☐ Expedite
☐ No hearing set
X Hearing is set
Date: June 21, 2024
Time: 9:00 a.m.
Judge/Calendar: Civil / Egeler

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

SCOTT SMITH,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, an agency of the State of Washington; WASHINGTON STATE OFFICE OF FINANCIAL MANAGEMENT in the OFFICE OF THE GOVERNOR, an agency of the State of Washington,

Defendants.

No. 24-2-00894-34

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff Scott Smith ("Smith" or "Plaintiff") filed a whistleblower suit in this case, alleging multiple violations of state law as well as common law negligence and wrongful termination. These allegations stem from improper government action when he was pressured to lie in fuel forecasts about the impact of the state's cap and invest program on fuel prices by his employer, the Washington State Department of Transportation ("WSDOT"), and the Washington State Office of Financial Management in the Office of the Governor ("OFM") (together, "Defendants"). When he refused to "jimmy the numbers," Defendants conducted a campaign of retaliation against him that culminated in his constructive termination. Smith filed a formal complaint with the State

Auditor regarding these acts, thus cementing his status under the law as a whistleblower.

Defendants filed a Motion to Dismiss with prejudice, arguing that Smith's complaint fails to state a cause of action because they claim he filed his whistleblower complaint "long after the retaliation about which he now complains" – even though the act does not have a time requirement for a formal whistleblower complaint or even require that one be filed at all. The Defendants also bizarrely argue that pressuring a state employee to lie in a report for political purposes does not constitute improper government action or gross mismanagement, which is inconsistent with the letter and spirit of the State Employee Whistleblower Protection Act ("Act"). They also claim that the multiple retaliatory acts described in the Complaint – including eliminating his position and failing to approve leave to visit his elderly mother on Thanksgiving – do not constitute retaliation, but instead constitute "minor inconveniences and alterations of his job responsibilities." Defendants' callous and unconscionable position is also wrong on the law and ignores the requirement that this Court view all facts in the Complaint in the light most favorable to Plaintiff. Finally, Defendants allege technical deficiencies with the remaining claims, which again, ignore the facts as alleged and how the causes of action are actually plead in the Complaint. Because the Defendants' Motion fails to meet the high standard for dismissal, it is without merit and should be denied.

STATEMENT OF FACTS

Smith is an economist with decades of experience whose primary responsibility at WSDOT was as the sole fuel consumption, price, and revenue estimator for the state government. In early 2023, Smith began to review data inputs to fuel-price estimates as part of his duties as staff to the Transportation Revenue Forecast Council ("TRFC"), reviews he had conducted for several years prior. Compl. at 2.

Pursuant to RCW 82.33.040 as-written prior to a 2023 amendment:

> *"…to promote the free flow of information and to promote legislative input in the preparation of forecasts, immediate access to all information relating to economic and revenue forecasts shall be available to the economic and revenue forecast work group, hereby created. Revenue collection information shall be available to the economic and revenue forecast work group the first business day following the conclusion of each collection period."*

Prior to the 2023 amendment, the TRFC membership included the executive head or chairperson of the Department of Revenue, OFM, the Legislative Evaluation and Accountability Program Committee, and the House Ways and Means Committee. Complaint at 2-3.

As he prepared estimates for the forecast for the March 2023 Report ("March 2023 Report")(https://ofm.wa.gov/sites/default/files/public/budget/info/transpo/March2023VolumnII.pdf), Plaintiff identified the portion of per-gallon price increases resulting from the Governor's cap-and-invest program, implemented pursuant to the Climate Commitment Act ("cap-and-trade program") that was to be publicly disclosed in the forecast. Ultimately, based on comprehensive scientific and technical analysis, Smith concluded that the per-gallon cost of the cap-and-trade program fell roughly within the forty (40) to fifty (50) cent range – a far greater burden on consumers (drivers, homeowners, etc.) than the "pennies" the Governor had claimed it would cost. In January of 2023, Plaintiff included those estimates within the overall fuel price analysis he prepared for the March 2023 Report. Compl. at 3.

On January 18, 2023, Plaintiff met with Mr. Nguyen Dang (his temporary supervisor), who informed Plaintiff that "management would prefer" that he not include in the overall gas price estimates the per-gallon cost impacts of the cap-and-trade program to be listed as part of the March 2023 Report. Plaintiff reasonably understood "management" to include Ms. Amber Coulson, the Department's financial and planning manager, and Mr. Erik Hansen of OFM. Plaintiff replied that under no circumstances would he "jimmy the numbers" and exclude the cost impacts of the cap-

and-trade program from his report. As Plaintiff put in his Whistleblower Report ("Whistleblower Report") to the state auditor: "The fact that carbon taxes raise the cost of gasoline is a matter of 6th grade math. The incidence (who the cost ultimately falls on) is usually assumed to be 100 percent on the consumer. This is the logic employed by the U.S. Energy Information Administration. Further, S&P [Global Ratings] displays a line-item cost per gallon in their Oil Price Information Report, a summary of wholesale fuel prices by location." Complaint at 3-4.

At a subsequent meeting a few days later, Plaintiff told Dang to "tell Amber [Coulson] that this [is] whistleblower stuff"—thus alerting Dang and Coulson that Plaintiff was henceforth a "whistleblower" under RCW 42.40.020(10), that he understood what they were asking of him was improper, and that he was prepared to invoke any and all of his rights and responsibilities under Chapter 42.40 RCW ("State Employee Whistleblower Protection"). Compl. at 4.

At a third meeting, Dang repeated management's preference that he and his colleagues omit cap-and-trade-related price impacts from any publicly disclosed or disclosable document. Plaintiff again refused. Dang informed Plaintiff that he had discussed the issue with Amber Coulson within the Department, and in particular, his conversation in which Plaintiff had stated, "this is whistleblower stuff," and Coulson then told Dang to inform Plaintiff that "if [he] ha[s] a problem, take it to HR." Compl. at 4.

Plaintiff continued to refuse to take any part in this official scheme to withhold from disclosure numbers to which the public is fully entitled. In furtherance of this official scheme, Plaintiff and other Department employees were instructed not to create public records regarding the impact of the cap-and-trade program on fuel prices. Compl. at 4.

Subsequently, the March 2023 Report was released with Plaintiff's numbers included, without the changes that Dang stated were "preferred by management." On March 27, 2023,

Amber Coulson called Plaintiff and told him that Erik Hansen with OFM had complained about Plaintiff and, in particular, said that he should be clearing "any surprises" with him prior to issuing his estimate. This was a significant change in the process for formulating economic analyses that Plaintiff had used in the course of his duties prior to January 2023. Compl. at 4-5.

Following Plaintiff's refusal to omit the impact of the cap-and-trade program from the March 2023 Report, OFM and WSDOT undertook several actions in retaliation for his refusal to "jimmy the numbers."

First, Defendants coordinated to support the passage of legislation that eliminated Plaintiff's position. HB 1838 was introduced in the legislature on February 1, 2023. The bill was supported by OFM and WSDOT. The bill had the effect of eliminating Plaintiff's position and transferring it to another agency effective in 2025. Following testimony in committee by representatives of OFM, including Erik Hansen, the bill passed the legislature and was signed into law by the Governor.

Second, Plaintiff's duties changed in that he was required to begin to clear "any surprises" regarding the release of any information with Hansen at OFM prior to its release to the rest of the TRFC. This step was contrary to prior practice.

Third, Plaintiff was denied basic software upgrades that were necessary for his position.

Fourth, the Department attempted to change and backdate his performance evaluations, which prior to this, had been uniformly positive and included no substantive criticisms, but was mostly "exceeds expectations" across the board.

Fifth, Plaintiff was denied a promotion as a permanent hire for his supervisor's position that he applied for since the position was unfilled, and he was performing many of the duties of the position.

Sixth, the Department instead assigned a new supervisor, who scaled down or eliminated the bulk of his preexisting responsibilities.

Seventh, Plaintiff's supervisor denied a request for Plaintiff to work out of state virtually, which other WSDOT employees were permitted to do post-pandemic. Plaintiff's supervisor denied the request on the grounds that he would need to meet in person with him. The supervisor then failed to attend the only in-person meeting that he scheduled with Plaintiff.

Eighth, Plaintiff requested leave to visit his elderly mother in Louisiana for Thanksgiving. He requested to be allowed to telecommute from an out-of-state duty station for one meeting and was willing to attend the meeting while on leave. The Department refused this request and instead mandated that Plaintiff attend the meeting remotely from Olympia. This was despite the fact that since the onset of the COVID-19 pandemic, almost all division staff had been – and continued to through the entire period in question – working remotely and there would be no difference in Plaintiff's participation in the meeting from Olympia versus Louisiana.

These actions were in response to Defendants' perception that Smith was a whistleblower, with Smith filing the whistleblower complaint just before he was constructively discharged. On November 2, 2023, the State Auditor acknowledged receipt of the Whistleblower Report, alleging the same pattern of misconduct and retaliation.

Ninth, Plaintiff was constructively discharged later that day. Compl. at 6.

STATEMENT OF ISSUES

1. Whether Plaintiff qualifies as a whistleblower under the Act and WLAD.
2. Whether Plaintiff properly alleges claims upon which relief can be granted for wrongful discharge.

3. Whether Plaintiff properly alleges claims upon which relief can be granted for negligence.

4. Whether OFM is a proper party to this litigation.

I. ARGUMENT AND CITATIONS TO AUTHORITY

A. Legal Standard

Under Washington caselaw, the essential purpose of a Civil Rule 12(b)(6) motion is "to determine if a plaintiff can prove any set of facts that would justify relief." *Freedom Found. v. Teamsters Local 117 Segregated Fund*, 197 Wash.2d 116, 139, 480 P.3d 1119 (2021) (quoting *P.E. Sys., LLC v. CPI Corp.*, 176 Wash.2d 198, 203, 289 P.3d 638 (2012) (emphasis added)). CR 12(b)(6) only permits the defeat of such claims if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery," including "hypothetical facts not included in the record." *Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). Motions to dismiss for failure to state a claim "'should be granted sparingly and with care.'" *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988) (internal citations omitted). Here, Smith more than establishes plausible allegations sufficient to defeat a CR 12(b)(6) motion, and facts that amply demonstrate that there are no "insuperable bar(s) to relief." *Hoffer*, 110 Wn.2d at 421.

Further, judgement as a matter of law is improper here because several material facts remain in dispute upon which reasonable minds could differ. This alone precludes dismissal prior to the completion of discovery, especially given the inferences the Court must draw in favor of a non-moving party. *Realm, Inc. v. City of Olympia* (2012) 168 Wash.App. 1, 277 P.3d 679, *review denied* 175 Wash.2d 1015, 287 P.3d 10 (2012). *Ranger Ins. Co. v. Pierce Cnty.* (2008) 164 Wash.2d 545, 192 P.3d 886 ("When determining whether a genuine issue of material fact exists,

on summary judgment, court must construe all facts and inferences in favor of the nonmoving party.").

B. Plaintiff *Is* a "Whistleblower" Under RCW 42.40.020

The Act in Chapter 42.40 RCW sets forth the policies and protections afforded to state employees. As noted above, Washington's policy is to protect state employees who disclose improper governmental action. RCW 42.40.010. To qualify as a "whistleblower," a person must be an employee of the state. RCW 42.40.020(10). The Act defines an "employee" as "any individual employed or holding office in any department or agency of state government." RCW 42.40.020(2). As noted in *Dezihan v. State*, 16 Wash.App2d 1085 (Division 3 2021) "[t]his language is clear and unambiguous." Whistleblower statutes are intended to encourage those with knowledge of institutional wrongs to come forward in order to safeguard the public. Wash. Rev. Code Ann. §§ 42.40.010, 42.40.020(2).

Smith was a whistleblower under RCW 42.40.020, which provides three ways pertinent to this case that state employees may be afforded protection under the Act:

> *(10)(a) "Whistleblower" means:*
> *(i) An employee who in good faith reports alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section; or*
> *(ii) An employee who is perceived by the employer as reporting, whether they did or not, alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section.*
> *(b) For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term "whistleblower" also means:*
> *(i) An employee who in good faith provides information to the auditor or other public official, as defined in subsection (7) of this section, and an employee who is believed to have reported asserted improper governmental action to the auditor or other public official, as defined in subsection (7) of this section, or to have provided information to the auditor or other public official, as defined in subsection (7) of this section, but who, in fact, has not reported such action or provided such information;*

To establish a prima facie case of whistleblower retaliation or discrimination, an employee must show that (1) she engaged in a statutorily protected activity, (2) her employer took an adverse employment action, and (3) the employee's activity caused the employer's adverse action. *See Milligan v. Thompson*, 110 Wash.App. 628, 638, 42 P.3d 418 (2002). In a summary judgement motion (in contrast to a motion to dismiss), once the employee establishes a prima facie case, the burden shifts to the employer to produce evidence of legitimate, nonretaliatory reasons for the employment action. *Keenan v. Allan*, 889 F.Supp. 1320, 1367 (E.D.Wash.1995), aff'd, 91 F.3d 1275 (9th Cir.1996); *Estevez v. Faculty Club*, 129 Wash.App. 774, 797–98, 120 P.3d 579 (2005). With the Court taking the facts in the light most favorable to Smith and allowing for pleading in the alternative, Plaintiff qualifies as and has alleged facts sufficient to be a whistleblower under all three circumstances.

a. Plaintiff Did Report Defendants' Wrongdoing to a Public Official, Though He Was Not Required to In Order to Establish Whistleblower Status

RCW 42.40.050 provides, "any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action, is presumed to have established a cause of action for the remedies provided under Chapter 49.60 RCW." As alleged in the Complaint, Plaintiff was an "employee who in good faith report[ed] alleged improper governmental action to the auditor or other public official" and therefore meets the plain language definition of a whistleblower under RCW 42.40.020(10)(a)(i). If an employee files a complaint about improper governmental action with the state auditor, he or she meets the definition of a whistleblower under the Act. Period.

Defendants make two arguments in an attempt to undermine Smith's clear legal status as a whistleblower under this provision. First, they claim that his report to the state auditor lacks a causal connection to the protected activity and the adverse action. Defendants' Motion to Dismiss,

Page 9. Defendant cites to *Boespflug v. Dep't of Labor & Indus*., No. 83301-4-I, 2022 WL 594288, at *4 (Wash. Ct. App. Feb. 28, 2022). *See also Mendoza de Sugiyama v. State Dep't of Transp*., No. 45087–9–II, 2015 WL 563960, at *9 (Wash. Ct. App. Feb. 10, 2015) (unpublished). However, Plaintiff's constructive termination claim occurred after he submitted his report to the State Auditor, so the cases that Defendants rely on are inapplicable here. In addition, all the cases Defendants cited regarding whistleblower status involved motions for summary judgement – not a motion to dismiss, like the instant Motion before the Court.

Second, they claim that his report did not identify "wrongful government action." Defendant's Motion to Dismiss at 14. RCW 10.40.010 provides, in pertinent part, that government wrongdoing includes:

> *(6)(a) "Improper governmental action" means any action by an employee undertaken in the performance of the employee's official duties:*
> *(iv)* ***Which is gross mismanagement;***
> *(v) Which prevents the dissemination of scientific opinion or* ***alters technical findings without scientifically valid justification****, unless state law or a common law privilege prohibits disclosure. This provision is not meant to preclude the discretion of agency management to adopt a particular scientific opinion or technical finding from among differing opinions or technical findings to the exclusion of other scientific opinions or technical findings. Nothing in this subsection prevents or impairs a state agency's or public official's ability to manage its public resources or its employees in the performance of their official job duties. This subsection does not apply to de minimis, technical disagreements that are not relevant for otherwise improper governmental activity. Nothing in this provision requires the auditor to contract or consult with external experts regarding the scientific validity, invalidity, or justification of a finding or opinion; . . ."* [emphasis added]

The section provides a further definition which is relevant.

> *(4) "Gross mismanagement" means the exercise of management responsibilities in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.*

Here, Plaintiff's claims that Defendants' pressure to get him to lie in his fuel cost report meets the statutory definition of improper government action in two ways: first, it constituted gross

mismanagement because it deviated from the standard of care or competence that a reasonable person would observe in the same situation. Second, the alternative calculations suggested by management constituted alterations of the technical findings in his draft report which (unlike the prong regarding scientific opinion) is not statutorily required to be actually disseminated. Again, viewing the facts in the light most favorable to the Plaintiff, Smith has alleged improper government action.

b. In the alternative, even if he had not made a report to the state auditor, Plaintiff also qualified as a whistleblower under RCW 42.40.020(10)(a)(ii) or (10)(b)(i), which allows for whistleblowers who have not reported but are perceived to be whistleblowers by their employers, or are believed to have reported and asserted to still meet the definition under the Act.

Even assuming *arguendo* that Plaintiff had failed to report improper governmental activity to the State Auditor, RCW 42.40.020(10)(a)(ii) and (10)(b)(i) provide an even looser standard for obtaining whistleblower status, which is also supported by allegations in the Complaint. An employee who "is perceived by the employer as reporting, **whether they did or not**, alleged improper governmental action to the auditor or other public official" is a whistleblower under the law [emphasis added]. In addition, an employee who "in good faith provides information to the auditor or other public official . . . and an employee who is believed to have reported asserted improper governmental action to the auditor or other public official . . . , or to have provided information to the auditor or other public official **but who, in fact, has not reported such action or provided such information** . . ." [emphasis added] is also a whistleblower. Plaintiff made multiple allegations in the Complaint that Defendants believed or perceived that he had provided information about the improper governmental action at issue in this case.

c. Defendants Did "Believe" and "Perceive" That Smith Made a Whistleblower Complaint

Accepting all facts alleged as true, there is ample support for Plaintiff's allegations that Defendants indeed perceived him as having filed a whistleblower complaint prior to the onset of at least some of their reprisal or retaliatory actions. In particular, Plaintiff made the following allegations:

> 14. At a subsequent meeting a few days later, Plaintiff told Dang to "tell Amber [Coulson] that this [is] whistleblower stuff" – thus alerting Dang and Coulson that Plaintiff was henceforth a "whistleblower" under RCW 42.40.020(10), that he understood what they were asking of him was improper, and that he was prepared to invoke any and all of his rights and responsibilities under Chapter 42.40 RCW ("State Employee Whistleblower Protection"). . .
>
> 16. Dang informed Plaintiff that he had discussed the issue with the Department's Coulson, and in particular, his conversation in which Plaintiff had stated, "this is whistleblower stuff," who told Dang to inform Plaintiff that "if [he] ha[s] a problem, take it to HR." Compl. at 4.
>
> 48. Plaintiff was properly perceived as a "whistleblower" under Chapter 42.40 RCW at all times pertinent to this cause of action, during which Defendants continued their campaign of retaliation against him, culminating in his constructive dismissal. Compl. at 10.

In addition to these allegations (which must be taken as true and in the light most favorable to Plaintiff), the fact that WSDOT perceived Smith as a whistleblower can also be gleaned from the not less than nine separate and distinct instances of reprisal and retaliation, each of which alone would suffice to maintain this cause of action. Plaintiff acquired "whistleblower" status at least (if not earlier than) the moment he announced that Defendants' actions to pressure him to "jimmy the numbers" was "whistleblower stuff." As the facts make clear, Defendants, through their agents and assigns, began a pressure campaign with the aim of silencing Plaintiff or, if they could not do that, at least punish him for his efforts at transparency.

The particularized allegations of injury set forth in the Complaint are more than enough of a foundation to survive the purely *legal* argument – with the potential to become a factual one upon depositions and other discovery – that a Whistleblower Act claim fails when a plaintiff

"makes *no* showing that he made a report or provided information to the auditor or a public official *or was believed by defendants to have done so*." *Chen v. City of Medina*, 2013 WL 392707, at *13 (W.D. Wash. Jan 31, 2013). *Chen* helps far more than it hurts Plaintiff's claim under the Act, teaching that a mere belief of whistleblower activity can be the basis for reprisal and retaliation, several instances of which Plaintiff has alleged in great detail.

Defendants conclude that Plaintiff's allegations "are inconsistent with any such inference" of malfeasance, but provide no greater explanation for why that is except that "[i]f Coulson truly believed Smith had reported 'improper governmental action,' it would make no sense for her to instruct Smith to also contact HR about it." Mot. at 13. The Court could imagine several scenarios for Coulson's instructing Smith to also contact HR, but does not need to. It suffices that Coulson and/or Hansen believed Smith had reported "improper governmental action" and that somebody – anybody in a position of relevant authority – who learned it from them, then proceeded to take reprisal or retaliatory action against Plaintiff. Compl. at 4. Even if the Court were inclined to view the specific allegations as insufficient, it would be premature to deny Plaintiff the chance to depose Coulson, Hansen, and Plaintiff's other former colleagues and supervisors. The bottom line is that Plaintiff had adequately alleged sufficient facts and pled that he met multiple thresholds for establishing whistleblower status under the definitions provided in the Act.

C. Plaintiff Properly Alleges "Reprisal or Retaliatory Action" Under 42.40.050

a. Smith Plausibly Alleges Facts Supporting Each Discrete Instance of Reprisal or Retaliatory Action

Plaintiff's Complaint alleges nine acts of retaliation that fall under the broad categories for adverse employment action under the Act. These include:

1. Defendants coordinated to eliminate his job.

2. Defendants changed Plaintiff's duties by requiring him to clear information in his reports with an employee of OFM, rather than WSDOT.
3. Plaintiff was denied basic software upgrades that were necessary for his position.
4. WSDOT attempted to change and backdate his performance evaluations.
5. Plaintiff was denied a promotion.
6. WSDOT assigned a new supervisor, who scaled down or eliminated the bulk of his preexisting responsibilities.
7. Plaintiff's supervisor denied a request for Plaintiff to work out of state virtually and then failed to attend meetings in person.
8. Plaintiff was denied leave to visit his elderly mother in Louisiana for Thanksgiving.
9. Plaintiff was constructively discharged.

Defendants dismiss each of these acts as legally insufficient to constitute retaliatory actions. This is as patently absurd as it is callous. Defendants miss the forest for the trees. While some individual acts may arguably be insufficient taken in isolation, the cumulative effect of these nine acts were vindictive, professionally crippling, and illegal. Plaintiff has adequately pled each and every one of his reprisal claims against Defendants – sufficient, at the very least, to overcome Defendants' 12(b)(6) motion.

This is especially true when comparing other retaliatory acts, which courts have recognized as legally sufficient, that pale in comparison to those alleged in the case at bar. *See, e.g., Boespflug v. Dep't of Labor & Indus*., No. 83301-4-I, 2022 WL 594288, at *4 (Wash. Ct. App. Feb. 28, 2022) (Department's failure to conduct an ergonomic evaluation in connection with whistleblower's

request for new work vehicle could constitute a retaliation claim.) *Hockett v. Seattle Police Dept.,* 2024 WL 1985784, at *5 (Wash.App. Div. 1 May 6, 2024) (Allegations by a whistleblower that SPD mocked him by calling him names such as "problem child" and "whistleblower," wrote his name on a whistleblower pamphlet, and placed a picture in his office calling him "institutionalized", all of which were sufficient to establish whistleblower status, particularly because these retaliatory acts caused him to feel ostracized and less reputable among his fellow SPD officers.)

Moreover, Defendants err in viewing each of these actions in isolation rather than as part of a pattern and practice with a cumulative effect. In *Antonius v. King County,* 153 Wash.2d 256, 269 (2004), the court said that "the hostile work environment 'occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.... Such claims are based on the cumulative effect of individual acts.'" (quoting *Morgan*, 536 U.S. at 115, 122 S.Ct. 206 (2002)). So here, the Court should consider the cumulative impact of the acts alleged rather than viewing them individually.

As to the other bases for his claim of wrongful termination, Plaintiff has sufficiently alleged "a continuous pattern of discriminatory treatment." Plaintiff's workplace grievances indeed rise to the intolerable, as he continually catalogued via email memos to himself, and via sworn statements – including in his whistleblower complaint to the state auditor – thereby demonstrating that Defendants' actions were intended to, and did succeed in, driving Plaintiff from WSDOT altogether – and not just replacing him in a new position after the legislature obsoleted his original role. Defendants repeatedly mischaracterize Plaintiff's allegations just enough to fit some (though not all) within some statutory or caselaw exception to what constitutes whistleblower retaliation.

For example, Defendants note that "attempt[ing]" to backdate performance evaluations "is not an adverse employment action." Mot. at 7.

Respectfully, this is not Plaintiff's argument. First, on information and belief, Plaintiff presumes that further discovery will confirm these allegations, at least sufficient to overcome a motion for summary judgment. In his Complaint, Plaintiff argues that "[m]anagement changed or attempted to change one of these performance evaluations by backdating it more than a year after [Plaintiff] refused to change his estimates for political purposes." Compl. at 8. Again, something further discovery will either bear out or disconfirm – including from documents and other records that Plaintiff would now have in his possession but-for Defendants' protective order pausing discovery until after the hearing on this Motion to Dismiss.

As another example, Defendants claim that Plaintiff "does not allege coworkers behaved in a hostile manner toward him." Mot. at 17. Again, this is patently untrue. Plaintiff alleges several distinct instances of hostility, directly from or at the encouragement of supervisors like Hansen and Coulson. Compl. at 9. The Complaint provided one example of "hostile" behavior towards Plaintiff because that is all Plaintiff can presently allege on information and belief, in order to preserve the underlying claim. Plaintiff fully expects to learn of additional such instances once discovery resumes – though we also note that refusing leave to visit one's elderly mother out of state, in order to needlessly stay "in-state" for Zoom calls can very well alone constitute "hostile" behavior. The caselaw Defendants cite to argue otherwise are either outside of Washington or the Ninth Circuit and its district courts, and only prove that denial of leave requests in those cases were not sufficiently "hostile." *Ogden v. Brennan,* 657 F. App'x 232, 235 (5th Cir. 2016); *White v. Andy Frain Servs*., 629 F. App'x 131, 134 (2d Cir. 2015); *Morales v. Gotbaum*, 42 F. Supp. 3d

175, 206–07 (D.D.C. 2014). The question is ultimately a factual one, to be borne out (or affirmatively disproven) during discovery.

b. Even if Defendants did not believe or perceive that Plaintiff had reported wrongful government action to the State Auditor, their actions constituted efforts to intimidate, threaten, and/or coerce him from doing so in violation of RCW 42.30.030.

In addition, even assuming *arguendo* that Defendants did not believe or perceive that Plaintiff was a whistleblower, their actions also violate RCW 42.40.030, which provides, in relevant part, that "[a]n employee shall not directly or indirectly use or attempt to use the employee's official authority or influence for the purpose of intimidating, threatening, coercing, commanding, influencing," or attempt any of the same "for the purpose of interfering with the right of the individual to . . . [d]isclose to the auditor . . . or other public official . . . information concerning improper governmental action." *Id.* Interestingly, these acts do require an actual report, but only that the purpose be to intimidate, threaten, or coerce an employee from disclosing improper government action to the Auditor. Here, viewing the facts alleged in the light most favorable to the Plaintiff, and even entertaining hypothetical facts, it is not difficult to imagine that the nine acts described in the Complaint were for the purpose of dissuading Plaintiff from availing himself of the protections of the Act.

D. Plaintiff Properly Alleges WLAD Violations

It appears Defendants' entire argument against Plaintiff's WLAD claim is that "for the same reasons his claim under the Whistleblower Act itself fails," "he was not a whistleblower under the statute and he was not subjected to any adverse action." Despite Defendants' insistence that Plaintiff proffers no allegations upon which he can demonstrate constructive termination, Plaintiff has well-pled that Defendants lobbied the legislature to jettison his WSDOT position, among the several other methods of retaliation employed, each of which alone – though without question in aggregate – "involve[d] a change in employment conditions that [were] more than an

inconvenience or alteration of job responsibilities." *Marin v. King Cnty.,* 194 Wn. App. 795, 811, 378 P.3d 203 (2016) (quoting *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004)). It was only after Defendants perceived that Plaintiff had or was reporting to a public official their coordinated scheme to "jimmy the numbers" that the former began the actions of retaliation that resulted in his constructive termination. Compl. at 5. For the same reasons described above, Defendants' argument fails. Even if the Court was not persuaded that the facts alleged are sufficient, the Court should permit discovery and hypothetical facts.

E. Plaintiff Properly Alleges Wrongful Discharge

As Defendants themselves readily concede, "a wrongful termination tort claim may be based on a constructive discharge." Mot. at 22 (citing *Peiffer v. Pro-Cut Concrete Cutting & Breaking Inc.*, 6 Wn. App. 2d 803, 829, 431 P.3d 1018 (2018)). In determining whether discharge contravenes public policy of protecting employees who report employer misconduct, the Supreme Court will consider whether an employer's conduct constituted either a violation of the letter or policy of this chapter, so long as employee sought to further the public good, and not merely private or proprietary interests, in reporting the alleged wrongdoing. *Dicomes v. State* (1989) 113 Wash.2d 612, 782 P.2d 1002.

Plaintiff's dismissal constitutes the tort of wrongful termination, which in Washington includes "terminations in violation of a public policy" – i.e., if the employee was fired for physical or moral (i.e., religious) characteristics, or because their actions or inactions are protected in light of their public-policy import – similar to the public-policy-interest factor at play in the immediately precedent cause of action. *See Becker v. Community Health Systems,* 184 Wn.2d 252, 359 P.3d 746 (2015); *see also Rose v. Anderson Hay & Grain Co.,* 184 Wn.2d 268, 358 P.3d 1159 (2015). Plaintiff's termination, and the events leading up to it, fit the public-policy exception to at-will

employment. Per *Becker* (and some other cases preceding it), the tort exception to at-will termination "have generally been limited to four scenarios," including "where employees are fired for refusing to commit an illegal act" and "where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing." 184 Wash.2d at 258–59.

At least one of the express *Becker* factors attaches seamlessly to Plaintiff's claimed public-policy exception to at-will employment, rendering his claim of wrongful termination prima facie legitimate instead of requiring "a more refined analysis [that] may be necessary" "when the plaintiff's case does not fit neatly within one of [*Becker*'s] scenarios". 184 Wash.2d at 259. *Hubbard v. Spokane County*, 146 Wash.2d 699 (2002) also offers guidance on the factors relevant to a wrongful termination in violation of public policy. Specifically, *Hubbard* held that "in order to establish a claim for wrongful discharge in violation of public policy, a plaintiff must prove (1) the existence of a clear public policy (clarity element); (2) that discouraging the conduct in which they engaged would jeopardize the public policy (jeopardy element); and (3) that the public-policy-linked conduct caused the dismissal (causation element)." *Id*. at 707.

The basis for Plaintiff's termination was his refusal to suppress numbers, most of which the public have a statutory right to access and review, at the very least under the Public Records Act – a "clear public policy" element. Further burgeoning the clear-public-policy element are the strong public interests behind the whistleblower laws themselves, including RCW 42.40.010's declaration that "[i]t is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures, regardless of whether an investigation is initiated under RCW 42.40.040."

In a similar vein, it would "jeopardize the public policy" behind the Climate Commitment Act to hide the full numbers from the public. Finally, the Complaint has already outlined in great detail the causal links between Plaintiffs' desire to disclose and Defendants' decision to eliminate his position and send him into early retirement. Defendants proceed to disagree that their actions included constructive discharge, however crystal clear it may be that the statutory termination of his position postdated Plaintiff's refusal to "jimmy the numbers" and opined to supervisors that that was "whistleblower stuff." It is Plaintiff's burden to prove that his discharge was a direct or proximate result of his refusal to engage in Defendants' coverup, but until discovery, the evidence of such is simply beyond Plaintiffs' procedural reach.

Defendants cannot have their cake and eat it too – they moved to pause discovery until after a hearing at which their chief argument is that Plaintiff has yet to compile enough evidence to sustain his claims as matters of law. It would be patently unfair to grant a Motion, the impending hearing for which justified the very protective order that now compels Plaintiffs' reliance on "hypothetical facts."

F. Plaintiff Adequately Alleges a Negligence Claim

Plaintiff's negligence claim is not barred by Defendants' incorrect theory of "duplication." Mot. at 25. It is true that Washington caselaw prevents recovery "for a negligence claim that duplicates" a "retaliation claim." *Mathews v. Karcher N. Am., Inc.*, No. 3:21-CV-05732-LK, 2023 WL 3318613, at *12 (W.D. Wash. May 9, 2023). However, this rule only requires factfinders to choose between the two with respect to each instance of injury. Simply bringing an employment discrimination claim in no way bars litigants from seeking ordinary negligence as an alternative, with the factfinders ultimately determining which of the two claims more closely approximates the complainant's injuries.

G. OFM Should Not Be Dismissed From This Lawsuit

OFM is a proper party to this lawsuit and should thus not be dismissed as such. Plaintiff's Complaint contains multiple allegations that plainly demonstrate OFM's participation in the wrongful governmental action at issue in this case but also its involvement in multiple retaliatory actions against Smith. For example, Smith understood from OFM's role in the TRFC process that when Dang came to him with the instruction that management would prefer that he not include the impacts of the cap and invest program in his fuel forecasts that management included Hansen with OFM. Compl. at 3. Later Coulson with WSDOT called Plaintiff and told him that Hansen had complained about Plaintiff and in particular said that he should be clearing "any surprises" with him prior to issuing his estimate. Compl. at 5. Hansen and others at OFM directly supported and assisted with several of the acts of reprisal and retaliation alleged, including the passage of HB 1838 which eliminated Plaintiff's position and at which Mr. Hansen personally appeared to support the bill in committee hearings as it moved through the legislature. Compl. at 3, 4, 5, 8. See also RCW 82.33.015 (naming OFM director as first member of the TRFC); RCW 82.33.040 (requiring the TRFC and other such councils release forecast data to the OFM, among a select few other authorities); RCW 82.33.070 (including OFM as part of the state budget outlook "work group," which relies on the accuracy of forecasts).

Finally, there is no requirement that a whistleblower's complaints of improper governmental action only be directed at the whistleblower's employer. *See* RCW 42.40.010. While a whistleblower must be a state employee, a complaint can be directed at any improper government action that meets the statutory definition by any agency – regardless of whether it employs the whistleblower.

CONCLUSION

Plaintiff respectfully requests that the Court DENY Defendants' Motion to Dismiss in this lawsuit because Defendants have failed to demonstrate an "insuperable bar to relief" with respect to each and every one of Plaintiff's claims, among other reasons. *Hoffer*, 110 Wash.2d at 420.

DATED this 31st day of May, 2024.

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CERTIFICATE OF SERVICE

I, Paige Jaramillo, declare under penalty of perjury under the laws of the State of Washington that I am causing a true and correct copy of the foregoing Plaintiff's Response to Defendants' Motion to Dismiss in accordance with the parties' electronic service agreement on this date to Defendants at:

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