91029-4

Court of Appeals No. 319504-III

SUPREME COURT OF THE STATE OF WASHINGTON

JOETTA RUPERT,

Appellant,

v.

KENNEWICK IRRIGATION DISTRICT,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Joetta Rupert, seeks review of the Court of Appeals' decision designated in Part II.

II. COURT OF APPEALS DECISION

Ms. Rupert seeks review of the unpublished decision of the Court of Appeals, Division III, *Joetta Rupert v. Kennewick Irrigation District*, __ Wn. App. __, No. 31950-4-III (2014). A copy of the unpublished decision at issue is provided and attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision is in conflict with *Renz v. Spokane Eye Clinic,* 114 Wn. App. 611, 60 P.3d 106 (2002) relating to the summary judgment standard in employment cases? RAP 13.4(b)(1)

2. Whether the Court of Appeals decision is in conflict with *Piel v. The City of Federal Way,* 177 Wn.2d 604, 306 P.3d 879 (2013) relating to the *jeopardy* element in tort of wrongful discharge cases and *Scrivener v. Clark College,* 334 P.3d 541 (2014) relating to the summary judgment standard in employment cases, in particular, the element of *pretext*? RAP 13.4(b)(2)

3. Whether the petition involves an issue of substantial public

interest under RAP 13.4(b)(4)? In this case, whether the remedies provided under the Local Governmental Whistleblower Protection Act, chapter 42.41 RCW are adequate as a matter of law to preclude a separate tort claim for wrongful discharge in violation of public policy based upon the *jeopardy* element. Additionally, the petition should be granted to provide clarity and eliminate the confusion evident in other appellate court cases dealing with the *jeopardy* element. *See* Judge Fearing's concurring opinion in *Becker v. Community Health Systems, Inc.,* 332 P.3d 1085 (2014).

IV. STATEMENT OF THE CASE

Ms. Rupert was hired by the Kennewick Irrigation District (KID) in 2003. Ms. Rupert received a series of promotions throughout her career with KID. The last promotion she received was manager of the Real Estate Department. Ms. Rupert reported directly to the Board of Directors (Board) which at the time was comprised of all males. The Board was Ms. Rupert's supervisors. CP 002, CP 187

Throughout Ms. Rupert's employment with KID, and up to the time of her firing on July 27, 2010, she had complained to the KID Board about the KID reserve fund (with an original value of $15,000,000) being improperly used and accounted for. CP 112, CP 120, CP 127-128, 207,

CP 250-259, CP 380, CP 318-325, CP 340-341 Ms. Rupert had become concerned about unauthorized expenditures being made by KID. CP 195-196 Ms. Rupert was concerned about the Board not meeting its fiduciary duties because there was no public discussion by the Board as to how the reserve fund should be spent, how much of the reserve fund was being spent or where it was being spent. CP 189 Ms. Rupert was also concerned about inconsistent information on investment reports prepared by the KID treasurer and, as a result, she brought those concerns to the Board. CP 252-258, CP 320-325

Ms. Rupert had shown Board member, John Jaksch, in the earlier part of 2010 evidence of mature investments (certificates of deposit) being cashed out instead of being reinvested and transferred to the operations account without Board authority and then used to purchase unauthorized vehicles and compensate KID employees for overtime. As a result, some employees in 2009 received more in overtime compensation than their annual salary. When Ms. Rupert showed Mr. Jaksch the documentation he commented, "somebody could go to jail for this." CP 086-088, CP 192, CP 271-273

KID Board member, Gene McGuire, had criticized Ms. Rupert for bringing these concerns to the Board about the use and accounting for of

the KID reserve fund and had directed his criticisms in front of the full Board. CP 258

Mr. McGuire had also been critical of Ms. Rupert raising concerns about the Board approving the sale and lease of public properties under its control. Ms. Rupert had previously retained a legal firm in Portland, Oregon for advice on the sale and lease of public properties and had been advised that a statute did not allow for more than a year to year lease. CP 246-247, CP 318-319

Mr. McGuire was extremely upset that Ms. Rupert had retained a legal firm for advice and, as a result, properties under her supervision and control were taken away from her and given to another male manager. CP 196

The Board hired an outside auditor, on Ms. Rupert's recommendation in 2010, to perform an audit for calendar years 2006-2009. CP 089, CP 189, CP 196, CP 201, CP 252-259, CP 267, CP 274 Ms. Rupert shared her complaints with the auditor. CP 267-270

The results of the audit were shared with the Board in May of 2010. The results of the audit disclosed the Board was not being provided with "routine financial reports." CP 051 Furthermore, the audit noted that KID investments during the calendar years subject to the audit continued

to decrease as certificate of deposits were redeemed monthly by the accounting division to cover operating expenses. The auditor also disclosed that she was unable to identify documentation supporting the appropriate authorization of the transfer of investment funds to the operating cash account. The auditor also noted the Board was not receiving and reviewing monthly investment reports. CP 052, CP 059

On June 17, 2010, Ms. Rupert informed the Board President at the time, Gene Huffman, she needed to speak to the KID General Manager, Charles Freeman, about another male manager, Scott Revell working outside the scope of his responsibilities and interfering with her job. Ms. Rupert went to Mr. Huffman because Mr. Freeman refused to speak to her in person because she was a woman. CP 235-239 Mr. Freeman had spoken with other male managers, as well as the all male KID Board. CP 200, 223, 227, 235-239 Mr. Huffman, in response, ordered Ms. Rupert not to contact Mr. Freeman because he had been "burned before" and that he was not comfortable working with women or being alone with another woman in the workplace. CP 235-239, 278 Mr. Huffman ordered Ms. Rupert not to have any contact with Mr. Freeman. CP 238 Ms. Rupert opposed Mr. Huffman's response by protesting, in part, that this was discriminatory treatment. CP 200, 227, 235-239

Ms. Rupert had also complained to Board Member, John Pringle, that she was not being treated in the same manner as male managers, Mr. Freeman and Mr. Revell. CP 189 She further protested that this discriminatory treatment was on the basis of her gender. CP 189 In response, Ms. Rupert was told by Mr. Pringle not to question the authority of the Board. CP 189

On or around July 15, 2010, Ms. Rupert told Mr. Jaksch that she felt she was being discriminated against on the basis of her gender and that she intended upon filing a formal complaint against Mr. McGuire for hostile work environment. CP 195, CP 242-244, CP 246-247, CP 258, CP 382-383

On July 15, 2010, Ms. Rupert met with Mr. Huffman in her office for over two and half hours relating to her complaints of discrimination and hostile work environment she had raised with Mr. Jaksch. At this same meeting, Mr. Huffman broached the topic of how Ms. Rupert was going to claim her time off from work for a personal injury trial she had to attend as a plaintiff relating to an automobile accident while she was in the scope of her employment with KID. CP 193 Ms. Rupert told Mr. Huffman she was going to use her accrued sick leave benefits and inquired as to whether this was a problem. Mr. Huffman responded by stating to

Ms. Rupert, "No, there isn't." CP 194, CP 286 Ms. Rupert reiterated that if there was a problem she could use her accrued vacation benefits. Mr. Huffman responded by again telling Ms. Rupert, "No don't change it." CP 188, CP 200, CP 286

Ms. Rupert was advised by Charles Freeman, on the same day, via e-mail communication that her request to use her sick leave was denied. CP 285-286

On July 20, 2010, Ms. Rupert was notified by the Board's attorney, Brian Iller, that she was being placed on administrative leave "pending an investigation of the charge that you attempted to use sick leave for time off to attend a personal injury trial for approximately one week." CP 313 The Board's decision to place Ms. Rupert on administrative leave was made by a motion initiated by Mr. Jaksch and seconded by Mr. McGuire. CP 359

On July 27, 2010, Ms. Rupert was terminated from employment by the Board without cause. CP 335-336 No specific reason was given by the Board for its decision to terminate her employment without cause. CP 336-337

In declarations provided in support of KID's motion for summary judgment, Mr. Pringle, Mr. Huffman and Mr. Jaksch asserted, for the first

time, that Ms. Rupert's employment with KID was terminated for cause based upon "poor performance." CP 093, CP 110-113, CP 117-120, CP 124-128

There is no evidence of any documented performance concerns prior to Ms. Rupert's without cause termination on July 27, 2010. CP 186, CP 191-199, CP 206

V. ARGUMENT

1. Ms. Rupert's Petition for Review should be granted on her retaliatory discharge claims because the Court of Appeals decision is in conflict with prior decisions of the Court of Appeals and Washington Supreme Court as to the standard for summary judgment in employment cases.

a. Summary Judgment Standard

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c) When making this determination, the court must consider all facts and make all reasonable, factual inferences in the light most favorable to the nonmoving party. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

On summary judgment, "the trial court has no authority to weigh evidence or testimonial credibility" and nor can the appellate court do so on appeal. *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 623, 60 P.3d

106 (2002) The issue is "whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met." *Id.* at 623

In cases involving retaliation for complaining about discriminatory conduct or behavior on the part of the employer, the plaintiff when faced with a summary judgment motion needs to "produce very little evidence in order to overcome the employer's motion for summary judgment." *Chuang v. University of California Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000); *Sangster v. Albertson's Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000) ("Summary judgment should rarely be granted in employment discrimination cases.")

As a result, summary judgment in favor of the employer "is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury." *Kuyper v. Dep't of Wildlife*, 79 Wn. App. 732, 739, 904 P.2d 793 (1995) (citing and quoting *Carle v. McChord Credit Union*, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992).

The Court of Appeals decision ignored this standard. *Scrivener v. Clark College,* 334 P.3d 541 (2014)

b. Elements of Retaliatory Discharge

WLAD forbids an employer, in part, from discharging an employee in retaliation for "opposing any practices forbidden by this chapter." RCW 49.60.210

To establish a prima facie case of retaliation, Ms. Rupert must show that (1) she engaged in statutorily protected activity, (2) her employer took an adverse employment action against her, and (3) there is a causal link between the activity and the adverse action. *Milligan v. Thompson*, 110 Wn. App. 611, 638, 43 P.3d 522 (2002) A tort of wrongful discharge claim required Ms. Rupert to establish the following: (1) the existence of a "clear public policy" ("clarity" element), (2) whether "discouraging the conduct in which [the employee] engaged would jeopardize the public policy" ("jeopardy" element), (3) whether the "public-policy-linked conduct caused the discharge" ("causation" element), and (4) whether the employer is "able to offer an overriding justification for the [discharge]" ("absence of justification" element). *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). Here, only the jeopardy and causation elements are at issue.

(1) Statutorily Protected Activity

The Court of Appeals affirmed dismissal of Ms. Rupert's retaliatory discharge claim. The Court of Appeals held that by not

complaining to a supervisor or human resources of activity that was forbidden by WLAD she had failed to show she was engaged in protected activity. See Appendix A, pg. 7-8.

To prove statutorily protected activity Ms. Rupert is not required to prove that KID's challenged conduct was unlawful. *Renz*, 114 Wn. App. at 619 Ms. Rupert was protected under WLAD if she opposed practices *"reasonably believed to be discriminatory"* regardless of whether the conduct was actually discriminatory. *Id.* at 619 Thus, a failure to prove either gender discrimination or hostile work environment is not dispositive of Ms. Rupert's retaliatory discharge claim. *Id.; see also Ellis v. City of Seattle*, 142 Wn.2d 450, 460, 13 P.3d 1065 (2000) (requiring only an "objectively reasonable belief").

Washington courts have also concluded that employee complaints to a supervisor may constitute a statutorily protected activity. *Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 798-99, 120 P.3d 579 (2005)

In this case, Ms. Rupert met her burden of production when she opposed the discriminatory behavior of Mr. Freeman, Mr. McGuire, Mr. Huffman and other male board members and employees by complaining to

at least three separate KID Board members who were her supervisors. CP 002, CP 079, CP 207, CP 250-253, CP 380

(2) Causation

The Court of Appeals also affirmed dismissal of Ms. Rupert's retaliatory discharge claim under WLAD and separate tort claim for wrongful discharge holding that she failed to establish a causal link between her complaints and firing. See Appendix A, pg. 8.

Ms. Rupert's petition for review should also be granted because she met her burden of production on these elements, and the Court of Appeals decision is in conflict with prior court decisions.

In regard to the burden of production, Washington courts have concluded that a retaliatory motive need not be the employer's sole or principal reason for the discharge so long as the employee establishes that retaliation was a substantial factor. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991) An employee can meet the burden of production on the causation element by establishing that she participated in opposition activity, the employer knew of the opposition activity, and the employer discharged her. *Renz*, at 621

Proximity in time between the protected activity and the adverse employment action is a factor that suggests retaliation. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 482, 205 P.3d 145 (2009)

The Court of Appeals ignored the proximity in time between Ms. Rupert's complaints to her supervisors of gender discrimination, hostile work environment, the accounting and use of the KID reserve fund and her unlawful firing on July 27, 2010. Ms. Rupert had complained of gender discrimination to Mr. Huffman relating to Mr. Freeman on June 17, 2010. Ms. Rupert had complained to both Mr. Jaksch and Mr. Huffman on or around July 15, 2010, of her continued complaints of gender discrimination and her intent to file a formal complaint of hostile work environment against Mr. McGuire five days prior to her being placed on administrative leave by the Board and twelve days prior to her termination on July 27, 2010. Ms. Rupert had steadily complained about the accounting and use of the KID reserve fund beginning in 2006 up to 2010 culminating in an audit which corroborated her concerns in May of 2010, two months prior to her termination on July 27, 2010. CP 189, CP 191, CP 195, CP 223, 235-239, CP 242-244, CP 246-247, CP 258, CP 379, CP 382-383

The Court of Appeals noted in affirming summary judgment dismissal that Ms. Rupert had performance issues and "she took sick leave contrary to KID's sick leave policy." Appendix A, pg. 8. KID claimed, after her firing, that "performance problems" were the reasons for Ms. Rupert's firing. However, the Board never documented any of her alleged "performance problems" before the decision to fire her was made. The first time performance problems were raised was at summary judgment. CP 110-113, CP 117-120, CP 124-128, CP 186-187, CP 191-193, CP 206. This rationale for affirming summary judgment dismissal is clearly in conflict with prior Court of Appeal decisions. *See Renz*, at 625 (summary judgment reversed where employer failed to document any of the employee's shortcomings until it decided to fire her.)

The Court of Appeals decision is also in conflict with a recent decision of the Washington Supreme Court, *Scrivener v. Clark College,* 334 P.3d 541 (2014) and its precedent as it relates to evidence of *pretext.* Ms. Rupert may satisfy the *pretext* element by offering sufficient evidence to create a genuine issue of material fact by establishing that (1) KID's reason for her firing is pretexual or (2) that although its stated reason at time of firing, e.g., violation of sick leave policy is legitimate, discrimination nevertheless was a substantial factor motivating the KID

Board. *Fell v. Spokane Transit Authority,* 128 Wn.2d 618, 643 n. 32, 911 P.2d 1319 (1996); *Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wn.2d 46, 73 (1991)

Ms. Rupert satisfied her burden of production relating to pretext. Ms. Rupert had engaged in protected oppositional activity in close proximity to her firing relating to gender discrimination, hostile work environment, and her raising concerns about the accounting and use of the KID reserve fund. She had also been told by her supervisor, Mr. Huffman, that her applying to use sick leave benefits was appropriate and should not be substituted for accrued vacation benefits. Additionally, Mr. Jaksch (who Ms. Rupert earlier had notified of her complaints) made the motion to place her on administrative leave and which was seconded by Mr. McGuire (who had demonstrated animus towards Ms. Rupert). *See Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011) (Employer may be liable for the demonstrated animus of a supervisor towards an employee's membership in a protected class or protected activity if the animus is a proximate cause of the employer's adverse action.) Finally, there were no documented performance problems at the time of her firing on July 27, 2010. *Sellsted v. Wash. Mut. Sav. Bank,* 69 Wn. App. 852, 860, 851 P.2d 716 (1993) (Setting forth the principle that multiple, incompatible reasons

may support an inference that none of the reasons given are the real reasons); *Renz,* at 625

2. Ms. Rupert's Petition for Review should be granted on her tort of wrongful discharge claim because the Court of Appeals decision is in conflict with the opinion of the Washington Supreme Court in *Piel v. The City of Federal Way.*

The Court of Appeals affirmed summary judgment dismissal of Ms. Rupert's tort of wrongful discharge claim on the basis she had failed to satisfy the *jeopardy* element. The Court of Appeals held that the remedies set forth within chapter 42.41 RCW the Local Governmental Whistleblower Protection Act (LGWPA) were adequate as a matter of law and, therefore, she failed to meet the *jeopardy* element. See Appendix A, pg. 11-13. The Court of Appeals decision is clearly in conflict with *Piel v. The City of Federal Way,* 177 Wn.2d 604, 306 P.3d 879 (2013)

The *Piel* Court held that the remedies available to a public employee under chapter 41.56 RCW are not adequate as a matter of law and therefore an employee may assert a tort claim for wrongful discharge in violation of public policy. *Id.* at 609

The *Piel* Court in reviewing its prior cases on this issue concluded that "[t]he adequacy of available remedies is the heart of jeopardy analysis in cases involving statutes that provide administrative schemes." *Id.* at

613 The *Piel* Court determined that statutory remedies were "inadequate where no recovery for emotional distress is available." *Id.* at 614 (citing and quoting *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 232-233, 193 P.3d 128 (2008).

In this case, Ms. Rupert satisfied the *jeopardy* element of her tort of wrongful discharge claim because chapter 42.41 RCW does not provide adequate remedies (in this case no recovery for emotional distress or other tort damages). RCW 42.41(7); *Smith v. Bates Technical College,* 139 Wn.2d 793, 806, 991 P.2d 1135 (2000); *Piel,* at 614.

3. The Washington Supreme Court should grant review because this petition involves an issue of substantial public interest: whether the procedures and remedies available to a public employee under chapter 42.41 RCW are adequate as a matter of law, such that the employee may not assert a tort claim for wrongful discharge in violation of public policy; and to eliminate the confusion and provide clarity to practitioners and lower court judges relating to the *jeopardy* element.

The Washington Supreme Court should grant the petition and declare for the first time that Ms. Rupert, along with other local public employees, should not be barred from bringing a tort claim "simply because her administrative . . . remedies may partially compensate her wrongful discharge." *Smith,* at 806; *Piel,* at 611. The Washington Supreme Court should further declare the procedures and other remedies available to a local public employee under chapter 42.41 RCW are

inadequate as a matter of law and therefore an employee is not precluded from bringing a tort of wrongful discharge claim. RCW 42.41.040(7)

The statutory scheme, which affords relief for a local governmental employee who is retaliated against for reporting improper governmental action, is inadequate for several reasons. First, the statute does not provide for the recovery of emotional distress or other tort damages. Instead, the relief is limited to the administrative law judge (ALJ) having the discretion to provide for "reinstatement, with or without back pay, and such injunctive relief as" the ALJ determines is appropriate. No potential award for front pay is available. RCW 42.41.040(7)

Second, the award of reasonable attorney fees and costs is discretionary and may be made to the prevailing party. RCW 42.41.040(7) (8) The potential award of reasonable attorney fees and costs to the employer if it prevails may have a chilling effect on employees filing charges of retaliation. Employees alleging improper governmental action and their attorneys may be dissuaded from filing a charge and proceeding to a hearing before an ALJ based upon the inherent risks posed if the employer prevails. RCW 42.41.040(7) This fee shifting mechanism available to the employer if it prevails is not available under WLAD. *Compare* RCW 42.41.040(7) with RCW 49.60.030(g)(2) There is also no

right to a jury trial. *See* Judge Fearing's concurrence in *Becker v. Community Health Systems, Inc.,* 332 P.3d 1085 (2014)

Third, the public employee alleging retaliatory action is required to file a written charge within thirty days (30) "of the alleged retaliatory action." RCW 42.41.040(3) This arbitrary time limit renders the statutory remedy inadequate. *See Justice Stephens dissenting opinion in Cudney v. ALSCO, Inc.,* 172 Wn.2d 524, 546, 259 P.3d 244 (2011) ("Furthermore, even an unequivocally fired employee may not learn the reason for his or her termination straight away if the reason is retaliation for making safety complaints." *Id.* at 546 (citing *Hubbard v. Spokane County*, 146 Wn.2d 699, 703-706, 50 P.3d 602 (2002))

Fourth, the Washington Supreme Court has not required the exhaustion of administrative remedies contained within a statutory scheme before pursuing a public policy tort claim. Such a requirement would "unsettle the body of law this court has developed addressing collateral estoppels where wrongful discharge tort claims coexist with administrative remedies." *Piel,* 615.

Finally, the petition should be granted to eliminate the confusion and provide clarity for "practitioners and lower court judges as to the nature and extent of the jeopardy element of a claim for wrongful

discharge in violation of public policy." *See* Judge Fearing's concurrence in *Becker v. Community Health Systems, Inc.*, 332 P.3d 1085 (2014)

VI. CONCLUSION

For all of the reasons set forth above, Ms. Rupert's Petition for Review should be granted by the Court.

Respectfully submitted this 14th day of November, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing and/or attached was served by the method indicated below to the following this 5th day of November, 2014.

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APPENDIX A

FILED
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WA State Court of Appeals, Division III

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

JOETTA RUPERT, an individual, Appellant, v. KENNEWICK IRRIGATION DISTRICT, a public entity, Respondent.	)	No. 31950-4-III UNPUBLISHED OPINION

BROWN, J. – Joetta Rupert appeals the summary judgment dismissal of her claims against Kennewick Irrigation District (KID) for retaliatory discharge in violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, and wrongful termination in violation of public policy. She contends the trial court erred because it failed to find remaining genuine issues of material fact regarding retaliation, and failed to rule as a matter of law she had established the jeopardy and causation elements necessary for her wrongful termination claim. We disagree with Ms. Rupert, and affirm.

FACTS

KID hired Ms. Rupert in June 2003 as an administrative assistant in its real estate department and a few years later promoted her to department manager. She was an at-will employee reporting directly to the KID Board.

KID utilized an endowment fund for the proceeds from the sale of KID real property. KID had adopted a policy for the use of the endowment fund, which the board repealed in 2006. Then, the fund was called a reserve fund worth about $15 million. Ms. Rupert became uncomfortable with how the reserve fund was used. She believed the board was not meeting its fiduciary duties and became concerned about inconsistent investment report information prepared by KID's treasurer. Ms. Rupert brought her concerns to the board. She reported to Board President John Jaksch that certain investments were being cashed out instead of being reinvested and transferred to the operations account without board approval. During the relevant annual inspections, no discrepancies were found by the state auditor. Nevertheless, based on Ms. Rupert's concerns, the board hired an outside auditor to perform an independent audit for 2006-2009. Ms. Rupert conferred with the outside auditor. The audit results, confirming some of Ms. Rupert's concerns, were shared with the Board in May 2010. The outside auditor, however, did not find any missing funds.

In November 2009, KID hired a new district manager, Charles Freeman. Communication immediately broke down between Mr. Freeman and Ms. Rupert. She felt this breakdown was because she was a woman.

In March 2010, the board reassigned Ms. Rupert's supervisory responsibilities on the Red Mountain properties to Scott Revell, planning department manager. Ms. Rupert felt this was in response to her raising concerns about the legality of leasing properties on Red Mountain for longer than a one year period.

On March 6, 2010, Ms. Rupert presented the board her easement recommendations for certain KID-owned property. Board member, Patrick McGuire, disagreed and, according to Ms. Rupert, became angry and hostile towards her and successfully suggested to other board members that they vote against her proposal. The same day, board members and managers attended a retreat where Ms. Rupert claims both President Jaksch and board member, Gene Huffman, made comments about not wanting to sit next to her.

On June 17, 2010, Ms. Rupert informed Mr. Huffman she needed to speak to Mr. Freeman about work problems she was having with Mr. Revell. Mr. Huffman allegedly told Ms. Rupert not to contact Mr. Freeman because he had been "burned before" and "was not comfortable being alone with [a] woman." Clerk's Papers (CP) at 238.

In July 2010, Ms. Rupert notified the board that she would be attending a personal injury trial for a prior automobile accident she was involved in and would be out of the office. Ms. Rupert used sick leave for the week she was off. On July 15, 2010, Ms. Rupert met with Mr. Huffman for over two and a half hours to complain about what she perceived as the unprofessional practice of not having direct contact with Mr. Freeman. Ms. Rupert alleges when she offered her hand to say goodbye, Mr. Huffman immediately grabbed it and brought her close to him, hugging her tightly and rubbed his

chest against hers without her consent. At this same meeting, Mr. Huffman broached the topic of how Ms. Rupert was going to claim her time off from work for the personal injury trial. Ms. Rupert told Huffman she was going to use her accrued sick leave benefits and inquired as to whether this was an issue, offering to use personal or vacation time instead. According to Ms. Rupert, Mr. Huffman told her using sick leave was "acceptable and fine." CP at 194. Manager Freeman, however, notified her by e-mail that her request to use her sick leave was denied. According to Ms. Rupert she responded, "'No problem, go ahead and change it.'" CP at 285.

On July 20, 2010, the board notified Ms. Rupert it was placing her on paid administrative leave "pending an investigation of the charge that you attempted to use sick leave for time off to attend a personal injury trial." CP at 313.

On July 27, 2010, KID terminated Ms. Rupert's employment. President Jaksch later declared during 2009 and 2010, he "became increasingly concerned of [Ms. Rupert's] performance and of the costs associated with the Real Estate Assets Department that she managed." CP at 124. The board decided these concerns in addition to the recent inappropriate use of sick leave warranted termination.

Ms. Rupert sued KID for discrimination, hostile work environment, retaliation in violation of WLAD, wrongful termination in violation of public policy under the Local Government Whistleblower Protection Act (LGWPA), chapter 42.41 RCW, and failure to pay wages. Ms. Rupert was aware of KID's whistleblower policy, but she did not avail herself to it. The parties settled the wage claim before the trial court summarily

dismissed her remaining claims. Ms. Rupert appeals solely the dismissal of her WLAD retaliation and wrongful discharge in violation of public policy claims.

ANALYSIS

The issue is whether the trial court erred in summarily dismissing Ms. Rupert's claims for WLAD retaliation and wrongful termination in violation of public policy. She contends she met her prima facie burden on both causes of action.

We review summary judgment orders de novo, performing the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The superior court properly grants summary judgment when no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007) (citing CR 56(c)).

In a summary judgment motion, the moving party's burden is to demonstrate summary judgment is proper. *Atherton Condo. Apartment-Owners Assoc. Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). We consider all the facts submitted and the reasonable inferences from them in the light most favorable to the nonmoving party. *Id.* We resolve any doubts about the existence of a genuine issue of material fact against the party moving for summary judgment. *Id.* "Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion." *Lilly v. Lynch*, 88 Wn. App. 306, 312, 945 P.2d 727 (1997).

First, regarding retaliation in Washington, an employer generally may terminate at-will employees with or without cause. *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340, 27 P.3d 1172 (2001). The WLAD, however, prohibits retaliation against a party

asserting a claim based on a perceived violation of his civil rights or participating in an investigation into alleged workplace discrimination. RCW 49.60.210(1).

To establish a prima facie retaliation case, a plaintiff must show (1) he or she engaged in statutorily protected activity, (2) his or her employer took adverse employment action against him or her, and (3) a causal link between the activity and the adverse action. *Short v. Battle Ground Sch. Dist.*, 169 Wn. App. 188, 205, 279 P.3d 902 (2012). All three must be established to survive summary judgment. *Id.* Because Ms. Rupert's employment was terminated, we focus on whether Ms. Rupert engaged in statutorily protected activity and if so, whether that activity was causally linked to her termination.

An employee engages in WLAD-protected activity when he or she opposes employment practices forbidden by antidiscrimination law or other practices he or she reasonably believed to be discriminatory. *Short*, 169 Wn. App. at 205. It is not necessary the complained about activity be actually unlawful because "'[a]n employee who opposes employment practices reasonably believed to be discriminatory is protected by the 'opposition clause' whether or not the practice is actually discriminatory.'" *Graves v. Dep't of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994) (internal quotation marks omitted) (quoting *Gifford v. Atchison, Topeka & Sante Fe Ry.*, 685 F.2d 1149, 1157 (9th Cir.1982)). Absent some reference to the plaintiff's protected status, a general complaint about an employer's unfair conduct does not rise to the level of protected activity under WLAD. *Alonso v. Qwest Commc'ns Co.*, 178 Wn. App. 734, 753-54, 315 P.3d 610 (2013) (citing Graves, 76 Wn. App. at 712)). "'To determine

whether an employee was engaged in protected opposition activity, the court must balance the setting in which the activity arose and the interests and motives of the employer and employee.'" *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 798, 120 P.3d 579 (2005) (quoting *Kahn v. Salerno*, 90 Wn. App. 110, 130, 951 P.2d 321 (1998)).

Ms. Rupert's complaints were not specific or formally made. Moreover, she initially did not claim the actions were discriminatory. Instead, she complained solely about workplace issues, not harassment or discrimination. She expressed professional concern to Mr. Huffman about being unable to meet with Mr. Freeman because it interfered with her work, even though Mr. Huffman told her Mr. Freeman "had been burned before" by female employees and was not comfortable being alone with them. CP at 238. Ms. Rupert deposed she did not recall the entirety of the conversation but recalled her displeasure that business was being hampered because of two managers not being able to communicate. Ms. Rupert admitted she did not report this conversation to anyone in management. Ms. Rupert claims Mr. Huffman tried to give her a hug as she left a meeting and she thought that was sexual harassment. But, again, this was unreported.

Ms. Rupert fails to show she engaged in statutorily protected activity or persuade us genuine material fact issues remain. She did not complain to any supervisor or to the human resource department of activity that was forbidden by WLAD. Her complaints were centered on financial issues related to the reserve fund and unprofessional treatment, not gender based discrimination issues. Ms. Rupert did not

make complaints under *Alonso* or *Estevez* fairly considered as opposition to employment practices forbidden by anti-discrimination law or other practices she reasonably believed to be discriminatory. *Short*, 169 Wn. App. at 205.

Considering her failure to establish the first factor in a retaliation claim, Ms. Rupert's claim necessarily fails. Nevertheless we note Ms. Rupert fails to show prima facie causation. Ms. Rupert must demonstrate retaliation for her oppositional conduct was a "substantial factor" motivating KID's adverse employment action. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 482, 205 P.3d 145 (2009). Close proximity in time between the adverse employment action and the protected activity, along with evidence of satisfactory work performance, can suggest an improper motive. *Campbell v. State*, 129 Wn. App. 10, 23, 118 P.3d 888 (2005). The record shows KID had become dissatisfied for some time with Ms. Rupert's performance, her department was over budget, and she took sick leave contrary to KID's sick leave policy. Ms. Rupert does not show retaliation was a substantial factor motivating KID's adverse employment action.

In sum, we conclude the court properly granted summary judgment in favor of KID on her WLAD retaliation claim.

Second, wrongful discharge in violation of public policy is an intentional tort, a narrow exception to the termination-at-will employment relationship. *Worley v. Providence Physician Servs. Co.*, 175 Wn. App. 566, 573, 307 P.3d 759 (2013). This narrow claim is recognized in four areas: "'(1) where the discharge was a result of refusing to commit an illegal act, (2) where the discharge resulted due to the employee

performing a public duty or obligation, (3) where the [discharge] resulted because the employee exercised a legal right or privilege, and (4) where the discharge was premised on employee "whistleblowing" activity.'" *Piel v. City of Federal Way*, 177 Wn.2d 604, 609-10, 306 P.3d 879 (2013) (quoting *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989) (citations omitted)). Ms. Rupert relies on the fourth area, whistleblowing.

To establish a claim for wrongful discharge in violation of public policy, the plaintiff must prove an existing clear public policy (clarity element), discouraging the conduct in which the employee engaged would jeopardize the public policy (jeopardy element), and the policy-linked conduct caused the dismissal (causation element). *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119 (2005). At issue here is the jeopardy and causation elements.

In order to establish the jeopardy element, the plaintiff must show other means of promoting the public policy are inadequate. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530, 259 P.3d 244 (2011). Protecting the public is the policy that must be promoted, not protecting the employee's individual interests. *Id.* at 538. In other words, the test of whether a tort claim for wrongful termination in violation of public policy is viable is if other means are inadequate to promote the public policy.

Here, the LGWPA provides an administrative process for adjudicating whistleblower complaints. Local governments are required to establish policies and procedures for reporting improper governmental action and for protecting employees who provide information in good faith from retaliation. RCW 42.41.030-.040. The law provides for a hearing before an independent administrative law judge, who may grant

relief including reinstatement, back pay, injunctive relief, and attorney fees and costs. RCW 42.41.040(5)-(7). The administrative law judge may also impose a civil penalty of up to $3,000 personally upon the retaliator and recommend that the person found to have retaliated be suspended with or without pay or dismissed. RCW 42.41.040(8). Our Supreme Court has provided guidance in determining whether these whistleblower protections are adequate to safeguard the public policy of protecting whistleblowers.

The plaintiffs in *Korslund* claimed they were wrongfully terminated for reporting safety violations, mismanagement, and fraud at the Hanford Nuclear Reservation. The court held that because the federal Energy Reorganization Act (ERA) provided an administrative process for adjudicating whistleblower claims and provided for reinstatement, back pay, and other compensatory damages, an adequate remedy existed protecting the public interest. *Korslund*, 156 Wn.2d at 182-83.

In *Cudney*, the plaintiff claimed he was discharged after reporting his supervisor was drinking on the job and had driven a company vehicle while intoxicated. The court held the Washington Industrial Safety and Health Act (WISHA) provided a sufficient administrative remedy, and state laws, on driving while intoxicated, adequately protected the public. *Cudney*, 172 Wn.2d at 527.

But, in *Piel*, the court held the administrative remedies available through the Public Employment Relations Commission (PERC) under chapter 41.56 RCW, were inadequate, on their own, to fully vindicate public policy when a public employer discharges a public employee for asserting collective bargaining rights.

Unlike *Korslund* and *Cudney*, *Piel* involved a prior case holding PERC remedies failed to fully address the broader public interests involved because it protected personal contractual rights solely. *Piel*, 177 Wn.2d at 616-17 (quoting *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 809, 991 P.2d 1135 (2000)). And unlike *Korslund* and *Cudney*, *Piel* involved a statute declaring PERC remedies supplement others and must be liberally construed to accomplish their purpose. *Piel*, 177 Wn.2d at 617 (quoting RCW 41.56.905). In those circumstances, the *Piel* court recognized a private common law tort remedy as necessary to fully vindicate public policy. *Id.* The *Piel* decision analyzed a single issue, "[a]re the remedies available to a public employee under chapter 41.56 RCW adequate as a matter of law, such that the employee may not assert a tort claim for wrongful discharge in violation of public policy?" 177 Wn.2d at 609. The *Piel* court found the "limited statutory remedies under chapter 41.56 RCW do not foreclose more complete tort remedies for wrongful discharge." *Id.* at 616.

Importantly, the *Piel* court specifically held its decision "does not require retreat from [*Korslund* or *Cudney*]." 177 Wn.2d at 616. The *Piel* court noted the administrative schemes at issue in *Korslund* and *Cudney* were not previously found to be inadequate to protect public policy and, unlike PERC, did not include a provision stating the "provisions of this chapter are intended to be additional to other remedies and shall be liberally construed." *Id.* at 617 (quoting RCW 41.56.905). The *Piel* court recognized *Korslund* found the ERA to have "comprehensive remedies," including back pay, compensatory damages, and attorney and expert witness fees. *Id.* at 613 (citing *Korslund*, 156 Wn.2d at 182). *Piel* further recognized that *Cudney* found the remedies

available under the WISHA to be "more comprehensive than the ERA and . . . more than adequate." *Id.* (citing *Cudney*, 172 Wn.2d at 533). Accordingly, if a statutory scheme has language and remedies analogous to those at issue in *Korslund* or *Cudney*, the scheme is distinguished from *Piel* and has comprehensive remedies to protect the public interest.

Here, the LGWPA provides remedies of reinstatement, back pay, injunctive relief, costs, reasonable attorneys' fees, and civil penalties and does not contain a provision providing "provisions of this chapter are intended to be additional to other remedies and shall be liberally construed" as was the case in *Piel*. 177 Wn.2d at 617 (quoting RCW 41.56.905). Ms. Rupert argues the LGWPA protections are inadequate because she cannot get compensatory damages. But, "[t]he other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy." *Hubbard v. Spokane County*, 146 Wn.2d 699, 717, 50 P.3d 602 (2002). Moreover, "the tort of wrongful discharge is not designed to protect an employee's purely private interest . . . rather, the tort operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000). The question here, as it was in *Korslund*, is "whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy." *Korslund*, 156 Wn.2d at 183. In this case, we conclude they are.

This case is like *Worley v. Providence Physician Servs. Co.*, 175 Wn. App. 566, 574-76, 307 P.3d 759 (2013) that was based on a similar whistleblower provision. This court held the employee's wrongful discharge in violation of public policy claim failed because whistleblower protections available under the Washington health care act, RCW 43.70.075, adequately promoted workplace safety, ensured compliance with the accepted standard of care, and prevented fraudulent billing in the health care industry.

In sum, because the LGWPA provides adequate remedies of reinstatement, back pay, injunctive relief, costs, reasonable attorneys' fees, and civil penalties, and because the statutory scheme in this case is different than the statutory scheme in *Piel*, Ms. Rupert cannot establish the jeopardy element of a wrongful discharge in violation of public policy claim. Without this element her claim fails. Nevertheless, we not for reasons similar to her retaliation claim, she also cannot establish the causation element. Given all, the trial court properly dismissed this claim in summary judgment.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, C.J.

Korsmo, J.