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King County Superior Court No. 08-2-02830-5 KNT

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

ROBERT AND JACQUELINE PIEL,

APPELLANTS,

v.

CITY OF FEDERAL WAY,

RESPONDENT

BRIEF OF RESPONDENT

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I. INTRODUCTION

After an eight-day trial in King County Superior Court, a jury returned a defense verdict on all of the claims brought by Plaintiffs Robert and Jackie Piel against Robert Piel's former employer, the City of Federal Way. The jury rejected Robert Piel's claim that he was discharged because he engaged in protected union activity years before his discharge.

The Piel's scattershot approach to challenging the trial court's evidentiary rulings in this matter falls far short of the high burden required to justify reversal of the jury's decision in this case.

II. ASSIGNMENT OF ERROR

The City of Federal Way (the "City") is not seeking review of any decisions of the trial court.

III. STATEMENT OF THE CASE¹

A. Background Facts.

1. Mr. Piel's Employment With The City, His 2006 Termination, And Arbitration.

Robert "Bud" Piel worked for the Federal Way Police Department for nearly 11 years, first as an officer and later as a lieutenant. RP. Vol. 6, 74:13-15, 78:23-79:2. Mr. Piel was terminated in 2006 by former Chief

¹ The Piel's statement of the case includes many facts that are not tied to specific assignments of error and therefore not relevant to the issues before the Court. Rather than responding to all of the issues raised in the Piel's Statement of the Case, the City's Statement of the Case addresses only those facts relevant to the issues before the Court. The Piel's also rely upon the Supreme Court's statement of facts, which they suggest "is a guide to some of the issues which should have been relevant to the trial of this matter." App. Br. at 7 (emphasis in original). But the Supreme Court's recitation of facts was from the summary judgment context, in which the facts are viewed in the light most favorable to the party opposing summary judgment. *See Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013). The Piel's are not entitled to have the facts in the record evaluated with the same lens after a jury trial.

Anne Kirkpatrick for significant misconduct involving a firefighter detained on suspicion of drunk driving. DEF'S SUPP CP __ (Sub #51, McDougal Decl., Ex. A.) The City found that Mr. Piel was responsible for the decision not to arrest the individual, and that the decision was based on the driver's special status as a firefighter. Ex 31 at 10-11. It also found that while the firefighter incident was being investigated, Mr. Piel abused his authority by attempting to undermine the credibility of the main witness in the incident, a subordinate officer. Ex 31 at 9-14.

Mr. Piel grieved the 2006 termination, and the matter proceeded to final and binding arbitration before Arbitrator David Gaba in April 2007. Ex 31 at 1. In the arbitration, Mr. Piel challenged the termination decision on various grounds, including that the discharge decision was motivated by anti-union animus in violation of RCW 41.56.140, such that it constituted wrongful discharge in violation of public policy. CP 260-89. The arbitrator held that the City had just cause to discipline Mr. Piel in connection with the firefighter incident, but ordered that the City reduce the discharge to a demotion from lieutenant to officer. Ex 31 at 19, 23.

2. Mr. Piel Returns To Work And Tells a Group of Employees That He Had Thoughts About "Murdering" City Employees.

Mr. Piel's first day back at work after the discharge was reduced to a demotion was August 13, 2007. RP. Vol. 6, 217:19. In his trial testimony, Mr. Piel admitted that he was feeling "angry" at the City, "apprehensive" and "nervous," and that he still believed his 2006 termination was wrongful. RP. Vol. 6, 217:20-24; RP. Vol. 7, 44:7-12;

45:7-16. During his initial interactions with City employees, Mr. Piel repeatedly made comments that people considered unprofessional, and which made them feel uncomfortable. *See* RP. Vol. 7, 117:7-25 (Ms. Shrock reporting comments by Mr. Piel regarding his return to work in a demoted capacity); *id.* at 120:21-121:3 (same); RP. Vol. 8, 69:18-70:6 (Officer Baker). As a result, Commander Melanie McAllester advised Mr. Piel to “tone down his sarcastic comments.” Ex 1. Mr. Piel’s telephonic communication that day with Valley Communications—overheard by other City employees—reflected his negative attitude toward the City and the former Chief of Police Anne Kirkpatrick:

[Piel]: Yeah, I was fired. . . . Then I won in arbitration and they realized they illegally fired me and I did nothing wrong. . . . So they had to rehire me. . . . With back pay . . . and benefits and a spanking. . . . I got to spank the Chief in front of everyone.

Ex 4, Tab 19 at 1-2;² Ex 4, Tabs 1-2.

The same day, at a swing-shift briefing, Mr. Piel continued to exhibit a negative and hostile attitude. He admits that he asked a newlywed female officer—with whom he had no prior relationship—if her husband was “ugly.” DEF’S SUPP CP __ (Sub #186E, Piel Dep. at 15:19-21); Ex 4, Tab 12. He bragged that he sent a book on testifying (referring to the arbitration) to former Chief Kirkpatrick. *Id.*, Ex 9 at 3. Officer Scott Parker, who had worked with Mr. Piel for more than 10

² In addition to reflecting Piel’s attitude, this statement was false. The arbitrator had found by clear and convincing evidence that Piel had certainly done something wrong; hence, the demotion. Ex 31.

years, testified that during the briefing Mr. Piel seemed “agitated” and “upset,” and unlike the officer he had worked with previously. RP. Vol. 8, 54:13-22. Officer Parker reported that Mr. Piel’s complaints and comments approached conduct unbecoming an officer. *Id.* at 54:13-55:24. *See also* Ex 4, Tab 16.

At the same briefing, after expressing relief that he had passed his firearms test at the gun range, Mr. Piel commented that he hadn’t held a gun since he had thought about coming back and “murdering” others in the Department. Ex 9 at 3-4. He made this comment in front of Officers Jason Ellis, Brian Bassage, and Jail Coordinator Jason Wilson. Ex 4, Tabs 9, 6, 1. After worrying about Mr. Piel’s behavior and statement overnight, Jason Wilson returned to the station the next day and immediately reported the comment to his supervisor. RP. Vol. 7, 85:25-86:9.

3. Commander Arbuthnot’s Investigation Into Mr. Piel’s Workplace Violence Comments.

The investigation into Mr. Piel’s comments about having thought about “murdering” members of the Federal Way Police Department was originally assigned to Commander Steve Arbuthnot. RP. Vol. 7, 184:3-6. Commander Arbuthnot collected statements from the individuals present when Mr. Piel made the comment (Officers Bassage and Ellis and Jail Coordinator Jason Wilson), as well as individuals who observed Mr. Piel during the shift-swing briefing and/or interacted with Mr. Piel that day and the day before. Ex 4, Tabs 2, 5, 7, 10, 12, 14, 15, 16. Jason Wilson particularly noticed the use of the word “murder,” and he said that Mr. Piel’s tone was flat, and he did not appear to be joking. Ex 9 at 2. Officer

Brian Bassage corroborated Jason's Wilson report that Mr. Piel had talked about "murdering" others in the department. Ex 4, Tab 6. Even Officer Jason Ellis, one of Mr. Piel's personal friends, recalled that Mr. Piel had said something about shooting someone and that Mr. Piel may have used the term "murder." RP. Vol. 3, 189:24-190:7; Ex 4, Tab 10.

Commander Arbuthnot then interviewed Mr. Piel in the presence of his Guild representative. Ex 4, Tab 23. During that interview, Mr. Piel flatly and repeatedly denied making any comment about thoughts of "murdering" anyone. *Id.*, Ex 11 at 2-3. The following is an excerpt from that interview:

[Q.] . . . Did you make a statement similar to "I haven't held a gun since I thought about coming back here and murdering a couple of people"?

[A.] No.

[Q.] No?

[A.] No, I did not say that.

[Q.] Are you sure?

[A.] I am absolutely positive.

[Q.] Okay. If you did not make a statement to that effect do you recall what you did say?

[A.] I didn't say anything remotely even in that context and I don't remember ever talking about my gun, except to Seth.

Ex 4, Tab 23 at 5. Mr. Piel was given the chance to state that he could not recall whether he had made such a statement. Again, he absolutely denied it:

[Q.] . . . So the next question would not be appropriate, you don't recall making a statement?

[A.] I didn't make that statement.

[Q.] You didn't make that statement?

[A.] Absolutely not.

Id. at 5-6.

During his interview, Mr. Piel, a trained polygrapher, offered to take a polygraph. Ex 4, Tab 23. After the interview, Mr. Piel sent to Commander Arbuthnot what he purported to be the results of a successful polygraph exam. RP. Vol. 7, 187:15-19 (Arbuthnot). However, the terms of the collective bargaining agreement between the City and the union representing Mr. Piel provides: "Nor shall polygraph evidence of complainant be admissible in disciplinary proceedings, except by stipulation of the parties to this Agreement." Ex 99 at 20. Commander Arbuthnot contacted the Guild President John Clary to ask if the Union would stipulate to the consideration of a polygraph exam; the Union said "absolutely" not. DEF'S SUPP CP __ (Sub #190, Def's Counter-Offer of Proof at p. 2.) Because Commander Arbuthnot had opened the email, the City was concerned that the purported polygraph results could influence the outcome of his investigation. RP. Vol. 7, 187:15-19. To ensure that the investigation was not tainted by consideration of impermissible

information, the City replaced Commander Arbuthnot with an independent investigator, Amy Stephson. RP. Vol. 4, 191:14-23.

4. Investigator Stephson Finds That Mr. Piel Made the “Murder” Comment, and That His Answers Support a Finding of Dishonesty.

At the start of her investigation, Ms. Stephson was provided with Commander Arbuthnot’s file, including statements he had already collected. RP. Vol. 8, 87:2-8.³ She then interviewed Officers Bassage and Ellis and Jason Wilson prior to interviewing Mr. Piel. *Id.* at 88:8-16; Exs 7-9. In his interview with Investigator Stephson, Mr. Piel again denied that he had talked about “murdering” members of the department:

[Q.] . . . did you make a comment in any context regarding thinking about shooting or murdering anyone?

[A.] No.

[Q.] You didn’t use the word shooting or murdering or anything to that effect?

[A.] I didn’t talk about shooting, murdering, killing, harming, injuring anybody.

Ex 7 at 9. Ms. Stephson concluded, based on the testimony of multiple witnesses, that Mr. Piel had commented about having thought about “murdering” members of the department. Ex 9. She concluded that his comment violated Section 10.6 of the City’s Employee Guidelines, which “strictly prohibits threatened or actual workplace violence.” *Id.*; Ex 56.

³ Ms. Stephson was not provided with the purported polygraph results. Exs 9, 11.

By its plain language, the Guidelines prohibit even joking about workplace violence. Ex 56 (“Because of the potential for misunderstanding, joking about any of the above misconduct is also prohibited.”).

Because honesty is a fundamental requirement of police work, the City asked Ms. Stephson to investigate whether Mr. Piel was dishonest in the previous interviews. In his second interview with Ms. Stephson, Mr. Piel changed his story, now claiming he could not “recall” whether he had made the “murder” statement. Ex 10 at 5 (“I don’t even remember that conversation I’m sorry I just don’t have a recollection of saying anything like that.”). The investigator determined that the City could reasonably conclude that Mr. Piel, a seasoned police officer who knows the difference between “absolutely not” and “I don’t recall,” had been untruthful when he repeatedly and unambiguously denied making the comment. Ex 11 at 3.

5. Commander McAllester Recommends Termination.

Ms. Stephson’s findings were then provided to Commander McAllester, the Professional Standards Commander, who is responsible for reviewing internal investigations and recommending discipline to the Chief. RP. Vol. 7, 128:17-129:1; 139:17-140:9. Commander McAllester reviewed Stephson’s reports and investigative file and listened to the tapes of various witness interviews. *Id.* at 140:17-141:12; Ex 12. She also researched workplace violence, and ultimately concluded that Mr. Piel exhibited some warning signs. *See* RP. Vol. 7, 141:15-23, 144:2-2; Ex 20.

Commander McAllester concluded that the sustained findings of workplace violence (threats) and untruthfulness both warranted termination. Ex 20. *See also* RP, Vol. 7, 150:7-8 (“[T]he two sustained findings were so serious that they really left me with no choice but to recommend termination.”).

6. Mr. Piel Is Terminated For Making Comments About Murdering Or Shooting Department Members And Being Dishonest About It.

On January 31, 2008, then-Chief of Police Brian Wilson issued a letter of discharge to Mr. Piel. Ex 27. The letter explains that ensuring a safe work environment within the Police Department is essential and states, “Your comment about murdering or shooting Department members heightens my responsibility to protect the members of this Department because you are a commissioned police officer with the knowledge and ability to carry out such an action.” *Id.* at 4. On the heels of the David Brame tragedy, Chief Wilson’s concern was heightened. RP, Vol. 5, 168:16-169:25; Ex 12. With respect to Mr. Piel’s dishonesty, the letter states, “honesty is the cornerstone of law enforcement.” Ex 27 at 5. It cites the case of *Kitsap County Deputy Sheriff’s Guild v. Kitsap County*, 140 Wn. App. 516, 165 P.3d 1266 (2007), in which the Court of Appeals stated that a “proven record of dishonesty prevents [one] from useful service as a law enforcement officer. To require [one’s] reinstatement to a position of great public trust in which [one] cannot possibly serve violates public policy.” *Id.* at 526. This litigation followed.

B. Procedural Background & The Trial.

1. The Piels' Original Appeal.

The Piels originally filed suit against the City of Federal Way in 2008. In October 2009, King County Superior Court Judge Bruce Heller granted the City's original motion to dismiss and motion for summary judgment. CP 143-46. The Piels then pursued a direct appeal to the Washington Supreme Court. DEF'S SUPP CP __ (Sub #90, Notice of Appeal to Supreme Court.) The only issue the Piels pursued on appeal was the question of whether the trial court properly dismissed Mr. Piel's wrongful discharge in violation of public policy claim based on the public policy provisions of Chapter 41.56 RCW. CP 158-59. The Piels expressly advised the court that they were not asserting a wrongful discharge claim based on Mr. Piel's filing of a notice of damages claim pursuant to RCW 4.96.020; CP __ (Sub #189, Def's Opp. to Pl's Mot. for Reconsideration at App. A, p. 43.) In a June 2013 decision, the Washington Supreme Court reversed the lower court's order of dismissal, holding that "an employee protected by a collective bargaining agreement may bring a common law claim for wrongful termination based on the public policy provisions of chapter 41.56 RCW notwithstanding the administrative remedies available through PERC." *Piel*, 177 Wn.2d at 606. The Supreme Court remanded the case for further proceedings consistent with its opinion. *Id.*

2. Post-Remand Summary Judgment.

Following remand, the parties again filed motions for summary judgment. Two of the issues raised at summary judgment are relevant to this appeal.

First, the City sought and obtained summary judgment on the question of whether the Piel were collaterally estopped from asserting that Mr. Piel's 2006 termination (reduced to a demotion after arbitration) was motivated by anti-union animus, as this claim was already presented to an arbitrator over the course of a three-day hearing in 2007. CP 117-339, 485-87. At the hearing before Arbitrator Gaba, Mr. Piel argued that his 2006 termination was retaliatory and directed at him because of his union involvement. CP 269-89. The Arbitrator rejected this argument, holding that there was "just cause" to discipline Mr. Piel for his involvement in the firefighter incident, which he expressly defined as including whether "the employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees." Ex 31 at 22-23. Because the factual question of whether the City was motivated by anti-union bias in discharging Mr. Piel in 2006 was previously litigated and determined in the prior arbitration, Judge Chad Allred agreed that collateral estoppel barred any attempt to re-litigate the 2006 termination. CP 485-87.

The trial court also granted the City's cross-motion for summary judgment on the question of whether Mr. Piel could state a claim for wrongful termination based upon filing a tort claim or making complaints with Human Resources under the City's "Employee Guidelines." CP 340-

404, 488-91. The trial court agreed that neither RCW 4.96.020, the statute requiring notice of damage claims, nor the City's Employee Guidelines establish a clear public policy required to support the narrow claim of wrongful termination in violation of public policy. *Id.*

3. The 2014 Jury Trial.

Trial on the Piels' remaining claims—for wrongful termination in violation of public policy related to Mr. Piel's 2008 termination and Ms. Piel's claim for loss of consortium—began on October 8, 2014. During the course of the eight-day trial, counsel for the Piels repeatedly tried to revisit and reargue the trial court's rulings on motions *in limine* and motions for summary judgment. The Piels called 11 witnesses, and the City called 8.⁴ At the end of the trial, the jury found that Mr. Piel had not been wrongfully terminated in violation of public policy. CP 1101-02.

⁴ Although the Piels do not assign a specific error to the trial court's management of the case, they complain about the trial court's restriction of Mr. Piel's testimony. App. Br. at 19. It was the Piels' decision to call Mr. Piel on the sixth day of an eight-day jury trial (after taking more than a day with witness Brian Wilson). Moreover, "[a] trial court is generally in the best position to perceive and structure its own proceedings," and "a trial court has broad discretion to make a variety of trial management decisions. . . ." *State v. Dye*, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013). *See also* ER 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . (2) avoid needless consumption of time."). Given that the City put on its first witness mid-morning of the seventh day of trial, the Piels should not be heard to complain about trial time.

IV. ARGUMENT

A. The Trial Court's Evidentiary Rulings Were Sound And Should Be Affirmed.

1. Standards of Review.

In order to obtain reversal of the jury's verdict, the Piels must show not just that the trial court's evidentiary rulings were wrong, but that they were "manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons." *Gorman v. Pierce Cnty.*, 176 Wn. App. 63, 84, 307 P.3d 795 (2013), *rev. denied*, 179 Wn.2d 1010, 316 P.3d 495 (2014). Generally, admissibility of evidence is in the trial court's discretion and its rulings on admissibility of evidence are reviewed under the abuse of discretion standard. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 264, 840 P.2d 860 (1992).

Even if the Piels could meet the high bar to show that the Court's evidentiary rulings were "manifestly unreasonable," they must also show that the error caused prejudice. *Brown v. Spokane Cnty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (error without prejudice is not grounds for reversal). "Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." *Id.* Moreover, an appellate court may affirm a trial court's decision on any basis that is apparent from the record, even if that basis was not argued at the trial court level. *See, e.g., Hogan v. Sacred Heart Med. Ctr.*, 122 Wn. App. 533, 547, 94 P.3d 390 (2004). This is true even for evidentiary rulings made by the trial court. *See Laue v. Estate of Elder*, 106 Wn. App. 699, 25 P.3d 1032 (Div. 1 2001) (regardless of whether trial court was

correct in excluding letter from attorney as hearsay, trial court would be affirmed because letter constituted a settlement offer and was inadmissible under Rule 408); *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (Div. 1 1993) (appellate court justified exclusion of evidence on basis of Rule 403, even though trial court had not mentioned the rule).

As shown below, the Piels fall far short of their burden to show that the challenged evidentiary rulings were “manifestly unreasonable” or based on untenable grounds. Even if the Piels’ evidentiary arguments were accepted, however, their appeal nonetheless fails because they cannot show that the errors at issue caused prejudice. In the absence of such prejudice, the jury verdict must stand.

2. The Trial Court Properly Excluded Evidence Of, Or Reference To, The Purported Polygraph Exam.

The Piels insist that the trial court erred by excluding evidence that Mr. Piel offered to, and supposedly did, take a polygraph exam during the investigation into his workplace violence comments. App. Br. at 20-27. The Piels insist that this evidence was “highly relevant” and that its exclusion was prejudicial to their case. The Piels are wrong on all points. The trial court’s evidentiary ruling, which came after lengthy written and oral argument, was correct. CP 609; RP. Vol. 3, 35:11-23.

(a) Polygraph Evidence Is Unreliable And Inadmissible Under Rule 403.

The trial court correctly granted the City’s *in limine* motion to exclude evidence regarding Mr. Piel’s offer to take a polygraph, as well as the purported results of a polygraph exam. Polygraph exams have long

been held to be unreliable, unfairly prejudicial, and inadmissible in Washington. *See State v. Ahlfinger*, 50 Wn. App. 466, 472-73, 749 P.2d 190 (1988) (“In Washington, polygraph evidence is inadmissible absent a written stipulation by both parties.”). *See also State v. Yapp*, 45 Wn. App. 601, 606, 726 P.2d 1003 (Div. 3 1986); *State v. Woo*, 84 Wn.2d 472, 527 P.2d 271 (1974). Polygraph examinations do not meet the evidentiary standards for reliability in order to be admissible scientific evidence. *State v. Thomas*, 150 Wn.2d 821, 860, 83 P.3d 970 (2004). Even in cases in which the parties stipulate to the admissibility of polygraph evidence, there must be further safeguards before it is admitted, including an opportunity for the opposing party to cross-examine the examiner respecting his/her “qualifications and training,” the “conditions under which the test was administered,” and the “limitations of and possibilities for error in the technique of polygraphic interrogation.” *State v. Renfro*, 96 Wn.2d 902, 906, 639 P.2d 737 (1982).

Evidence that a party agreed to take a polygraph or had taken a polygraph is also considered prejudicial and therefore inadmissible. *Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 186-87, 796 P.2d 416 (1990) (counsel’s comment that client was willing to submit to polygraph, when results were inadmissible, was improper, but jury given curative instruction); *State v. Rowe*, 77 Wn.2d 955, 468 P.2d 1000 (1970).⁵ Courts

⁵ The reasoning of *State v. Rowe* is applicable here, notwithstanding the fact that it occurred in the criminal context. In *Rowe*, the court characterized an offer to take a polygraph test as “a self-serving act or declaration which is made without any possible risk. If the offer is accepted and the test given, the results cannot be used in evidence whether they were favorable or unfavorable.” 77 Wn.2d at 958. In light of the plain language of the CBA prohibiting the use of polygraph results in the absence of mutual

have recognized that permitting a party to introduce evidence that he or she consented to or took a polygraph exam would effectively allow a party to introduce unreliable evidence via the back door. *Rowe*, 77 Wn.2d at 958-59; *State v. Ross*, 7 Wn. App. 62, 66, 497 P.2d 1343 (1972). ER 403 plainly gives the Court the discretion to exclude evidence if the probative value is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” ER 403.

The exclusion of the polygraph results was particularly appropriate in this case, as the Piels had no witness to authenticate, explain, or verify the polygraph results to the jury. CP 590-92. Even if polygraphs were generally reliable, the Piels offered no expert who could attest to the reliability of this purported exam. The only witness offered by the Piels on this evidence was Mr. Piel, who emailed what he said were the results of a polygraph he claims to have taken and passed. *Id.*; CP 997-98. Without the polygrapher to testify about the testing and explain the results, the City would have been severely hampered in its efforts to test the validity of the test process and its results. *Renfro*, 96 Wn.2d at 906 (admission of polygraph evidence requires safeguards, including the ability to cross-examine the polygrapher). As one example, the City would have had no opportunity to ask an expert whether the fact that Mr. Piel is a trained polygrapher himself could have impacted the validity of the results. *See* Ex 108. Presenting the purported results of Mr. Piel’s test

consent by the City and the Union, the same can be said about Piel’s offer to take a polygraph. Ex 27 at p. 2; DEF’S SUPP CP __ (Wilson Decl., ¶ 3.)

to the jury through a lay witness who was the subject of the exam is inherently unreliable and would have unfairly prejudiced the City. This alone is sufficient basis to exclude the test results.

(b) The Purported Polygraph Evidence Is Not Relevant To The Piel's Claims.

Not only are polygraph exams inherently unreliable, and the proffered evidence here lacking in the most basic reliable authentication, but evidence of the purported results of Mr. Piel's polygraph examination is completely irrelevant to the Piel's claims. As noted above, the fact that Mr. Piel claims to have taken a polygraph test, and the purported results of that test, played no role in the City's decision to terminate his employment. DEF'S SUPP CP __ (Sub #168, Wilson Decl., ¶ 3); Ex 27. Indeed, the City took the extra precaution of hiring an independent investigator in order to be sure that purported polygraph test results did not impermissibly influence the results of the City's investigation into Piel's conduct. RP. Vol. 4, 191:14-23. Neither Investigator Stephson, Commander McAllester, nor Chief Wilson—the person who made the final discharge decision—ever saw the purported results of the polygraph. See DEF'S SUPP CP __ (Sub #168, Wilson Decl., ¶ 3.); Exs 9, 11-12. More importantly, the question for the jury was not whether Mr. Piel was truthful when he absolutely denied that he ever said anything about “shooting, murder, killing, harming, injuring anybody”; the question for the jury is whether the City genuinely believed that Mr. Piel was dishonest. See, e.g., *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 190 n.14, 23 P.3d 440 (2001) (“It is not unlawful for an at-will employee to be

discharged because he or she is perceived to have misbehaved.”) (citations omitted; emphasis in original). This evidence is irrelevant to the question of whether the City wrongfully terminated Piel.

Evidence that Mr. Piel offered to take a polygraph examination is also not relevant to the Piel's claims. Contrary to arguments made by the Piel's, Mr. Piel's state of mind is simply not the central issue in this case. Again, the question for the jury was not Mr. Piel's state of mind during his interviews with Commander Arbuthnot and Investigator Stephson—it was whether the City genuinely believed that Mr. Piel was dishonest in the interviews. The fact that Mr. Piel offered to take a polygraph has no bearing on this question.

This case is thus distinguishable from *Subia v. Riveland*, 104 Wn. App. 105, 15 P.3d 658 (2001), on which the Piel's rely. In *Subia*, the polygraph results were considered by the employer/decision maker and thus “highly relevant” to the employer's legitimate nondiscriminatory reason for placing the plaintiff on administrative leave. *Id.* at 113-14. As noted by the Court of Appeals, the central issue at trial was not whether the plaintiff had engaged in the underlying misconduct; rather, the issue was whether employer had a racially discriminatory purpose when it placed the plaintiff on leave. *Id.* at 114. Because the polygraph results was one of the reasons the employer decided to place the plaintiff on leave, it was unjust to hamstring the employer by preventing it from using the evidence to explain its decision. *Id.*

This case presents the opposite situation: neither the investigator, nor the commander who made the termination recommendation, nor the final decision maker considered Mr. Piel's purported polygraph results. RP. Vol. 7, 139:17-140:9; Exs 7, 9, 12; DEF'S SUPP CP __ (Sub #168, Wilson Decl., ¶ 3.) Nothing in *Subia* suggests that evidence that played no role in the employer's decision is relevant or admissible. If anything, *Subia* supports the City's argument that polygraph evidence is not admissible under ER 403 when the probative value of such evidence is minimal or nonexistent.

(c) The Piels' Arguments About The City's Alleged Stipulation To And Prior Use Of Polygraphs Are Unsupported By The Record.

The Piels' argument that the City's refusal to consider the purported polygraph evidence shows pretext was properly rejected as unsubstantiated.

First, the Piels' recently-concocted theory that the City somehow entrapped Mr. Piel into taking a polygraph by stipulating to its use, and then used the purported results as an excuse to transfer the investigation away from Commander Arbuthnot is unsupported by the record and should be rejected. As noted above, the City filed an *in limine* motion seeking to exclude Mr. Piel's purported results of and reference to the purported polygraph results, based in part upon the fact that the purported results were not considered by the City as part of its investigation. CP 524-26. The City submitted a sworn declaration from former Chief Brian Wilson demonstrating that the terms of the CBA between the Union and

the City prohibited the City from using polygraph results in the absence of agreement by both the Union and the City. DEF'S SUPP CP ___ (Sub #168, Wilson Decl., ¶ 3.) ("Nor shall polygraph evidence of complainant be admissible in disciplinary proceedings, except by stipulation of the parties to this Agreement.").

The Piels opposed this motion on numerous grounds, including arguing that the City did consider the polygraph evidence because Ms. Stephson was aware that Mr. Piel's submission of the purported results triggered her involvement in the investigation. CP 575 at 2. Significantly, the Piels did not oppose the motion *in limine* on the grounds that the City had stipulated to a polygraph. *Id.* It was only at the hearing on the motions *in limine* that the Piels concocted the theory that the City and Union somehow stipulated to the polygraph. RP. Vol. 1, 85:6-24, 87:18-88:17. *See* CP 603-06 (Piels' Motion for Reconsideration). The Piels argue that a stipulation satisfying the CBA was established by the following exchange between Commander Arbuthnot and Mr. Piel, which occurred in the presence of Officer Pon:

SA: Okay Can you think of any reason why three members of that squad that were in the room, three employees that were in the room during that conversation would say that you made that statement, basically, . . . similar to "I haven't held a gun since I thought about coming back here and murdering a couple of people."

RP: I can't think of a reason why they would say that and I, I would have no

problem at all taking a polygraph with them to confirm that.

SA: Okay.

CP 221.

The Piels' post-hoc attempt to construct a contractual stipulation out of this ambiguous comment fails. There is no evidence to show that either Commander Arbuthnot or Officer Pon, the Union steward, had any authority to stipulate to the use of the polygraph in Piel's case. It strains credulity to believe that Mr. Piel understood this ambiguous⁶ "okay" to establish a stipulation between the Union and City to the use of a polygraph in his investigation. The fact that the Piels waited more than seven years to raise this theory, and the lack of any other evidence that the City and Union stipulated that the polygraph could be considered, further undermines the credibility of this evidence.⁷

As to the Piels' argument that the City must have stipulated, as it allegedly provided Mr. Piel with questions for the polygraph, the Piels have never provided any evidence to support that claim. Neither their opposition to the City's motion *in limine*, nor their motion for

⁶ Commander Arbuthnot also said "Okay" after Mr. Piel's response to the previous question, when Mr. Piel denied ever considering coming to the Department to murder employees. CP 221. "Okay" in that context is nothing more than a verbal acknowledgment of the answer; not an agreement with Mr. Piel's statement.

⁷ Contrary to claims made by the Piels, the email from Union President John Clary asking why the purported polygraph results were not included in Mr. Piel's file is not evidence that such a stipulation existed. CP 1043. The document exists and was the reason for the transfer of the investigation. Plaintiffs' counsel suggests that Mr. Clary would not have written this email if he had in fact refused to stipulate to the use of the polygraph, but since the Piels chose not to call Mr. Clary to testify, this claim is speculative at best.

reconsideration on this issue contains any citation to such questions. CP 574-82, 566-73.⁸

The Piel's argument that the City's refusal to consider the purported polygraph results during the investigation into Mr. Piel's workplace violence was a deviation from past practice is also unsupported by the record. Unrefuted evidence from Brian Wilson established that the use of polygraphs in disciplinary proceedings was prohibited by the terms of the CBA with the Union. DEF'S SUPP CP __ (Sub #168, Wilson Decl., ¶ 3.) *See also* DEF'S SUPP CP __ (Sub #190, Def's Counter-Offer of Proof, indicating that there has been no pattern and practice of using polygraphs in internal investigations). In response to the City's motion *in limine* on this issue, Mr. Piel submitted a declaration in which he asserts:

- “before the union was formed a polygraph was considered a useful tool during internal investigations as far as officer conduct.”
- “[t]he City used and to my understanding still uses polygraphs during the officer testing process during the hiring process.”
- “Polygraphs are also used in Internal Affairs investigation when both sides agree to accept the findings.”

⁸ The purported report from the polygrapher, which was Plaintiffs' proposed Trial Exhibit 86, is not in the record. Contrary to claims made by Piel's counsel, the questions attached to the report are questions asked by Commander Arbuthnot during his initial interview with Mr. Piel—not questions for Mr. Piel to provide to the polygrapher. RP. Vol. 7, 186:16-23. Moreover, there is no basis to contend that Mr. Piel somehow misunderstood what this document was—according to the purported results from his exam, the questions posed by the examiner did not even match those on the sheet allegedly provided by Commander Arbuthnot.

CP 586 at ¶ 10 (emphasis added). Mr. Piel's declaration provides no support for the claim that the City deviated from past practice by refusing to consider the purported polygraph results in his disciplinary investigation under the terms of the Guild CBA.⁹ This evidence is not contrary to the City's evidence that, pursuant to the CBA, polygraphs may not be used in disciplinary investigations of Guild members absent a stipulation. In sum, the Piels' claim that that there was a stipulation and a deviation from past practice are unsupported by competent evidence, and the pretext argument thus was properly rejected by the trial court.

(d) The Piels' Argument Regarding The Importance Of The Purported Polygraph Evidence Is Attenuated And Speculative.

Even if the Piels could meet the burden of showing that the trial court's exclusion of the purported polygraph evidence was manifestly unreasonable, they cannot meet their burden to show its exclusion was prejudicial and affected the outcome of the trial.

The Piels' claim that exclusion of the purported polygraph evidence affected the outcome of the trial is simply too speculative. Even if, as the Piels argue, admission of the purported polygraph evidence would have caused the jury to believe that Mr. Piel was not dishonest because Piel "had good reason to deny making the comments, apart from 'intent to deceive,'" (App. Br. at 23 n.20), there is no reason to believe

⁹ The Piels' claim that Officer Monico would have testified that he was taken in for a polygraph exam does not demonstrate a deviation from past practice. CP 996. First, it is unclear when this event occurred, although it happened prior to Brian Wilson's tenure as Chief. RP. Vol. 2, 250:9-15. Further, the incident apparently involved a "complaint lodged with the department" by a citizen, and not an internal investigation. CP 996.

that this would have any bearing on the jury's conclusion regarding the City's motivations for terminating Mr. Piel. First, there is no reason to conclude that the jury would have accepted testimony from Mr. Piel alone that he supposedly took a polygraph and passed it as evidence that the City did not believe he had been dishonest. Second, contrary to claims made by the Piels, Mr. Piel was terminated for making statements threatening workplace violence and then lying about it. Exs 12, 27; RP Vol. 7, 143:7-144:23. Supposed proof that Mr. Piel was not dishonest, contrary to the City's belief, would not undermine the City's legitimate alarm about a workplace violence statement by an armed police officer.¹⁰

The Piels' second argument, that admission of the purported polygraph evidence would have caused the jury to question Brian Wilson's motivation, is equally attenuated. First, admission of the polygraph evidence would not have resulted in the jury automatically concluding that then-Chief Wilson deviated from past practice. As noted above, the Piels have no evidence to support their claim that by refusing to consider polygraph evidence, the City deviated from relevant past practice during the term of the CBA. Moreover, had the purported polygraph evidence been admitted, the City would have put on evidence demonstrating that the CBA prohibited the City from considering the evidence. Second, there is no evidence to support the assertion that Chief

¹⁰ Brian Wilson's answer to hypothetical questions about the discipline that would have been leveled against Mr. Piel had he not had a sustained finding of dishonesty is not evidence that Mr. Piel was terminated solely for dishonesty. As noted by Commander McAllester, both sustained findings, in and of themselves, warranted termination. Ex 12.

Wilson was aware of any preliminary conclusions by Commander Arbuthnot. RP. Vol. 4, 191:24-192:8. Third, even if the jury were to question then-Chief Wilson's motivation for transferring the investigation away from Commander Arbuthnot, it is undisputed that Ms. Stephson was an independent investigator, and there is no evidence of bias or predisposition on her part.¹¹ Nor are there any allegations of anti-union bias by Commander McAllester, a former Union leader, who testified that Mr. Piel did her "a favor" by forming the union, and that she believed her union involvement helped her to get promoted. RP. Vol. 7, 152:14-21. To say that the purported polygraph evidence would have caused the jury to (1) be skeptical of Brian Wilson; (2) ignore the City's efforts to give Mr. Piel a fair hearing (including hiring an independent investigator and holding two *Loudermill* hearings); and (3) ignore the other evidence supporting the City's legitimate and nondiscriminatory reason for terminating Mr. Piel is too speculative to show prejudice. Therefore, the trial court's ruling on the admissibility of the polygraph evidence should stand.

¹¹ The Piels seem to suggest that Wilson transferred the investigation away from Commander Arbuthnot in part due to Arbuthnot's preliminary conclusion that some of the allegations against Mr. Piel were unfounded. RP. Vol. 2, 222:21-223:2. Mr. Piel was never subject to discipline for these allegations, and Investigator Stephson was only tasked with investigating the workplace violence comments. Ex 9. More importantly, it is undisputed that Commander Arbuthnot never shared his preliminary conclusions with Chief Wilson. RP. Vol. 4, 191:24-192:8.

3. The Trial Court Did Not Permit The City To Use The Court's Polygraph Ruling As A Sword.

The Piels' next argument, that the City somehow used the trial court's ruling on the polygraph evidence improperly, or put false evidence before the court, also fails.

As a preliminary matter, while counsel for the Piels repeatedly objected and attempted to re-argue the polygraph ruling during the course of the trial, they never responded to the City's request for input on how to address the fact that the investigation was transferred to a new investigator, consistent with the trial court's ruling excluding polygraph evidence. After the trial court's *in limine* ruling excluding reference to the polygraph examination, counsel for the City sent Plaintiffs' counsel an email attaching documents redacted in accordance with the court's orders, and proposing language that the parties could use to explain the transition of the investigation from Commander Arbuthnot to Ms. Stephson. RP. Vol. 3, 30:14-31:6. Plaintiffs' counsel never responded to the email; nor did they ever propose any alternative way to allow the parties to explore the transfer issue. Instead, Plaintiffs' counsel asserted that the documents could not be redacted at all without changing their meaning in a way that was favorable to the City. *See* RP. Vol. 4, 195:16-196:19.

More importantly, nothing prohibited the Piels from examining witnesses on the question of why the City transferred the investigation to Ms. Stephson without specifically referring to the polygraph. The City elicited such testimony by asking its witnesses about "information"

provided by Mr. Piel.¹² RP. Vol. 7, 187:15-19. The Court made it clear that the Piels were entitled to cross-examine Commander Arbuthnot (and, presumably, other witnesses) about the information provided by Mr. Piel and why it merited a transfer, provided that they did not specify the type of information at issue. *See, e.g.*, RP. Vol. 7, 189:12-14 (“You’re entitled to ask him and cross him on the issue without . . . disclosing what the information was.”); RP. Vol. 4, 199:13-15 (“I’d caution both parties not to use the phrase polygraph, given my ruling earlier.”). For example, the Piels could have asked witnesses questions about whether such information had been used in the past and when, whether Officer Pon stipulated to the use on behalf of the Union by his silence, etc. Despite the fact that the Court gave Plaintiffs’ counsel explicit permission to cross examine Commander Arbuthnot on this issue, they declined to do so. RP. Vol. 7, 191:14-198:5.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), is not, as the Piels contend, directly on point for what happened in this case. App.

¹² Contrary to claims made by the Piels (App. Br. at 31-32), the trial court correctly recognized that Arbuthnot’s testimony about his conversation with Union President Clary was not hearsay. RP. Vol. 7, 190:12. As a preliminary matter, it is not clear that the question at issue asked about a “statement,” such that the hearsay rule is even implicated. ER 801. When a statement is not being offered for the truth, but instead is offered for notice, it is not hearsay, and no exceptions are required. *See, Price v. State*, 96 Wn. App. 604, 618, 980 P.2d 302 (1999) (concluding that a woman’s out-of-court statements to DSHS was not offered to prove the truth of the matter asserted but were offered “to establish that DSHS was on notice of the biological mother’s possible drug and alcohol abuse and failed to disclose this information” to the future adoptive parents); *see also* 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 803.15 (5th ed. 2012) (“Perhaps most commonly, out-of-court statements have been admitted [to] show that the hearer or reader received notice of some fact, or had knowledge of some fact, as a result of the statement in question.”). Commander Arbuthnot’s testimony was offered to establish that he had notice of the Union’s position, which explains his actions.

Br. at 33. *Gefeller* stands for nothing more than the firmly-established principle that a party cannot open the door to an area of inquiry and then object to the other side being able to cross-examine the witness on that topic. 76 Wn.2d at 455. In *Gefeller*, the defendant questioned the police officer witness about whether he had taken a lie detector test, whether he was cooperative, and what the test results were. *Id.* at 454-55. Defendant assigned error to the court permitting the prosecution to ask the witness on redirect to explain his testimony that the test results were inconclusive. *Id.* Not surprisingly, the Supreme Court rejected this argument on the grounds that the defendant had opened the door in his initial inquiry. The other authority cited by the Piels follows this same reasoning.

That is not what happened in this case. The trial court's ruling on the polygraph evidence was applied uniformly to both sides in this case: neither the Piels nor the City were permitted to ask questions about Mr. Piel's offering to take or supposedly having taken the test. RP. Vol. 4, 199:13-15. Had the City asked questions about a "polygraph"—which it did not—that would have opened the door, and the Piels would have been able to inquire about it per *Gefeller*. Both the City and the trial court made it clear that the Piels *were* entitled to ask questions about the reasons for transferring the investigation from Arbuthnot to Stephson—the Piels simply chose not to do so. By refusing to ask these questions, Plaintiffs' counsel—not the trial court—hampered their ability to argue pretext.¹³

¹³ Here again, the Piels' argument is founded largely on their claim that admitting the purported polygraph evidence would have established pretext on the part of the City, as the City's refusal to consider the evidence was a deviation from past practice. App. Br. at 27. As explained above, there is simply no evidence in the record to support the

Because none of the trial court's rulings with respect to the highly unreliable polygraph evidence were manifestly unreasonable or based on untenable grounds, the Piels' arguments on this point fail.

4. Evidence Of Jason Wilson's Allegedly "Deviant Behavior" Was Properly Excluded Under ER 403.

As an initial matter, the Piels' characterization of the trial court's ruling excluding the evidence of Jason Wilson's allegedly deviant behavior is simply wrong. The Piels cast the Court's decision as a determination that the evidence was not relevant; in fact, the Court's ruling was based upon the prejudicial nature of the evidence at issue. After considering both written motions *in limine* and oral arguments of counsel, the Court ruled:

I don't need to go further on this issue. . . .
I'm ruling that the evidence regarding his deviant behavior will not come in. I don't think it's . . . relevant. . . . [I]t's too prejudicial . . . to[o] salacious, . . . and . . . no point on . . . having the jury be preoccupied with that.

RP. Vol. 1, 111:10-15. The Piels conveniently ignore the issue of prejudice, likely because their counsel conceded that they sought to use this evidence for its prejudicial value. *See* RP. Vol.1, 107:14-16 ("[B]ut, Your Honor, sometimes the shocking nature of -- of -- of conduct burns it

argument that the City previously considered polygraph evidence in the context of a disciplinary investigation of a Guild member in the absence of a stipulation between the City and the Union. *See above*, section IV.A.2.(c).

in people's mind.""). The trial court's ruling that the evidence was unfairly prejudicial and thus subject to exclusion under ER 403 should be affirmed.

The Piels' argument regarding the alleged probative value of this evidence is flawed. They overstate Jason Wilson's importance to the City's case in an attempt to bolster their arguments. App. Br. at 38. It is simply inaccurate that "Jason Wilson was at the center of the City's case." Mr. Wilson's alleged motive for reporting that Mr. Piel had made a disturbing "murder" comment is irrelevant. The question for the jury was whether *the City* was genuinely motivated to terminate Mr. Piel because of concerns about workplace violence and dishonesty by a police officer.

Unlike the witness in *State v. Darden*, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002), upon which the Piels rely, Jason Wilson was not the only eyewitness to Mr. Piel's comments and strange behavior. Jason Wilson's testimony was corroborated by Officers Ellis and Bassage:

- Officer Bassage noted that "Officer Piel made a comment about how even though he had not touched a gun; he had thought about picking one up to murder a few people in the department." Ex 4, Tab 5.
- Officer Ellis similarly noted that "Piel stated to my recollection that he hadn't shot a pistol until he thought about shooting someone," and indicated that Mr. Piel "may have used" the term murder. Ex 4, Tabs 8 & 9.

Because Jason Wilson was not "essential" to the City's case, *Darden* has no bearing here, and there was no basis to afford the Piels additional "latitude" in examining him.

In fact, the probative value of this evidence was minimal and founded entirely on the Piels' speculative claim that Jason Wilson would be biased against Mr. Piel because Wilson was not hired as a police officer in 2002 and Mr. Piel was involved in the hiring process. DEF'S SUPP CP __ (Sub #167, Def's MIL Reply at 3-4.) Even that assertion is speculative, as Mr. Piel's own declaration, submitted in opposition to the City's motion *in limine* on this issue, makes it clear that it was Chief Kirkpatrick, and not him, who made the hiring decision regarding Wilson. CP 585-86 at ¶ 9. More importantly, the Piels offer no plausible explanation about how this possibility undermines the veracity of Commander McAllester in recommending discharge or Chief Wilson in implementing the decision. An alleged "failure" by Ms. Stephson to follow up on whether Jason Wilson might have had a motivation to wait for years to find something to report to get Mr. Piel in trouble does not undermine the credibility of City employees who concluded that Mr. Piel did, in fact, engage in behavior that is simply unacceptable for a police officer.

Given the highly prejudicial nature of the evidence at issue, along with its minimal probative value, the trial court's exclusion of the evidence was well within its discretion. Indeed, *Dods v. Harrison*, 51 Wn.2d 446, 448, 319 P.2d 558 (1957), a case on which the Piels rely, recognizes that "the scope or extent of cross-examination for the purpose of showing bias rests in the sound discretion of the trial court." *Accord, Brown v. Spokane Cnty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 203, 668 P.2d 571 (1983).

**5. The Trial Court Did Not Err By Excluding
Actions Taken By Different Decision Makers.**

The trial court's rulings that evidence about decisions made by different decision makers (not involved in Mr. Piel's termination) in the past, using different standards, was not relevant to the Piel's claims likewise should be upheld. As discussed below, the record before the court demonstrates that the events at issue, some of which predated the Manual of Standards applicable to Piel's termination, were made by former Chiefs Ron Wood and Anne Kirkpatrick—neither of whom was employed by the City when Mr. Piel was terminated. Because of the many differences between the events at issue and the people involved, such evidence was of minimal probative value at best. The trial court's decision on this point was not “manifestly unreasonable” or an abuse of discretion.

The Piel's claim that any prior example of supposed threats of violence “during the entire history of the FWPDP,” or any prior allegations of dishonesty during the 10-plus years that the department has been in existence are “directly relevant” to their claims. App. Br. at 39-40. Not surprisingly, none of the cases cited by the Piel's supports the argument that actions taken by different decision makers, against different employees, using different standards,¹⁴ are relevant to a plaintiff's

¹⁴ The Piel's accuse the trial court of preventing their counsel's efforts to examine witnesses on the standard for dishonesty, but this accusation is belied by the record. To the contrary, counsel for the Piel's spent significant time on this topic—particularly during their multi-day examination of Brian Wilson. RP. Vol. 4, 216:16-240:25. *See also* RP. Vol. 7, 156:2-159:16 (McAllester); RP. Vol. 8, 130:23-133:4 (Stephson). The trial court's rulings on objections to questions that had already been asked and answered (RP. Vol. 4, 236:17-237:12; 240:21-25) or questions that were argumentative (RP. Vol. 4, 235:22-236:3) were well within its discretion. Similarly, there is no evidence that such

disparate treatment claims. *See, e.g., Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 140, 279 P.3d 500 (2012) (affirming summary judgment for employer, in part because plaintiff failed to show pretext and that she was treated differently from similarly situated employees); *Kuyper v. State*, 79 Wn. App. 732, 738-39, 904 P.2d 793 (1995) (affirming summary judgment for employer, in part because plaintiff failed to show employer's stated reason was "not a motivating favor in employment decisions for other employees in the same circumstances"). In *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 861, 851 P.2d 716 (1993), cited by the Piels, the trial court reversed the entry of summary judgment in part because the plaintiff showed that younger employees were treated more favorably *by the same decision maker*.¹⁵

There is no legal authority supporting the Piels' argument that actions taken by different decision makers are *per se* relevant to disparate treatment claims. To the contrary, *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 610, 881 P.2d 256 (1994), *as amended on denial of reconsideration*

rulings some constituted a comment on the evidence—the trial court directed counsel for the Piels to move on only after sustaining numerous objections, including on the grounds that the questions had been asked and answered previously. *See RP*. Vol. 4, 238:9-11. Further review of the record shows that counsel proceeded to examine the witness on this topic even after the court's admonition.

¹⁵ In *Sellsted*—unlike here—the plaintiff had significant evidence suggesting that the employer's stated reasons were pretextual, including the fact that (1) only employees within the protected age group were placed on probation, while younger employees received counseling, (2) employees scrutinized were all within the protected age group, (3) plaintiff was quickly replaced by a newly-hired employee who had the same job responsibilities plaintiff had performed, and (4) the employer gave "multiple incompatible reasons" for plaintiff's termination. *Sellsted*, 69 Wn. App. at 861.

(Sept. 1, 1994), *overruled on other grounds by MacKay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995), cited by the trial court, affirmed the lower court's exclusion of evidence of decisions made by different supervisors on the grounds that such evidence was irrelevant.

The record reveals that the incidents in question involved different decision makers who were not involved in the decision to terminate Mr. Piel. The incidents were also far afield temporally and/or factually from the facts of this case; as such, the trial court reasonably concluded that such evidence was inadmissible:

- **Otto/Stonebrenner incident:** The Piels claim that the trial court erred by refusing to allow questioning of Police Chief Andy Hwang about the “Otto/Stonebrenner” incident. App. Br. at 40. This incident occurred during then-Chief Anne Kirkpatrick’s tenure, and neither she nor Chief Hwang was involved in the decision to terminate Mr. Piel. RP. Vol. 4, 34:17-38:23. In addition, this evidence does not show that Chief Hwang did not discharge an officer who engaged in dishonesty, as Chief Hwang testified that he did not come to the conclusion that Officer Otto had been untruthful during the investigation. RP. Vol. 4, 34:5-14.
- **Greg Wilson incident:** The incident involving Greg Wilson and the screen saver was even further removed, as it occurred under then-Chief Ron Wood, who predated

Chief Kirkpatrick.¹⁶ CP 675-76. As Brian Wilson testified in his deposition, the Greg Wilson incident happened in 1998 or 1999, before the City even implemented the Manual of Standards violated by Mr. Piel. CP 705. Wilson further testified that Chief Wood, unlike Chief Kirkpatrick, did not believe that dishonesty was grounds for termination. *Id.*

- **Brian Wilson Incident:** Evidence regarding the incident in which Brian Wilson made a comment that another officer reported as threatening was also properly excluded by the trial court. This incident took place in 2001, and involved different decision makers and investigators. RP. Vol. 5, 85:16-21. Even if the decision makers had been the same, the alleged comment by Chief Wilson does not make him similarly situated to Mr. Piel. Mr. Piel stated that after he was terminated, while holding a gun, he had thought about coming back to the Department to murder Department employees. Chief Wilson is alleged to have made a comment equivalent to wanting to “wring the neck” of another employee. Treating the two statements differently does not establish a discriminatory motive. *See, e.g., Pence v. Tenneco Auto. Operating Co., Inc.*, 169 F. App’x 808, 810 (4th Cir. 2006) (finding comparators not

¹⁶ Evidence regarding this incident was also subject to exclusion under Rule 403.

similarly situated, where “none of his evidence demonstrates that Tenneco ever failed to fire an employee who it believed had threatened to kill other employees.”).

As these incidents involved different decision makers and substantially different facts, the trial court’s conclusion that this evidence was inadmissible was well within its discretion.

6. Evidence and Testimony From Witnesses Who Interacted With Piel In The Break Room Is Relevant And Not Unfairly Prejudicial.

The Piel’s contend that the written statements from Officers Scholl and Baker “were irrelevant to Piel’s termination,” and claim that the court therefore erred in admitting such evidence, and in permitting Officer Baker to testify. App. Br. at 45. The Piel’s also claim that this evidence is subject to exclusion under ER 403. The Piel’s are wrong on both points. The evidence is relevant, as it was relied on by the investigator to evaluate credibility, and by Commander McAllester to assess the potential for violence by Mr. Piel. Any supposed prejudice is outweighed by its relevance for explaining the bases for the discharge decision.

First, Mr. Piel’s statements in the break room are clearly relevant. They were not independent grounds for discipline, but the statements from both Officers Baker and Scholl were part of the record that the City considered when making the termination decision. Ex 4, Tabs 12 & 14. They also demonstrate the City’s integrity, as it declined to impose discipline for what it considered minor inappropriate conduct by Mr. Piel. Investigator Amy Stephson testified that she reviewed the statements from

Officers Baker and Scholl during her investigation to get more information about what had happened and to test Mr. Piel's recollection. RP. Vol. 8, 98:20-99:9. Commander Arbuthnot considered the statements as part of his investigation (RP. Vol. 7, 181:5-7), and Commander McAllester reviewed the statements before making a discipline recommendation (RP. Vol. 7, 139:21-140:9). She considered the women's reports of statements by Mr. Piel relevant to whether his "murder" statement should be considered a serious threat. RP. Vol. 7, 143:25-144:23. Contrary to arguments made by the Piels, Chief Wilson testified that he did consider the statements, which he thought showcased Mr. Piel's demeanor on his first day back:

[The statements] did showcase, uh, his demeanor, his character, uh, which was of concern to those employees during the time that he was, uh, uh, in the police department. So, those were considered in terms of the overall concern regarding the workplace threat, uh, that was present as a result of this incident.

RP. Vol. 5, 52:6-14 (B. Wilson).

Indeed, counsel for the Piels conceded that evidence about what Mr. Piel said in the briefing room was relevant. When arguing that the City should be precluded from calling Officers Scholl and Baker as witnesses, counsel argued that such testimony would be cumulative:

[T]he jury's heard a lot, obviously, about comments that were made and we don't have a problem because it sets the mental stage. But I don't know that cumulative

testimony, at this point, on a collateral issue is necessary.

RP. Vol. 3, 260:5-9 (emphasis added). The Piel's argument that this evidence is not relevant should be rejected.

The Piel's claim that this evidence was unfairly prejudicial also fails. As a preliminary matter, the Piel's waived any argument under ER 403 during the trial. First, the Piel's failed to object when Officers Bassage and Ellis testified about Mr. Piel's comments to Officers Baker and Scholl. *See* RP. Vol. 3, 178:6-177:12; 208:8-209:4.¹⁷ *See* ER 103(a)(1). Then the Piel's attorney specifically asked Officer Ellis questions about Piel's statements to Officers Baker and Scholl:

“I just like to ask you about the –what was the, um, uh, - - - just tell the jury what – what you, kinda, heard and what you took from it – these comments from Scholl and – [Baker]. What –what did you hear and what was your take on that?”

RP. Vol. 3, 208:8-14.

Trial courts have wide discretion in balancing the probative value of evidence against its potential prejudicial impact, and that balancing is reviewed for manifest abuse of discretion. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 213, 258 P.3d 70 (2011); *State v. Johnson*, 90 Wn. App. 54,

¹⁷ The Piel's fault the Court for not recognizing that they filed a motion *in limine* on this issue, but it is important to note that the Piel's motion *in limine* fails to identify any specific witness or document, making only the vague request that “[u]nsustained/[u]nfounded [c]omplaints” be excluded. CP 514. Motions *in limine* that fail to identify the evidence at issue “with sufficient specificity to enable the trial court to determine that it is clearly inadmissible” should be denied. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 286-87, 686 P.2d 1102 (1984).

61, 950 P.2d 981 (1998). Evidence about asking if a coworker's husband is ugly and commenting that marriages between officers often fail is not likely to trigger an emotional response among the jurors. *See Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 618, 20 P.3d 496 (2001). As such, the probative value of this evidence plainly outweighs any risk of prejudice.

Even if the Piel could show that the statements and testimony should have been excluded under ER 403, they cannot show prejudice resulting from the admission of this evidence. There is no reason to believe that jurors would have reached a different conclusion about whether the City had legitimate, non-retaliatory motives for its discharge decision because they heard evidence about unwelcome, bizarre comments Mr. Piel made right before he made the "murder" statement. Because admission of the statements of Officers Baker and Scholl was harmless, the trial court's decision on this point should be affirmed.

B. The Trial Court's Summary Judgment Rulings Should Be Affirmed.

On review of summary judgment, an appellate court engages in the same inquiry as the trial court. *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 358, 110 P.3d 1145 (2005). Questions of law—including the question of whether collateral estoppel bars re-litigation of an issue—are reviewed *de novo*. *Christensen v. Grant Cnty. Hosp. Dist. No. 1.*, 152 Wn.2d 299, 305-06, 96 P.3d 957 (2004); *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123, 330 P.3d

190 (2014). As discussed below, the trial court’s summary judgment rulings correctly decided the issues of law presented.

1. The Trial Court Correctly Ruled That Neither Filing A Tort Claim Nor Making Complaints To The City’s HR Department Is Protected Activity.

In response to the Piel’s request for a summary judgment ruling that Mr. Piel’s conduct satisfied the “clarity” element of a claim for wrongful termination in violation of public policy, the trial court correctly ruled that (1) the Federal Way Employee Guidelines do not meet the standard for a legislatively or judicially recognized public policy; and (2) filing a notice of damage claim pursuant to RCW 4.96.020 is not protected conduct giving rise to a claim for wrongful termination in violation of public policy. Because these actions do not, as a matter of law, implicate the clear public policy that is a prerequisite to claims for wrongful termination, the trial court’s ruling should be affirmed.

This Court has recognized that the wrongful discharge tort is a “narrow” exception to at-will employment, such that courts must “proceed cautiously.” *Weiss v. Lonnquist*, 173 Wn. App. 344, 351 293 P.2d 1264 (2013) (citations omitted). To prevail on a wrongful discharge claim, a plaintiff must satisfy a four-factor test. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 529, 259 P.3d 244 (2011) (citing *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996)). Specifically, the plaintiff must show: (1) “the existence of a clear public policy (the clarity element)”; (2) “that discouraging the conduct in which [he] engaged would jeopardize the public policy (the jeopardy element)”; (3) “that the

public-policy-linked conduct caused the dismissal (the causation element)”; and, finally, (4) that “[t]he defendant [has not] offer[ed] an overriding justification for the dismissal (the absence of justification element).” *Id.* These elements are conjunctive, meaning that all four elements must be proved. *Id.* (citing *Ellis v. City of Seattle*, 142 Wn.2d 450, 459, 13 P.3d 1065 (2000)).

For the clarity element, “[c]ourts must find not create public policy, and the existence of such public policy must be clear.” *Branting v. Poulsbo RV*, No. 66754-8-I, 171 Wn. App. 1012, 2012 WL 5192764 at *7 (Wn. App. Div. 1, Oct. 22, 2012), *rev. denied*, 176 Wn.2d 1025, 301 P.3d 1047 (2013) (citation and quotations omitted). A court will consider whether the employer’s conduct contravenes “the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.” *Id.* (citing *Thompson v. St. Regis*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 380, 652 P.2d 625 (1982))). To qualify as a public policy for purposes of the wrongful discharge tort, a policy must be “truly public” and sufficiently clear. *Sedlacek v. Hillis*, 145 Wn.2d 379, 389, 36 P.3d 1014 (2001); *see also Dicomis v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989) (“[P]ublic policy concerns what is right and just and what affects the citizens of the State collectively.”) (quotation omitted).

Accordingly, to state a claim for wrongful discharge in violation of public policy, a plaintiff must identify a clearly mandated public policy that is either legislatively or judicially recognized. *Wilmot v. Kaiser Alum.*

& Chem. Corp., 118 Wn.2d 46, 67, 821 P.2d 18 (1991). Although judicial decisions may establish public policy, “courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.” *Thompson*, 102 Wn.2d at 232 (emphasis omitted) (quoting *Parnar*, 65 Haw. at 380); *accord*, *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208, 193 P.3d 128 (2008).

The Piels’ claim based on complaints made to Human Resources under the City’s Employee Guidelines are not protected conduct giving rise to a claim for wrongful termination. The Employee Guidelines do not reflect clearly mandated, legislatively or judicially recognized public policy. *See Gardner*, 128 Wn.2d at 949 (distinguishing public policy and workplace rule). Indeed, the disclaimer in the Guidelines makes clear they that do not convey a “legal right” on employees, but “are designed and intended to be general in nature.” Ex 56 at 1. In the absence of such a policy, the Piels’ claims relating to this conduct fail as a matter of law.

The trial court also correctly ruled that filing a written claim for damages with the City does not, as a matter of law, establish the clarity element for a wrongful discharge claim. The claim filing statute, RCW 4.96.020, does not reflect a public policy of encouraging employees to file claims. The notice of claims statute does not provide employees who follow its procedures with a “legal right,” such that discharge for filing any type of claim jeopardizes that public policy. On the contrary, the public policy behind the statute is for the benefit of the public entity that is potentially subject to a lawsuit. Specifically, the purpose of the 60-day

waiting period under the claim filing statute is to allow government defendants time to investigate claims and pursue settlement before they are sued. *E.g., Bosteder v. City of Renton*, 155 Wn.2d 18, 117 P.3d 316 (2005); *Estate of Connelly ex rel. Connelly v. Snohomish Cnty. Public Utility Dist. No. 1*, 145 Wn. App. 941, 187 P.3d 842 (2008); *Renner v. City of Marysville*, 145 Wn. App. 443, 187 P.3d 283 (2008), *rev. granted*, 165 Wn.2d 1027, 203 P.3d 382, *aff'd* 168 Wn.2d 540, 230 P.3d 569.

The Piels have consistently failed to identify any authority to support the proposition that the act of filing a tort claim pursuant to the requirements of RCW 4.96.020 is a “legal right,” such that doing so establishes the clarity element of a wrongful discharge claim as a matter of law. Indeed, to hold otherwise would be to greatly expand the conduct potentially giving rise to a claim for wrongful termination, in contravention of the Washington Supreme Court’s direction that courts proceed “cautiously” before declaring public policy in the absence of prior legislative or judicial expression on the subject. *Thompson*, 102 Wn.2d at 232. The trial court in this case correctly recognized that this procedural requirement set forth in the tort claims statute cannot be stretched to establish a new basis for a wrongful discharge tort claim.

2. Judicially Estoppel Bars Claims For Wrongful Termination Based On The Notice of Tort Claim.

The City was entitled to summary judgment dismissal of the Piels’ claim for wrongful termination related to Mr. Piel’s filing of a tort claim for the additional reason that the Piels are judicially estopped from pursuing such a claim based upon representations they made to the

Washington Supreme Court during the initial appeal of this matter. In their opening brief to the Washington Supreme Court in *Piel I*, the Pielts told the court that they were not asserting a wrongful discharge in violation of public policy tort based on filing a notice of tort claim under RCW 4.96. DEF'S SUPP CP __ (Sub #181, Def's Opp to Mot for Reconsideration, App. A at 43.) Allowing the Pielts to pursue the wrongful termination claim relating to the filing of a tort claim after making these representations would offend the principles of judicial estoppel. See *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005) (Judicial estoppel seeks to preserve respect for judicial proceedings and to avoid inconsistency, duplicity, and waste of time.). This provides an independent basis to affirm the trial court's ruling dismissing the Pielts' claim for wrongful termination related to the filing of a tort claim.

3. Collateral Estoppel Properly Bars The Pielts' Claims Regarding His 2006 Discharge.

The trial court's ruling that collateral estoppel bars the Pielts' claims relating to Mr. Piel's 2006 discharge is equally sound. "[I]t is well settled that in an appropriate case the decision in an arbitration proceeding may be the basis for collateral estoppel or issue preclusion in a subsequent judicial trial." *Robinson v. Hamed*, 62 Wn. App. 92, 96-97, 813 P.2d 171 (1991). The Supreme Court affirmed the potential collateral estoppel effect of prior proceedings in this very case, noting that it had previously held "that an employee who loses in an administrative proceeding . . . may be collaterally estopped from asserting a wrongful discharge claim."

Piel, 177 Wn.2d at 615 (citing *Reninger v. Dep't of Corrections*, 134 Wn.2d 437, 951 P.2d 782 (1998) and *Christensen v. Grant Cnty. Hosp. Dist. No. 1.*, 152 Wn.2d 299, 96 P.3d 957 (2004)). Collateral estoppel is intended to prevent retrial of crucial issues or determinative facts determined in previous litigation, serves to prevent inconvenience or harassment of parties, and promotes judicial economy. *Christensen*, 152 Wn.2d at 306-07; *Reninger*, 134 Wn.2d at 449. Collateral estoppel also provides for finality in adjudications. *Christensen*, 152 Wn.2d at 307 (citing Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L.Rev. 805 (1985)).

As discussed below, the trial court correctly concluded that all of the elements for collateral estoppel are present here.

(a) The Issue Decided in the 2007 Arbitration Is Identical To Mr. Piel's Claim For Wrongful Termination in 2006.

First, the trial court correctly concluded that Mr. Piel's claim for wrongful termination based upon his 2006 termination was identical to the issue before the arbitrator in the 2007 arbitration. CP 485-87. Mr. Piel presented this identical theory that the decision was motivated by anti-union bias to Arbitrator Gaba during the course of the three-day hearing, and in his post-trial brief. CP 262-89. During the course of the hearing, Mr. Piel was represented by counsel (Mr. Hansen, his counsel in this matter), and the parties presented testimony and documentary evidence. Witnesses were subject to cross-examination, and the parties had the opportunity to "fully argue all of the issues in dispute." Ex 31 at 1.

Arbitrator Gaba explained that one of the tests for determining whether an employer had “just cause” is whether the employer applied its rules “evenhandedly and without discrimination to all employees.” Ex 31 at 16. A finding that the employer discriminated against a particular employee in its employment decision because of union activity would lead to the conclusion that the employer did not have just cause to discipline the employee. *Id.* But after the hearing, Arbitrator Gaba concluded that there was clear and convincing evidence that the City did have just cause¹⁸ to discipline Mr. Piel for not arresting the firefighter.

The trial court correctly found that question of whether Piel’s 2006 termination was retaliatory (*i.e.*, based upon anti-union animus) was squarely before Arbitrator Gaba. CP 610. Had Arbitrator Gaba found evidence to support Piel’s argument that the termination was motivated by anti-union animus, Arbitrator Gaba could not have concluded that the discipline was supported by just cause; as noted in his opinion, evidence that the discipline was discriminatory would defeat the City’s claim of just

¹⁸ The fact that the standard for “just cause” under the CBA is different from the standard for wrongful termination does not bar the application of collateral estoppel. The Court of Appeals rejected a similar argument in *Robinson*, 62 Wn. App. at 99. *Robinson* involved a physical altercation between two Boeing employees that resulted in Mr. Hamed being charged with criminal assault and terminated pursuant to the collective bargaining agreement between his union and Boeing. *Id.* at 94. Hamed grieved his discharge, and the arbitrator ruled that Boeing had “just cause” to terminate Hamed. *Id.* When Hamed filed suit against Robinson and Boeing for defamation, wrongful termination, tortious interference, and aiding and abetting a tort, the trial court dismissed his claims on res judicata grounds. *Id.* On appeal, Hamed argued that the issue from the arbitration was not identical to the issues before the trial court, because the arbitration involved questions of whether he acted in an “uncivil or unreasonable” manner as proscribed in the CBA. *Id.* at 99. The Court of Appeals declined to interpret the arbitrator’s ruling so narrowly, noting that “[t]he issue of who was telling the truth was essential to the arbitrator’s decision.” *Id.* at 102. The Court held that this determination was entitled to preclusive effect, and was fatal to Hamed’s claims.

cause. Ex 31 at 15-16. Arbitrator Gaba's determination that the City had just cause to discipline Piel for his involvement in the firefighter incident is entitled to preclusive effect, and the trial court did not err in holding that collateral estoppel bars Mr. Piel from attempting to re-litigate his claim for wrongful termination related to his 2006 termination.

(b) The 2007 Arbitration Resulted In A Decision On The Merits.

The 2007 Arbitration resulted in a decision on the merits. The collective bargaining agreement between Mr. Piel's union and the City provides for "final and binding" arbitration. Ex 99 at 21 (Art. 14 § 2). Mr. Piel's union argued to the Arbitrator that "[a]n employer's decision to impose discipline cannot be based on the improper motive of bias against a labor organization," and that the evidence shows "a pervasive history of harassment and retaliatory conduct directed at Lt. Piel." CP 263. Arbitrator Gaba rejected these claims in a 23-page written order in which he determined that the City did not discriminate against Mr. Piel based on his union activity, such that it had just cause to discipline him. Ex 31.

(c) Mr. Piel Was A Party Or in Privity With A Party To The Prior Arbitration.

Similarly, there can be no reasonable dispute that Mr. Piel was the real party in interest in the 2007 arbitration. Although the Federal Way Lieutenants Association Union was the named party, this does not prevent the application of collateral estoppel to bar Mr. Piel from re-litigating his claims here. As in *Robinson*, having invoked the arbitration proceeding to vindicate his rights, Mr. Piel cannot now claim that he was not in privity

with his union and bound by its results. *See Robinson*, 62 Wn. App. at 100.

(d) Applying Collateral Estoppel Would Not Be Unjust.

Finally, the trial court's determination that there is nothing unfair or unjust about applying collateral estoppel to bar Mr. Piel's claim relating to his 2006 termination was well within the trial court's discretion. CP 485-87. There is nothing inherently unfair about applying collateral estoppel to bar a subsequent claim, provided the party had the full and fair opportunity to litigate, there is no significant disparity of relief, and all the other requirements of collateral estoppel are satisfied. *Christensen*, 152 Wn.2d at 313. Mr. Piel and his union had three hearing days to present their arguments and evidence. Ex 31 at 1. They presented testimony and documentary evidence, and had a full opportunity to cross-examine witnesses. *Id.* Mr. Piel was able to obtain reinstatement to employment and an award of lost wages and benefits. *Id.* at 23.

In sum, the trial court correctly concluded that Mr. Piel already litigated the question of whether his 2006 discharge was motivated by anti-union animus. Because this question was previously determined by Arbitrator Gaba, the trial court's ruling that collateral estoppel bars Mr. Piel from re-litigating this claim must stand.

V. CONCLUSION

The Piel's "kitchen sink" approach to challenging the jury's verdict in this case should be rejected. Despite their hyperbolic description of alleged errors that bears little relationship to the actual trial

record, they fall far short of their burden to show that the trial court's rulings were manifestly unreasonable or based upon untenable grounds. Even if they could reach this high bar—which they cannot—the Piels simply cannot establish any resulting prejudice or impact to the outcome of this case. The trial court's rulings on summary judgment are equally sound. For all the reasons stated herein, Defendant City of Federal Way respectfully requests that the Piels' appeal be denied.

DATED this 14th day of August, 2015.

Respectfully submitted,

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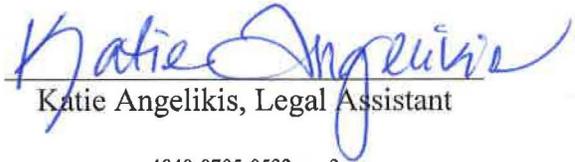
CERTIFICATE OF SERVICE

I hereby certify that on this day I caused the foregoing to be served, as indicated, upon the following:

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4840-0705-0532, v. 3