RCW 49.17.160 provides particular remedies for its violations, allowing courts “to *restrain violations* ... and order all appropriate relief including *rehiring* or *reinstatement* of the employee to his or her former position with *back pay*.” RCW 49.17.160(2) (emphasis added). Like the statutory language in *Woodbury*, this language provides specific remedies, including rehiring or reinstatement to restrain violations of the statute. The statute does *not* say that an award of damages—for emotional distress or anything else—is permitted. Under *Woodbury*, emotional distress damages are not available pursuant to RCW 49.17.160.

Moreover, the remedies enumerated in RCW 49.17.160 are *equitable*. The statute’s reference to “all appropriate relief” is modified by the list of equitable relief that follows it, i.e., “rehiring or reinstatement of the employee to his or her former position with back pay.”¹³ Under established principles of statutory interpretation, “the meaning of words

¹³ Back pay is considered an equitable remedy. *E.g.*, *Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1069-70 (9th Cir. 2005).

may be indicated or controlled by those with which they are associated.”
In re Detention of Kistenmacher, 163 Wn.2d 166, 179, 178 P.3d 949
(2008) (quotations omitted). *See also Wash. State Human Rights Comm’n*
v. Cheney Sch. Dist., 97 Wn.2d 118, 126-27, 641 P.2d 163 (1982)
(enumeration of remedies was exclusive and authority to take “such other
action” was qualified by what came after it, which indicated no intent to
include emotional distress damages). Emotional distress damages are not
listed in RCW 49.17.160, and they are not equitable.

Notably, the Department of Labor and Industries—the agency
charged with the administration and enforcement of RCW 49.17.160’s
non-retaliation mandate—has recognized that the statute does not provide
for emotional distress damages. Specifically, it told the Supreme Court
that RCW 49.17.160 does *not* grant the agency authority to seek
“emotional distress damages.” Amicus Brief of Dept. of L&I, *Cudney v.*
AlSCO, Inc., No. 83124-6 (Dec. 11, 2009 Wash.), *available at* 2009 WL
5262682, at *11-*12. Rather, the agency seeks “only remedies provided
by RCW 49.17.160, such as back wages and reinstatement.” *Id.* at *11. In
fact, it does not plead compensatory damages or front pay, but only back
wages, because back wages are what the statute authorizes. *Id.*

Courts have also dealt with the availability of emotional distress
damages—including under RCW 49.17.160—in the context of deciding
whether the applicable statutory scheme is an employee’s exclusive
remedy for alleged retaliation, or whether the employee can also bring a
common law tort claim for wrongful discharge in violation of public

policy. Part of that analysis has been whether the relief available in the statutory scheme is deemed adequate. If the relief is less than what is available under common law, that suggests the statutory scheme was not intended to supplant a common law claim. In those cases, courts have held that RCW 49.17.160 and similar statutes do not clearly authorize emotional distress damages.¹⁴

For example, the Supreme Court has held that a statute that provides remedies for workers discharged in retaliation for filing a workers' compensation claim did not supplant the common law tort claim for wrongful discharge because, in part, the statutory remedies were likely inadequate. *Wilmot*, 118 Wn.2d at 60-61. Under that statute—just like RCW 49.17.160—a court has jurisdiction “to restrain violations of subsection (1) of this section and to order all appropriate relief including rehiring or reinstatement of the employee with back pay.” *Id.* at 55 (citing RCW 51.48.025). The Court said it was “not clear” whether “all appropriate relief” included emotional distress damages, which would be available under common law. *Id.* at 61. Moreover—and again like RCW 49.17.160—the specific remedies listed in the statute, rehiring or

¹⁴ In a trio of recent decisions, the Supreme Court held that to determine whether a statutory scheme precludes an employee from bringing a common law tort, a court does not look to the adequacy of the statutory remedies, but rather to whether the statutory remedy is exclusive. *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 285, 358 P.3d 1139 (2015); *Becker v. Community Health Sys.*, 184 Wn.2d 252, 359 P.3d 746, 748-49 (2015); *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 310, 358 P.3d 1153 (2015). The issue in this cross-appeal does not turn on whether an “exclusivity” or “adequacy” standard applies for purposes of establishing a common law tort because Tang has pled no such claim. Rather, the earlier cases cited herein involve interpreting statutory language to determine what remedies are available, which remains relevant here.

reinstatement with back pay, “appear equitable in nature,” which suggested that “all appropriate relief” did *not* include “all normally available damages in a tort action,” like emotional distress. *Id.* Had the Legislature intended for those remedies, it could have easily added “other damages” to the list of available remedies. *Id.* at 62.

This Court has done a similar analysis of RCW 49.17.160 and reached the same conclusion. *Wilson v. City of Monroe*, 88 Wn. App. 113, 125-26, 943 P.2d 1134 (1997). In *Wilson*, a plaintiff brought a common law claim of wrongful discharge in violation of public policy for alleged whistleblowing about workplace safety. The Court examined whether the plaintiff could bring that claim, or instead whether he was limited exclusively to a statutory claim under RCW 49.17.160. The Court looked to the “adequacy” of the statute’s remedies, including whether the statute allowed a plaintiff to recover emotional distress damages. *Id.* at 125-26. While RCW 49.17.160 provides for “all appropriate relief including rehiring and reinstatement,” because the specific remedies “appear equitable in nature,” the court “doubt[ed] that the Legislature intended ‘all appropriate relief’ under the statute to mean all normally available damages in a tort action.” *Id.* at 126. *See also Smith v. Bates Tech. College*, 139 Wn.2d 793, 810, 991 P.2d 1135 (2000) (PERC statute, which allowed PERC to issue “appropriate remedial orders” and order “payment of damages,” did “not clearly authorize all damages that would be available in a tort action,” including emotional distress).

In short, because the Legislature chose to enumerate particular types of relief in RCW 49.17.160, but said nothing about emotional distress damages, Tang may not seek emotional distress damages here.

B. When the Legislature intends a statute to include emotional distress damages, it expressly says so, or at least authorizes an award of “actual damages.”

A related principle of statutory construction is that when the Legislature intends to permit an award of emotional distress or other economic damages, the statute will say so expressly or will permit an award of “actual damages.” Under a variety of statutes, courts have held that the Legislature intended to permit emotional distress damages when the statute provided for “actual damages.” *E.g.*, *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 529, 554 P.2d 1041 (1976) (Fair Credit Reporting Act); *Ellingson v. Spokane Mortg. Co.*, 19 Wn. App. 48, 56-58, 573 P.2d 389 (1978) (Washington Law Against Discrimination); *Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1313 (W.D. Wash. 2013) (Insurance Fair Conduct Act). But even when a statute allows an award of “actual damages,” that does not necessarily mean the statute permits an award of emotional distress damages. “[A]ctual damages has a chameleon-like quality because the precise meaning of the term changes with the specific statute in which it is found.” *Segura v. Cabrera*, -- P.3d --, 2015 WL 6549175, at *4-*5 (Wash. Oct. 29, 2015) (quotations omitted).

In the statute here, RCW 49.17.160, the Legislature did *not* mention “emotional distress damages” *or* “actual damages” because it did not intend for such damages to be awarded under the statute. “It is well

settled that where the legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed.” *Woodbury*, 172 Wn. App. at 753 (citations omitted).

Moreover, the purpose behind RCW 49.17 does not indicate a legislative intent to provide emotional distress damages. Rather, it is to “assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington” and “to create, maintain, continue, and enhance the industrial safety and health program of the state.” RCW 49.17.010. The statute’s intent is to make the workplace safe. Indeed, most of RCW 49.17 is devoted to exactly that and specifies the standards employers must meet to ensure workplace safety. RCW 49.17.160 protects the continued employment of employees who raise complaints about worker safety, but it does not provide for emotional distress damages.

VI. CONCLUSION

The City respectfully requests that the Court affirm the order granting summary judgment and dismissing Tang’s case. If the Court does not affirm, the City respectfully requests that the Court reverse the order denying partial summary judgment and hold that emotional distress damages are unavailable under RCW 49.17.160.

DATED: December 14, 2015.

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APPENDIX A – TIMELINE

Date	Event	Record Citation
Feb. 2012	Halladay project is assigned to Enrico's group after it gets budget approval, and Tang is assigned as the Project Manager.	CP 717 (Tang Dep. 31-32)
3/6/12	Tang receives Coaching Memorandum and Expectations Memorandum.	CP 222-23; CP 225-27
3/26/12	Tang receives 2011 Performance Review.	CP 229-37
4/2/12	Tang receives Verbal Warning – Insubordination.	CP 239-42
4/11/12	Testing at Halladay site shows methane in the soil.	CP 1023-24 ¶¶ 3, 5; CP 1030; CP 1032-34
5/23/12	Meeting notes indicate that the Halladay project team agrees that a "Methane Mitigation Plan stamped by PE would be required (for permitting)."	CP 190
8/13/12	Tang receives a <i>draft</i> Written Reprimand – Insubordination & Frequent Tardiness.	CP 244-45
8/31/12	Tang receives Written Reprimand – Insubordination & Frequent Tardiness.	CP 247-49
8/31/12	Enrico assigns Tang the civil site design work on the Halladay project. Tang refuses.	CP 215-16 ¶ 16; CP 721 (Tang Dep. 55)
9/6/12	Enrico and Tang meet to discuss the Halladay project; Enrico again assigns Tang the civil site design work. Tang again refuses.	CP 216 ¶ 19; CP 251-57
9/10/12	Tang cites WAC 196 and his perceived inability to do the design work as grounds for refusing the assignment.	CP 251-52

9/21/12	Tang receives recommendation that he be suspended for three days.	CP 327-31
Nov. 2012	Enrico finishes Halladay Project Management Plan ("PMP") while Tang is on vacation.	CP 216 ¶ 21
1/17/13	Cross writes three-page memo detailing Tang's performance deficiencies over the "last three years" and refuses to allow Tang to work on future Facilities projects.	CP 275-77
2/5/13	Tang receives recommendation for demotion.	CP 333-37
2/26/13	<i>Loudermill</i> hearing regarding demotion and suspension.	CP 339
4/2/13	Recommendation for demotion upheld. Tang is demoted to Associate Engineer.	CP 339-40
5/6/13	Tang files complaint with L&I.	CP 193-94
6/28/13	Enrico meets with Yim to formulate a plan to address methane at the Halladay site before construction begins. Other individuals, including Coburn, Aigbe, and Cross, are informed of Enrico's and Yim's plan.	CP 217 ¶¶ 32-35; CP 294; CP 296; CP 298; CP 803; CP 805 CP 1024 ¶ 7; CP 1036; CP 1038; CP 1040
7/17/13	L&I determines "there is insufficient evidence to substantiate that discrimination, as defined by the WISH Act, occurred."	CP 196
9/30/13	L&I affirms its determination of no WISHA discrimination under RCW 49.17.160.	CP 212
10/30/13	Tang files this lawsuit.	CP 1-7

APPENDIX B – RELEVANT PROVISIONS

RCW 49.17.160(1) & (2)

Discrimination against employee filing complaint, instituting proceedings, or testifying prohibited—Procedure—Remedy

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or herself or others of any right afforded by this chapter.

(2) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty days after such violation occurs, file a complaint with the director alleging such discrimination. Upon receipt of such complaint, the director shall cause such investigation to be made as he or she deems appropriate. If upon such investigation, the director determines that the provisions of this section have been violated, he or she shall bring an action in the superior court of the county wherein the violation is alleged to have occurred against the person or persons who is alleged to have violated the provisions of this section. If the director determines that the provisions of this section have not been violated, the employee may institute the action on his or her own behalf within thirty days of such determination. In any such action the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay.

WAC 196-27A-020(2)(d) & (e)

Fundamental canons and guidelines for professional conduct and practice.

...

(2) Registrant's obligation to employer and clients.

...

(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.

SMC 25.09.220(B)

Areas within 1000 feet of Methane-producing Landfills.

Areas within 1000 feet of methane-producing landfills may be susceptible to accumulations of hazardous levels of methane gas in enclosed spaces. Methane barriers or appropriate ventilation may be required in these areas as specified in Title 22, Subtitle I, Building Code, and Seattle-King County Health Department regulations.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the (1) attached Respondent / Cross-Appellant City of Seattle's Answering Brief and Opening Brief on Cross-Appeal and (2) Verbatim Report of Proceedings to be served via email on the individual listed below:

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Suzette Barber

2015 DEC 14 PM 1:02
SUPERIOR COURT
STATE OF WASHINGTON