

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

RYAN SANTHUFF,

Plaintiff,

vs.

STATE OF WASHINGTON, and DAVID
JAMES NOBACH, an individual

Defendants.

Case No.: 19-2-04610-4 KNT

PLAINTIFF'S TRIAL BRIEF

PLAINTIFF'S TRIAL BRIEF

THE SHERIDAN LAW FIRM, P.S.
Attorneys at Law
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
Tel: 206-381-5949 Fax: 206-447-9206

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I. INTRODUCTION 1

II. STATEMENT OF FACTS 5

III. ARGUMENT AND AUTHORITY 14

 A. Plaintiff Will Prevail On His Claim Of Whistleblower Retaliation 14

 1. Santhuff is a Whistleblower 14

 2. Santhuff Suffered Reprisal 16

 3. Defendants Cannot Meet The Burden Of Proof For Their
 Affirmative Defense 18

 B. Plaintiff Will Prevail On His Retaliation Under The WLAD 18

 1. Plaintiff Engaged In Protected Opposition Activity Under
 The WLAD 19

 2. Plaintiff Suffered An Adverse Employment Action Under
 The WLAD 20

 3. Retaliation Was A Substantial Factor In Plaintiff’s Mistreatment 21

 C. Defendant Nobach Aided and Abetted in WSP’s Retaliation 22

 D. Mr. Santhuff Has Suffered Economic and Non-Economic Damages
 Caused by The Defendants 22

 E. The Court May Order Reinstatement as a Form of Injunctive Relief 26

 F. The Court May Order A Civil Penalty and/or Disciplinary Action
 Against Nobach 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I. INTRODUCTION

Plaintiff Ryan Santhuff asserts claims against his current employer, the Defendant State of Washington, for whistleblower retaliation under the State Employee Whistleblower Protection Act, RCW 42.40.050, and for retaliation under the Washington Law Against Discrimination, RCW 49.60.210(1). Plaintiff separately claims that Defendant David James (“Jim”) Nobach aided, abetted, encouraged or incited the retaliation. RCW 49.60.220.

The jury will find in favor of Detective Santhuff¹ at trial on his claim of whistleblower retaliation, because (1) he engaged in protected whistleblowing by having a reasonable basis in fact for his reporting or providing information about the violation of “state law or rules” and/or “gross mismanagement” to the WSP’s internal affairs section, *i.e.*, the Office of Professional Standards (“OPS”) and its commander, Capt. Mike Saunders ; and (2) he was subject to hostile or adverse actions that constitute “reprisal or retaliatory action” under the statute. *See* RCW 42.40.020(10)(a) (definition of “whistleblower”); RCW 42.40.020 (definition of “good faith”); *and* RCW 42.40.050(1)(b) (list “including but not limited to,” 15 examples of retaliation). Having met these two elements, Plaintiff under the statute “is **presumed** to have established a cause of action for the remedies provided under chapter 49.60 RCW.” RCW 42.40.050(1)(a). The jury will find that Defendants cannot meet the statutory burden of proof for their affirmative defense, which states that in order to “rebut the presumption” of a claim for whistleblower retaliation, Defendant must “prov[e] by a preponderance of the evidence ... that improper motive was **not a substantial factor**.” *See* RCW 42.40.050(2).

¹ After Mr. Santhuff left Aviation, he promoted to Detective within the WSP in July 2018.

1 The jury will further find in favor of Detective Santhuff on his claim of retaliation under
2 the WLAD, because he and other pilots from WSP's Aviation Section will testify how
3 "everything changed" following WSP's March 2016 discipline of Lt. Nobach and Ms. Biscay
4 for engaging in behavior that inappropriately sexualized the workplace of Mr. Santhuff and
5 others. Santhuff will testify how the misguided actions WSP took in response to Santhuff's
6 report—a report that Sgt. Scott Sweeney, Lt. Nobach's subordinate, confronted Nobach about
7 and pushed up the chain of command over Nobach's head—created "turmoil" in Aviation.
8 In response to the sexual harassment reporting, WSP took "remedial action" in name only. It
9 made things worse by failing to follow its Regulations Manual, which required a documented
10 investigation into the sexual harassment report. That never occurred. WPS also departed from
11 the disciplinary standards applicable to violations of the sexual harassment policy, issuing Lt.
12 Nobach a lenient counseling document ("an 095") rather than a disciplinary suspension. The
13 lack of any formal investigation and slap on the wrist given to Lt. Nobach just emboldened him
14 and promptly resulted in a retaliatory work environment within the Aviation Section. The
15 hostility by Nobach and Biscay affected more than just the reporters (Santhuff and Sweeney).
16 Things grew so bad that another supervisor, Sgt. Scott Hatteberg, "broke down" in a meeting
17 with Santhuff while two other trooper pilots were present. Hatteberg pleaded with Santhuff to
18 apologize to Lt. Nobach, for the good of the entire section and so things could return to how
19 they used to be. Santhuff was moved by how upset Hatteberg became and felt obliged to speak
20 directly with Lt. Nobach in an effort to relieve the obvious tension in the Section. In their
21 meeting, Santhuff tried to explain to Nobach how his reporting followed months of various
22 "people in the aviation division believ[ing] that [Nobach] ... and his secretary ... were having
23
24
25

1 an inappropriate relationship in the workplace.” Santhuff’s honest effort at having a candid
2 discussion about the concern he reported only angered Lt. Nobach more; he told Santhuff
3 during their meeting, with an angry, raised voice, “*if I’m going to be held accountable for this*
4 ***** [the Sexual Misconduct Incident] then you and everybody else here will be, too.*”

5 In a May 2016 meeting between Trooper Santhuff and Capt. Alexander (Lt. Nobach’s
6 boss), and with Sgt. Hatteberg and Lt. Nobach also present, as Santhuff began to explain to
7 Alexander how retaliation against him had started after the sexual harassment incident got
8 reported, Capt. Alexander shut Santhuff down and stopped him from discussing the retaliation,
9 telling him, in effect, “This situation has been dealt with, and we aren’t going to talk about it.”
10 In the same meeting Santhuff was cut off by Lt. Nobach, who became red in the face and
11 raised his voice at Santhuff. This was another failure of WSP to go by-the-book, now with
12 regard to the Regulations governing reports and investigations of allegations of retaliation.
13 Santhuff was not interviewed as part of any investigation into his May 2016 report of
14 retaliation. Capt. Alexander told Santhuff in the May meeting that if he and Lt. Nobach
15 couldn’t get along, “one of you” will be removed from the Section, which Santhuff understood
16 to mean that he would be removed. In early October 2016, after more retaliation, Santhuff
17 reported to internal affairs (OPS) how both the sexual harassment report and his prior report of
18 retaliation to Capt. Alexander were not processed in accordance with WSP’s policies and
19 regulations. The day after Santhuff confirmed these allegations, and others, in writing to OPS,
20 which got forwarded up the chain of command, Santhuff was pushed by Capt. Alexander to
21 transfer out the Aviation Section. Santhuff resigned and promptly requested an exit interview
22 with Human Resources, which provided no relief from the retaliation.
23
24
25

1 Based on the evidence and arguments at trial, the jury will find Defendants liable for its
2 wrongful conduct and will award Detective Santhuff the damages proximately caused by their
3 conduct, including damages for his non-medical emotional harm. *See* WPI 330.81 (stress, loss
4 of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or
5 anguish). Economist Paul Torelli, Ph.D. will testify that Mr. Santhuff, owing to his
6 constructive removal from the Aviation Section, is going to suffer a loss to his pension of
7 \$180,000. He will further opine that based on the flight hours Mr. Santhuff would have accrued
8 had he not been pushed out of the Aviation Section in 2016, Santhuff would have been able to
9 find a fulltime job as a commercial airline pilot post-retirement from the Aviation Section and
10 that he has lost up to \$1.9 million in future earnings from the post-WSP career that he will no
11 longer have the flight hours to qualify for.

13 Detective Santhuff will also ask the jury to recommend to the Court that he be
14 reinstated as a Pilot in Aviation, with protections against further retaliation, in lieu of front
15 pay.² He will further request a recommendation from the jury that the Court should order WSP
16 to suspend Lt. Nobach without pay for 30 days and/or to issue him a civil penalty, in addition
17 to any other equitable relief the Court may deem appropriate. *See* Compl. (Sub # 1), at 23, ¶¶
18 4.5-4.16; *see also*, RCW 49.60.250 (authorizing “order to the state employer to suspend the
19 retaliator for up to thirty days without pay” and imposition of “a civil penalty upon the
20 retaliator of up to five thousand dollars”).

23 //

24 _____
25 ² *See Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 829 P.2d 196 (1992) (discussing special
interrogatories on the alternatives of reinstatement and front pay), *rev'd on other grounds*, 124 Wn.2d 634, 880
P.2d 29 (1994).

II. STATEMENT OF FACTS

1
2 The WSP has an aviation section, which currently maintains and flies seven propeller
3 driven airplanes. Defendant David James Nobach, is a lieutenant with the WSP. Lt. Nobach was
4 in charge of the Aviation Section during the times relevant to this case, and both he and
5 Detective Santhuff are licensed pilots.

A. Santhuff is a Whistleblower Who Suffered Hostile Acts and Other Retaliation

6
7
8 Detective Santhuff was a Trooper Pilot in WSP's Aviation Section from January 2014
9 until October 2016, when he asserts the WSP constructively removed him from that role.

10 Witnesses will testify how everything changed following the February 26, 2016 sexual
11 harassment incident. Washington State Patrol's 2016 regulation manual describes the methods
12 for submitting a report of sexual harassment, including behavior that is "not directed at an
13 individual but is a part of that individual's work environment" ("Third Party Harassment");
14 such reports may be reported orally to the employee's "immediate supervisor or higher, Office
15 Professional Standards (OPS), or Human Resources (HRD)." *See* Exhibit 113 at p. 146-150
16 (§ 8.00.220.I(C); § 8.00.220.III(A)).

17
18 WSP's 2016 regulation manual also describes the methods for submitting a report of
19 improper governmental conduct (how to blow the whistle) and lists who the agency designees
20 are: "The agency designee includes the Deputy Chief, Commander of the Office of Professional
21 Standards, and the Commander of the Human Resources Division." Exhibit 113 at p. 164-166.
22 Captain **Michael Saunders** was the Office of Professional Standards ("OPS") Commander and
23 as such he was one of the persons designated by WSP to receive reports of improper
24 governmental conduct. At the Washington State Patrol, OPS is the name for the "internal
25

1 affairs” unit. At various points, Captain Saunders, the OPS Commander, learned about Trooper
2 Santhuff’s reports concerning Lieutenant Nobach’s improper conduct.

3 Captain Saunders was first informed of Lieutenant Nobach’s misconduct in late March
4 2016. Trooper Santhuff complained about Lieutenant Nobach and his office manager Brenda
5 Biscay’s third-party sexual harassment through the chain of command to his immediate
6 supervisor Sergeant Scott Sweeney. Sergeant Sweeney recalled, “Ryan [brought] up this
7 incident... of Brenda standing behind Jim... kind of shaking her boobs in his head and
8 grabbing his head. Specifically, I don’t remember what he said. I just remember being shocked
9 that that actually happened and Ryan saw that.” Sgt. Sweeny testifies that he confronted Lt.
10 Nobach about Santhuff’s report of inappropriate behavior, and that Lt. Nobach told him he
11 “didn’t recall the incident.” (Lt. Nobach claims that Sweeney “never ever mentioned” that
12 Santhuff claimed he observed Ms. Biscay rubbing her breasts against the back of his neck).
13 Nobach’s denial had the effect of resolving nothing, so in accordance with WSP’s policies,
14 Sweeney took the matter up the chain of command to Captain James Riley.
15
16

17 Sgt. Sweeney testifies that after this reporting, “*Things were different in our office. ...*
18 *It was an uncomfortable environment.... It was uncomfortable for me, and I know it was*
19 *uncomfortable for Ryan.*” Plaintiff Ryan Santhuff testifies similarly:

20 I was experiencing a fairly uncomfortable work environment right after the sexual
21 harassment report was made, and not just me, ***the entire section was feeling the***
22 ***uncomfortable environment***, you know, and especially -- especially directed at
23 Sergeant Sweeney and I, and the tension was extreme and Sergeant Hatteberg was
24 trying to work as a mediator between me ... Lieutenant Nobach.

25 According to Captain Johnny Alexander (Lieutenant Nobach’s boss), Capt. Alexander
was informed that Lieutenant Nobach participated in “improper conduct” with Ms. Biscay on

1 March 29, 2016. On March 30, Cap. Alexander issued an 095 to Lt. Nobach. “An 095 is a
2 [written] counseling document that would be issued to employees for positive or negative job
3 performance.” “An 095 is basically documenting a conversation or counseling. It could also be
4 a form of praising an employee for an act.” Alexander testified that in terms of progressive
5 discipline, this was one level above oral counseling (the lowest form of progressive discipline)
6 and that above “an 095“ would be a verbal reprimand, written reprimand, and more severe
7 forms of discipline like unpaid suspensions and termination. However, the WSP Administrative
8 Investigation Manual categorizes counseling and verbal reprimands short of a “written
9 reprimand” as “corrective remedial action,” rather than discipline. Exhibit 135, at 4-2.

10 Captain Alexander testified that prior to issuing the 095s to Nobach and Biscay, he
11 consulted with “the Office of Professional Standards and the Human Resource division”—
12 specifically, “Captain Mike Saunders,” and that Captain Alexander “mentioned [to Captain
13 Saunders] that the witness to the event ... was Trooper Santhuff.” Captain Saunders
14 corroborates this. Capt. Saunders testified that “*Lieutenant Nobach wasn’t interviewed
15 because there wasn’t an administrative investigation. It was clear the allegations were true.*”

16 Santhuff has testified how the actions taken by WSP did nothing to make the situation
17 better:

18 “Their response just created major turmoil within aviation. Not just with me, but
19 like [Chris] Noll. I mean, everybody in there recognized that something was
20 going on. ... The lieutenant wouldn't talk to me. If anything, he'd just kind of like
21 glare at me as I walked by. The same with the secretary [Ms. Biscay]. Instead of
22 like a phone call, she'd send me an e-mail instead of transferring the call. She
23 didn't want to talk to me. She didn't want to even see me.

24 In his deposition, Santhuff went into detail about how Sgt. Hatteberg sought to
25 intervene and what flowed from that.

And there was a time where Hatteberg came into the pilots’ office and two other
pilots, Jayson Caton and Chris Noll, and I were in the pilots’ office and Hatteberg

1 came in and was **basically demanding that I go apologize to Nobach** so we can
2 move past the-- this reporting of the sexual harassment incident between Jim and
3 Brenda. ... And Jeff [**Hatteberg**], **he breaks down**, and Chris Noll and -- and
4 Jason Caton and I are literally looking at each other like holy [cow] ... what is
5 going on.... I felt guilty that he felt that way and I just said, "Wow, Jeff, I'll go
6 talk to Nobach right now." ... [S]o I go down to Nobach's office and I knock on
7 the door and... I said, "I think you and I need to have a talk, we need to hash this
8 out." ... I grab a cup of coffee for myself, I walk in, we're sitting down at this
9 round table in his office, and I said, "I just want you to hear what happened." And
10 so I sit down and I explain to him how the reporting of the sexual harassment
11 went down. I explain to him that months -- **for months people in the aviation**
12 **division believed that him and -- him and his secretary Brenda Biscay were**
13 **having an inappropriate relationship in the workplace.** I explained to him that
14 months before the sexual harassment reporting, I went through Capital Perks
15 Espresso in Olympia ..., and the owner who I got to know over the years from
16 stopping in there asked me, "What's the deal between your boss and that gal he
17 comes in here with?" And I'm like, "Uh, nothing, you know, they just stop in here
18 for coffee." And she's like -- and she's basically saying, "Yeah, are you sure?"
19 She's like, "Because a number of the girls have brought it to my attention" -- a
20 number of her employees has brought it to her attention that she believes that they
21 believe that Nobach is having an inappropriate relationship with -- or what she
22 called it, an affair. And Nobach would at times come into the coffee stand with
23 his wife and daughter on the weekends, and she explained his wife is so nice and
24 she's like, "I just feel really guilty or bad if that's the case, if he's having an affair
25 because that's what it appears to be." And I downplayed it for him even though I
was having my own questions that they would disappear numerous times a week
for hours, at times hours during their shift, you know, and I'm not -- **I'm not just**
speaking for myself. I'm speaking for most of the employees in the section at
that time were questioning what they were doing. ... So that meeting right after
Hatteberg broke down, I'm explaining to Nobach all of these things that had
happened prior to the reporting -- or this incident where Brenda rubbed her
breasts on the back of Nobach and **I'm explaining to him what people in**
aviation think and what I have experienced personally and what I've observed
personally, and he is getting more and more and more angry, and it gets to the
point where he starts yelling at me. And he had a stack of papers on his -- on his
desk which I believe were -- had to do with the sexual harassment complaint, and
he referenced them as we were talking and -- but I never saw them, he had them
upside down, but he referenced them as we were talking about this sexual
harassment complaint, and he says to me -- as he's getting angry about what I'm
telling him, he says to me, "God damn it, if I'm going to be held accountable for
this shit then you and everybody else here will be too." And I'm like, "Whoa,"
like, "Whoa, Jim, I'm not here to upset you. I'm here to lay this out on the table so
we can move past this and I just want -- I want to clear the air so we can move
past this because your sergeant is up there crying in the office because he can't

1 handle the stress," and Jesus, you know, I can't even explain because I -- you
2 know, I can't even put into words what I was experiencing and how I felt during
3 this time frame. It's -- you know, the stress levels that I dealt with were -- I had
4 never experienced this before....

5 In the spring of 2016, "around the same time that the 095 was issued," Capt., Alexander
6 testifies that Trooper Santhuff began to claim, and maintained from that point forward, that Lt.
7 Nobach was retaliating against him "because [Trooper Santhuff] was the witness who
8 reported" on him. This report of retaliation was provided to the OPS Commander, Captain
9 Saunders. The jury will further hear how in a meeting with Capt. Alexander on May 20, 2016,
10 Capt. Alexander shut Santhuff down and stopped him from discussing the retaliation he
11 claimed started after the sexual harassment incident got reported.

12 Some of the retaliation against Santhuff that went unresolved included, but was not
13 limited to:

- 14 • Lt. Nobach at various times refused to talk to Trooper Santhuff, avoided him,
15 and his tense body language and facial expressions indicated that he was
16 extremely angry at Trooper Santhuff
- 17 • On April 1, 2016, during the morning briefing, Lt. Nobach read from papers,
18 including the policy against sexual harassment, and directed the Aviation
19 Section employees that inappropriate office conduct would not be tolerated. As
20 Lt. Nobach gave this directive, he stared at Trooper Santhuff in an effort to
21 intimidate him.
- 22 • Lt. Nobach subjected Trooper Santhuff to non-standard flight training (right seat
23 training), made changes in the training environment, and lied about a flight in
24 order to make Trooper Santhuff appear as if he was a failing pilot. A record that
25 Trooper Santhuff was failing training could give Lt. Nobach a pretextual basis
to remove him from the Aviation Section.³

³ As to the evaluation of Santhuff's flying, Nobach admits that he has the ability to make any pilot look bad if he wants to. At his deposition he was asked about his ability to affect how well a pilot does during a "check ride" or a training ride when he is doing the evaluation.

Q. All right. Now, would you agree with me that you can -- you as the instructor -- you can affect how well a person flying the plane does based on how quickly you give them things to do? ...

A. Just like any field, **you can bury anybody if you want to.** I can sit here and start speaking extremely fast and get in front of the court reporter so...

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- Santhuff’s workload was increased to the point where he did not have time within his shift to complete the work in line with Lt. Nobach’s stated expectations. Santhuff asked Sgt. Sweeney to schedule out Santhuff’s day to complete all expectations and the Sergeant could not. Santhuff nevertheless continued to be verbally reprimanded for not meeting all of Lt. Nobach’s stated expectation;
 - Santhuff’s breaks and work activity began to be closely timed by Lt. Nobach and Ms. Biscay;
 - Sgt. Hatterberg documented alleged performance issues of Santhuff that were stale; meaning he was documenting events that allegedly took place months earlier and which he hadn’t deemed important enough to document at the time.
 - Sgt. Hatterberg also gave Trooper Santhuff an unwarranted 095 permanent counseling record in September 2016 that related to a scheduling mishap that Trooper Santhuff did not cause and for which Ms. Biscay was most likely at fault.
 - Santhuff became ostracized by Aviation Section employees. He went to the hanger to chat with the assembled employees before the 8 o’clock start of the work day as he had done many times before. Upon arriving, the persons who usually would chat with him all dispersed upon his approach.

15 Chris Noll will testify how there was a change in Nobach’s behavior that bled into his
16 treatment of nearly everyone. Noll will testify that Lt. Nobach said words to the effect, that “*if I*
17 *have to go this*” (a half-day sexual harassment training with a private facilitator), “*then*
18 *everyone has to go.*” In mid-July 2016, the entire Aviation Section attended the half-day sexual
19 harassment training that was due to Nobach and Biscay’s misconduct. During the half-day
20 training, Trooper Santhuff was required to participate in interactive exercises with both Lt.
21 Nobach and Ms. Biscay. Chris Noll will testify how “bizarre” it was for WSP to send the entire
22 section to this half-day sexual harassment training—as State government employees, they had
23
24

25 Q Okay. And you can do that for pilots as well, right?
A Any field, yes.

1 all already completed mandatory sexual harassment training.⁴

2 In September 2016, through Plaintiff's union steward, Kenyon Wiley, he again reported
3 and provided information about Lt. Nobach's misconduct and the retaliation. On October 3,
4 2016, Detective Sgt. Bruce Maier with OPS interviewed Santhuff. Det. Maier did not record
5 his interview of Santhuff or the other witnesses he interviewed for his investigation, which was
6 unusual for an OPS investigation. On October 7, 2016, Capt. Alexander directed Santhuff
7 through Sgt. Sweeney to stop "doing your own investigation" within Aviation. When Santhuff
8 asked Sgt. Sweeney what he meant, he was told that Capt. Alexander felt Santhuff was doing
9 things that were making people feel "uncomfortable." On or about October 10, 2016, Capt.
10 Alexander and Lt. Nobach had a meeting with all personnel within the Aviation Section. Capt.
11 Alexander advised everyone that OPS was conducting an investigation into accusations made
12 by an employee and to not interfere with the investigation in any way. This meeting appeared
13 intended to further ostracize Santhuff from the other Section employees.

14 On or about October 19, 2016, Santhuff's union steward, Mr. Wiley advised him that
15 he had spoken with Capt. Saunders (the OPS commander) and that it was his understanding
16 that none of the matters Santhuff had reported were going to be addressed. Thus, on October
17 20, 2016, Santhuff emailed Det. Sgt. Maier in OPS to confirm in writing the substance of their
18 October 3rd in-person meeting. In this confirming email, Santhuff reiterated the four (4)
19 specific concerns he had raised in their previous meeting:

- 20 (1) "[H]ow the sexual harassment situation was handled well outside WSP policy"
21 (Santhuff specifically asked OPS to "investigate why the sexual harassment
22 complaint was not handled per policy";

24 ⁴ Forcing Santhuff, Sgt. Sweeney, and the other section members to attend an awkward and "interactive" re-
25 training effort with Lt. Nobach and Ms. Biscay (the only two persons who were alleged to and/or found to have
engaged in inappropriate behavior) was also action that was "inconsistent compared to [training] actions taken
before" Santhuff and Sweeney engaged in protected activities. *See* RCW 42.40.050(1)(a)(xv).

- 1 (2) How Santhuff “made a retaliation complaint to Captain Alexander in May, which
2 was dismissed without” any investigation, again contrary to WSP policy
3 (Santhuff specifically asked OPS to investigate the retaliation and “hostile work
4 environment”);
- 5 (3) How “Lieutenant Nobach intentionally refus[ed] to provide the Governor with a
6 transport flight upon request”; and
- 7 (4) How there had been a “deletion of emails to avoid a pending public disclosure
8 request.”

9 See Trial Exhibit 98 (October 20, 2016 email, reiterating the issues they discussed October 3rd).

10 Although his email was circulated to Capt. Saunders and other top managers at WSP,
11 Santhuff received no response to the detailed October 20th email to OPS Det. Sgt. Maier, and
12 WSP took no disciplinary action against Lt. Nobach or Capt. Alexander based on the reported
13 improper government actions Santhuff reported in the Fall of 2016. See, e.g., Exhibit 96 (on
14 October 17, 2016, Capt. Alexander wrote to Lt. Nobach, “Although a recent Preliminary
15 Investigation revealed you did not commit an agency policy violation, information was
16 presented suggesting the need for better communication skills on your behalf.”).

17
18 On October 20, 2016, Ms. Biscay told Santhuff that she had been ordered to lock all
19 cabinets in the office. The cabinets contained documents that Santhuff routinely referenced for
20 daily tasks. When he asked why he was now being locked out, she had no explanation other
21 than that she was just following orders.

22
23 The next day, October 21, 2016, Captain Alexander had a meeting with Santhuff. In the
24 meeting Capt. Alexander appeared upset and told Santhuff that he did not appreciate all of the
25 information that Santhuff had told OPS, and that he had heard Santhuff was considering leaving

1 the Aviation Section, which Trooper Santhuff replied was not true. Capt. Alexander ordered
2 Santhuff that “*if [he] wanted to stay in aviation [he] had to let everything go that’s happened*
3 *in the past.*” Capt. Alexander couched his words by saying, “I’m not telling you that we want
4 you out of the section. ... I’m not telling you we want you to leave aviation,” but Plaintiff took
5 this as “speaking out of both sides of his mouth” given Alexander’s directive to Santhuff that he
6 “if [he] want[s] to stay ... [he’s] got to let everything go....”

7
8 Fearful of further damage to his career, as well as for his well-being and safety, Trooper
9 Santhuff felt forced to resign and requested an immediate transfer out of the Aviation Section
10 and asked for a meeting with the Captain of Human Resources. On October 26, 2016, Santhuff
11 had an exit interview with HR, Capt. Travis Mathesen and Lt. Matagi. He explained the Sexual
12 Misconduct Incident, which HR advised they were never notified about, despite the WSP
13 policies requiring HR to be notified. Trooper Santhuff described some of the retaliatory acts he
14 experienced and explained how the OPS investigation was not conducted per policy. Capt.
15 Mathesen said he would look into Santhuff’s complaints and would follow-up with him.
16 However, Santhuff never received any follow-up. The following day, Capt. Mathesen posted a
17 whistleblower policy in the daily bulletin that removed himself and the OPS Commander as
18 persons designated for receipt of whistleblower complaints.

19
20 After Trooper Santhuff’s departure from the Aviation Section, Capt. Alexander
21 threatened that if Trooper Santhuff continued to push the issues he reported, he would be
22 investigated for “truthfulness,” which could be career ending. If there were any basis for his
23 threat, then Alexander was obliged by WSP’s Regulations to investigate the issue of Mr.
24
25

1 Santhuff's truthfulness. However, there was no justification for the threat, so no investigation of
2 Santhuff ever occurred.

3 In February 2017, Sgt. Hatteberg met with Santhuff and gave him an unwarranted,
4 adverse Job Performance Appraisal (JPA) for July 2016 - October 2016. Santhuff requested
5 changes to the narrative, scoring, and for the prior 095 to be removed. Sgt. Hatteberg refused.
6 Santhuff grieved the review, but his grievance and appeal were denied.

7
8 In August 2017, in a meeting with Capt. Alexander to discuss the results of an
9 investigation into Trooper Santhuff's report regarding the Email Destruction Incident, Capt.
10 Alexander told Trooper Santhuff that he "did not leave Aviation on good terms." Yet, after
11 Santhuff left Aviation, he returned to field operations working highway patrol in the Olympia
12 Area, before he was promoted to Detective in July 2018 owing to his talent and good work.

13 III. ARGUMENT AND AUTHORITY

14 A. Plaintiff Will Prevail on His Claim of Whistleblower Retaliation

15 1. Santhuff Is a Whistleblower

16
17 RCW 49.60.210(2) provides, "It is an unfair practice for a government agency or
18 government manager or supervisor to retaliate against a whistleblower as defined in chapter
19 42.40 RCW." Whistleblower retaliation claims are to be determined under the unique statutory
20 framework outlined in the State Whistleblower Protection Act. *See* RCW 42.40.050.⁵ Under
21 RCW 42.40.050(1)(a), "Any person who is a whistleblower, as defined in RCW 42.40.020, and
22

23
24 ⁵ There are no published Washington appellate decisions interpreting RCW 42.40.050. The only published
25 decision substantively discussing RCW 42.40.050 concerns the retroactivity of the legislature's 1992
amendment. *See Bayless v. Cmty. Coll. Dist. No. XIX*, 84 Wn. App. 309, 317, 927 P.2d 254 (1996) (finding
the statute to be remedial and retroactive).

1 who has been subjected to workplace reprisal or retaliatory action is *presumed* to have
2 established a cause of action for the remedies provided under [WLAD].”

3 The statute defines “whistleblower” broadly. Whistleblower means an “employee who
4 in good faith **reports** alleged improper governmental action to the auditor or other public
5 official, as defined in subsection (7) of this section.” RCW 42.40.020(10)(a)(i). A person is
6 also a whistleblower when they are “**perceived by the employer as reporting, whether they**
7 **did or not.**” RCW 42.40.020(10)(a)(ii). The term whistleblower is defined to also include:

8 “An employee who in good faith **provides information** to the auditor or other
9 **public official,**” and

10 “**an employee who is believed to have ... provided information** to the auditor
11 or other **public official** ... but who, in fact, has not reported such action or
12 provided such information.

13 RCW 42.40.020(10)(b)(i) (emphasis added); *accord* Pl.’s proposed Jury Instruction No. 14.

14 The definition of “public official” includes “individuals designated to receive
15 whistleblower reports by the head of each agency.” RCW 42.40.020(7); *accord* Pl.’s proposed
16 Jury Instruction No. 15. As stated above, WSP designated OPS Commander Captain Saunders
17 to be a public official during the relevant time period and he was informed of Santhuff’s
18 reports of improper conduct involving Lieutenant Nobach at various points.

19 The definition of “improper governmental action” includes any action by an employee
20 undertaken in the performance of the employee’s official duties “[w]hich is in violation of
21 federal or state law or rule, if the violation is not merely technical or of a minimum nature,” as
22 well as “gross mismanagement.” RCW 42.40.020(6)(a). Capt. Saunders in his deposition
23 admitted that the incident involving Ms. Biscay rubbing her breasts against Lt Nobach was
24 reported to him in March 2016, that it involved “totally inappropriate” conduct which reflected
25

1 “gross mismanagement,” and that he agreed Santhuff was “the whistleblower” with respect to
2 reporting the incident.

3 The matters that Santhuff later reported to OPS in Fall 2016, as documented by Plaintiff
4 in Exhibit 98, similarly show him reporting improper governmental action, in the form of:

- 5 (1) How Capt. Alexander did not conduct a formal investigation into the unprofessional
6 and sexualized conduct between Nobach and Biscay, in violation of WSP’s
7 Regulations and Rules;
8
9 (2) How Capt. Alexander did not conduct a formal investigation into the allegations
10 made by Santhuff in May 2016 concerning retaliation by Lt. Nobach;
11
12 (3) How Lt. Nobach refused to provide the Governor with transport flights upon
13 request, based upon pretextual “maintenance issues”; and
14
15 (4) How there had been a “deletion of emails to avoid a pending public disclosure
16 request,” in violation of RCW 42.56.100 (“If a public record request is made ... the
17 agency... shall retain possession of the record, and may not destroy or erase the
18 record until the request is resolved.”).

19 *See* Trial Exhibit 98 (October 20, 2016 email, reiterating the issues they discussed October 3rd).

20 **2. Santhuff Suffered Reprisal**

21 Under the State Whistleblower Protection Act, “reprisal or retaliatory action” means,
22 “**but is not limited to**, any of the following:

- 23 (i) **Denial of adequate staff to perform duties;**
24 (ii) Frequent staff changes;
25 (iii) Frequent and undesirable office changes;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- (iv) Refusal to assign meaningful work;
- (iv) Unwarranted and unsubstantiated [corrective action, disciplinary action] or unsatisfactory performance evaluations;**
- (v) Demotion;
- (vi) Reduction in pay;
- (vii) Denial of promotion;
- (ix) Suspension;
- (x) Dismissal;
- (xi) Denial of employment;
- (xii) **A supervisor or superior behaving in a hostile manner toward the whistleblower, or encouraging coworkers to behave in a hostile manner toward the whistleblower;**
- (xiii) A change in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish;
- (xiv) **Any other action that is inconsistent compared to actions taken before the employee engaged in conduct protected by this chapter, or compared to other employees who have not engaged in conduct protected by this chapter.”**

See RCW 42.40.050(1)(b) (modified to delete “letters of reprimand” and to substitute in its place “corrective action, disciplinary action”); accord Pl.’s proposed Jury Instruction No. 19.

1 The jury will readily find that the hostile and adverse acts taken against Santhuff that
2 are discussed here and which will be presented at trial, qualify as “reprisal or retaliatory action”
3 for purposes of RCW 42.40.050(1)(a).

4 **3. Defendants Cannot Meet the Burden of Proof for Their Affirmative Defense**

5 With the jury finding that Santhuff is a whistleblower and that WSP’s managers took
6 hostile or adverse actions against him, the jury will find that Santhuff has met his statutory
7 burden of proof and that he is therefore “presumed to have established a cause of action for the
8 remedies provided under chapter 49.60 RCW.” *Id.* As stated in the Plaintiff’s proposed Jury
9 Instruction No. 20, “If Detective Santhuff proves both of these elements, you must find for
10 Detective Santhuff *unless* the State proves by a preponderance of the evidence that:
11

- 12 (i) the State’s action or actions were justified by reasons unrelated to the
13 employee’s status as a whistleblower and
14 (ii) improper motive was not a substantial factor.”
15

16 *Id.*, citing RCW 42.40.050(1)(2) (modified to conform to the facts and delete extraneous
17 language).

18 Given the record presented, the jury will find that the State fails to meet its affirmative
19 defense and cannot rebut the presumption of retaliation.

20 **B. Plaintiff Will Prevail on His Retaliation Under the WLAD**

21 WLAD “create[s] a private cause of action against any employer engaging in an
22 ‘unfair practice.’” *Jin Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, 189 Wn.2d 607, 612, 404
23 P.3d 504 (2017) (quoting *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 489, 325 P.3d 193
24 (2014)). RCW 49.60.210(1) provides, in relevant part, “It is an unfair practice for any
25

1 employer... to discharge, expel, or otherwise discriminate against any person because he or
2 she has opposed any practices forbidden by this chapter.” Generally, in a WLAD retaliation
3 case, an “employee proves causation ‘by showing that retaliation was a substantial factor
4 motivating the adverse employment decision.’” *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403,
5 412, 430 P.3d 229 (2018) (quoting *Allison v. Hous. Auth.*, 118 Wn.2d 79, 96, 821 P.2d 34
6 (1991)). “To establish a prima facie case of retaliation, an employee must show three things:
7 (1) the employee took a statutorily protected action, (2) the employee suffered an adverse
8 employment action, and (3) a causal link between the employee’s protected activity and the
9 adverse employment action.” *Id.* at 411 (boldface added) (quoting *Currier v. Northland*
10 *Servs., Inc.*, 182 Wn. App. 733, 742, 332 P.3d 1006 (2014)).

12 **1. Plaintiff Engaged in Protected Opposition Activity Under the WLAD**

13 The jury will find Trooper Santhuff engaged in protected opposition activity when he
14 reported his sexualized workplace and allegations of “third-party sexual harassment” up the
15 chain of command, consistent with WSP’s procedures. This opposition activity led to an 095
16 being issued to Lieutenant Nobach and also led WSP to require sexual harassment re-training
17 in April and July 2016, including a discussion of “3rd party harassment” . *See* Exhibits 60 and
18 76.

20 “[A]n employee who opposes employment practices reasonably believed to be
21 discriminatory is protected by the “opposition clause” whether or not the practice is actually
22 discriminatory.” *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 619, 60 P.3d 106
23 (2002) (quoting *Graves v. Dep’t of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994)); accord
24 Pl.’s proposed Jury Instruction No. 7 (incorporating the “reasonable belief” standard based on
25

1 WPI 330.05). “The term ‘oppose,’ undefined in the statute, carries its ordinary meaning: ‘to
2 confront with hard or searching questions or objections’ and ‘to offer resistance to, contend
3 against, or forcefully withstand.’” *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 848, 292
4 P.3d 779 (2013) (quoting Webster's Third New International Dictionary 1583 (2002)). Based
5 on the record, the jury will find that Santhuff engaged in protected opposition activity under the
6 WLAD when he went against sexualized conduct in the workplace that he witnessed between
7 his boss, Lt. Nobach, and Ms. Biscay.

8
9 The jury will similarly find that Santhuff engaged in protected opposition activity
10 under the WLAD when he reported retaliation to his Sergeants and to Capt. Alexander that he
11 claimed stemmed from report of sexualized conduct in the workplace between his boss, Lt.
12 Nobach, and Ms. Biscay.

13 **2. Plaintiff Suffered an Adverse Employment Action Under the WLAD**

14 For purposes of the WLAD retaliation claim, “the term ‘adverse’ means unfavorable or
15 disadvantageous. Under the WLAD, an employment action is adverse if it is harmful to the
16 point that it would dissuade a reasonable employee from making a complaint of discrimination,
17 harassment, or retaliation. Whether a particular action is adverse is judged from the perspective
18 of a reasonable person in Detective Santhuff’s position.” *See* Pl.’s proposed Jury Instruction
19 No. 8 (citing WPI 330.06).

20
21 The jury will readily find that the hostile and adverse acts taken against Santhuff that
22 are discussed here and which will be presented at trial, qualify as “adverse employment actions”
23 as such term is defined in WPI 330.06
24
25

1 **3. Retaliation Was a Substantial Factor in Plaintiff’s Mistreatment**

2 Proof of causation under the WLAD’s substantial factor analysis “is not an all or
3 nothing proposition,” as the State “may be motivated by multiple purposes” and have
4 “legitimate” purposes, but “still be liable.” *See, e.g., Rickman v. Premera Blue Cross*, 184
5 Wn.2d 300, 314 (2015); *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 447 (2014). *Accord* Pl.’s
6 proposed Jury Instruction No. 9 (“ ‘Substantial factor’ means a significant motivating factor in
7 bringing about the employer’s decision. ‘**Substantial factor**’ does not mean the only factor
8 or the main factor in the challenged act or decision.”), citing WPI 330.01.01.

9 The jury will be able to infer the influence of an unlawful motive by, among other
10 things, finding Santhuff’s testimony credible about the hostile statements that Nobach made to
11 him following his report (*i.e.*, “*if I’m going to be held accountable for this **** ... then you*
12 *and everybody else here will be, too.*”).

13 The jury will also draw the causal link based on finding that Nobach’s testimony on
14 many material issues lacks credibility. *See, e.g., Hill v. BCTI Income Fund-I*, 144 Wn.2d 172,
15 184 (2001) (“the trier of fact can reasonably infer from the falsity of the explanation that the
16 employer is dissembling to cover up a discriminatory purpose” (quoting *Reeves v. Sanderson*
17 *Plumbing Prods.*, 530 U.S. 133, 147-48 (2000)). “[I]t is permissible for the trier of fact to infer
18 the ultimate fact of discrimination from the falsity of the employer’s explanation,” and to
19 “consider a party’s dishonesty about a material fact as affirmative evidence of guilt.” *Hill*, 144
20 Wn.2d at 184 and *Reeves*, 530 U.S. at 147.

21 The close temporal proximity between Santhuff’s protected activity and Lt. Nobach’s
22 hostile acts against Santhuff will also permit the jury to draw the necessary causal link.
23

1 *See Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 415-16 & n.9-10 (2018) (“it is
2 a reasonable inference that [adverse] actions were in retaliation” when they “followed shortly
3 thereafter,” and characterizing adverse performance review that followed more than six months
4 after Cornwell told her manager about her lawsuit as following “shortly thereafter”).

5 **C. Defendant Nobach Aided and Abetted in WSP’s Retaliation**

6 “It is an unfair practice for any person to aid, abet, encourage, or incite the commission
7 of any unfair practice, or to attempt to obstruct or prevent any other person from complying
8 with the provisions of this chapter or any order issued thereunder.” RCW 49.60.220; accord
9 Pl.’s proposed Jury Instruction No. 12.

11 Once the jury finds WSP liable for retaliation, it will have no difficulty finding that Lt.
12 Nobach aided, abetted, encouraged or incited the unfair practice and thus will hold him liable
13 on the aiding and abetting claim.

14 **D. Mr. Santhuff Has Suffered Economic and Non-Economic Damages Caused by The**
15 **Defendants**

16 At trial, Detective Santhuff will testify about the non-medical damages outlined in the
17 Washington Patterned Instructions. WPI 330.81 (6th ed.) which provides in part:

18 If you find for the plaintiff, you should consider the following elements:

19 ...

20 (2) The reasonable value of lost future earnings and fringe benefits; and

21 ...

22 (4) The emotional harm to the plaintiff caused by one or both of the
23 defendants’ wrongful conduct, including pain and suffering, emotional
24 distress, loss of enjoyment of life, humiliation, personal indignity,
25 embarrassment, fear, anxiety, and/or anguish experienced and with
reasonable probability to be experienced by the plaintiff in the future.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

As to the non-medical emotional harm damages outlined above, medical testimony is not required to obtain these damages under RCW 49.60.210: ““The plaintiff, once having proved discrimination, is only required to offer proof of actual anguish or emotional distress in order to have those damages included in recoverable costs pursuant to RCW 49.60.”” *Bunch v. King Cnty. Dep't of Youth Servs.*, 155 Wn.2d 165, 180 (2005) (quoting *Dean v. Municipality of Metro. Seattle–Metro*, 104 Wn.2d 627, 641 (1985)). The Supreme Court has held that, “[t]he distress need not be severe” for the plaintiff to recover. *Id.* In *Bunch*, the Supreme Court opined that “the evidence of emotional distress is limited, but it is sufficient to support an award of noneconomic damages. Bunch testified that he was overwhelmed by the discrimination, and that he was depressed and angry. The county discriminated against him over a six-year period, which is substantial.” *Id.* The Court noted that the “record contains numerous instances in which he was disciplined for petty offenses that others committed with impunity. He now works for significantly less pay with minimal benefits. He had to explain to his family why he was fired. All of these facts provide a basis from which the jury could infer emotional distress.” *Id.* Bunch was awarded \$260,000 in noneconomic damages without the benefit of medical testimony or medical records, an amount affirmed by the Court. *Id.* at 167. Here, the plaintiff, like Mr. Bunch, will testify about his non-medical damages.

1 The non-medical emotional harm damages will be proved through testimony regarding
2 plaintiff's level of stress, humiliation, etc. on a scale of 1-10.

3 Recent cases litigated by the Sheridan Law Firm show comparable or higher damages.
4 In 2019, in *Robb v. Benton and Franklin Counties*, Ms. Robb proved that she was retaliated
5 against and wrongfully terminated for opposing efforts to privatize the Crisis Response Unit in
6 2015, because twenty years before, it was privatized and became a monopoly, requiring the
7 counties to intervene to protect the citizens from high costs and poor service. The jury found:
8

- 9 • The Counties wrongfully discharged Ms. Robb for reporting improper
10 governmental actions; and
- 11 • The Counties retaliated against Ms. Robb by terminating her for reporting sexual
12 harassment

13 The jury awarded her \$1.5 Million (\$541,000 in non-medical emotional harm), and the Court
14 awarded Ms. Robb an additional \$965,100.75 in attorney fees and costs.

15 In 2018, in *Trussler v. State*, Ms. Trussler proved that she was retaliated against for
16 opposing discrimination, and the jury awarded her \$1,200,000 (\$600,000 in non-medical
17 emotional harm). The Honorable Jim Rogers presided over the three-week jury trial. The jury
18 deliberated for a total of two days before reaching its verdict. The jury also recommended that
19 Ms. Trussler be reinstated. The State paid about \$500,000 in attorney fees and costs and paid
20 another \$500,000 so she would not come back to work.

21 In 2017, in *Atwood v. MSA and Steve Young*, at trial Ms. Atwood was interviewed by
22 investigators about claims against her supervisor, and she truthfully recounted his improper
23 behavior and his use of federal work time to work on his job as Kennewick's mayor. She was
24 fired a few days later. At trial, she proved that:

- 25 • MSA engaged in retaliation against Ms. Atwood;

- MSA Vice President Steve Young aided and abetted in MSA's retaliation against Ms. Atwood;
- MSA wrongfully discharged Ms. Atwood for whistleblowing;
- MSA engaged in gender discrimination against Ms. Atwood;
- MSA Vice President Steve Young aided and abetted in MSA's gender discrimination

The jury awarded Ms. Atwood damages in the amount of \$8.1 million of which \$2.1 million was lost wages and \$6 million was for emotional harm damages, which was based on nonmedical and medical testimony. Plaintiff obtained another +\$1.5 million in fees, costs, and the tax adjustment, and a \$300,000 multiplier for counsel's work on the case. The case remains on appeal.

In 2015, in *Chaussee v. State*, the jury awarded Mr. Chaussee \$1 million for emotional harm proximately caused by the State's whistleblower retaliation (he was a perceived whistleblower not the actual whistleblower). At the time of the jury verdict, Mr. Chaussee was still employed working at the ferries, he had no economic damages, and claimed no medical condition caused by the State's retaliation. His damages were all nonmedical emotional harm within the framework of Washington Patterned Jury Instruction 330.81. He was also awarded another \$381,000 in attorney fees and costs.

In 2016, in *Gillespie v State*, Mr. Gillespie was the actual whistleblower in the *Chaussee* case, and also experienced retaliation and nonmedical emotional harm. His case against the State settled for \$700,000 soon after he filed the lawsuit.

In 2015, in *Walter Tamosaitis v. URS E&C*, No. 1410006928, was a case involving whistleblower retaliation at Hanford, which caused the defendant to remove him from his job duties and to assign him to a room with no windows and a job with no responsibilities.

On October 2, 2013, URS E&C terminated Dr. Tamosaitis in retaliation for having

1 raised performance and safety issues in 2010 and having subsequently filed a complaint with
2 the Department of Labor, then in federal court in the Eastern District of Washington under the
3 ERA’s “kick out” provision, and for having testified truthfully before Congress. In 2015, after
4 winning an appeal of a summary judgment dismissal, the case settled for \$4.1 million—medical
5 and non-medical emotional harm damages were alleged.

6 Trooper Santhuff, like other SLF clients, could easily be awarded \$1 million or more in
7 emotional harm. And under *Bunch*, whatever he is awarded cannot be touched on appeal.

8 As for his economic losses, Plaintiff’s expert, Economist Paul Torelli, Ph.D. will
9 testify that Mr. Santhuff, owing to his constructive removal from the Aviation Section, is
10 going to suffer a loss to his pension of \$180,000. He will further opine that based on the
11 flight hours Mr. Santhuff would have accrued had he not been pushed out of the Aviation
12 Section in 2016, Santhuff would have been able to find a fulltime job as a commercial
13 airline pilot post-retirement from the Aviation Section and that he has lost up to \$1.9
14 million in future earnings from the post-WSP career that he will no longer have the flight
15 hours to qualify for.
16
17

18 **E. The Court May Order Reinstatement as a Form of Injunctive Relief**

19 Detective Santhuff will ask the jury to recommend to the Court that he be reinstated as
20 a Pilot in the Aviation Section, with protections against further retaliation, in lieu of the front
21 pay award. There is little case law regarding granting or denying injunctive relief pursuant to
22 the WLAD. However, federal cases interpreting Title VII are “persuasive authority for the
23 construction of RCW 49.60”.⁶ In *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552,
24

25 _____
⁶ *Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wn.2d 675, 678 (1986).

1 829 P.2d 196 (1992), *rev'd on other grounds*, 124 Wn.2d 634, 880 P.2d 29 (1994), the Court of
2 Appeals described how the right to reinstatement under the WLAD derives from federal law:

3 The Washington law against discrimination provides that all remedies
4 authorized by the United States Civil Rights Act of 1964, 42 U.S.C. §
5 2000a *et seq.*, are available to plaintiffs in actions under the law against
6 discrimination.⁷ RCW 49.60.030(2). Title VII provides for the remedy of
7 reinstatement where appropriate. 42 U.S.C. § 2000e-5(g). The remedial
8 provision of the law against discrimination is to be liberally construed in
9 order to encourage private enforcement. *Blair v. Washington State*
10 *Univ.*, 108 Wn.2d 558, 570, 740 P.2d 1379 (1987).

11 ... [S]everal Title VII cases hold[] that successful plaintiffs presumptively
12 are entitled to reinstatement, which is a basic element of the ‘make whole’
13 remedy. *Darnell v. Jasper*, 730 F.2d 653, 655 (11th Cir.1984); *Sowers v.*
14 *Kemira, Inc.*, 701 F.Supp. 809, 827 (S.D.Ga.1988). The decision whether
15 to order reinstatement is discretionary with the trial court. *Taylor v.*
16 *Safeway Stores, Inc.*, 524 F.2d 263, 268 (10th Cir.1975). **Where plaintiffs**
17 **are entitled to reinstatement, but a hostile or otherwise unsuitable**
18 **work environment counsels against it, front pay may be awarded as**
19 **an alternative.** *Sowers*, 701 F.Supp. at 827.

20 *Wheeler*, 65 Wn. App. at 573; *see also Williams v. City of Valdosta*, 689 F.2d 964, 977
21 (1st Cir. 1982) (reinstatement is a remedy to which plaintiff “is normally entitled . . .
22 absent special circumstances”); *Garza v. Brownsville Independent School District*, 700
23 F.2d 253, 255 (5th Cir. 1983) (“reinstatement or hiring preference remedies are to be
24 granted in all but the unusual cases”); *Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 170
25 (2nd Cir. 2002) (noting that under Title VII reinstatement has been interpreted as “the
first choice”); and *Jackson v. City of Albuquerque*, 890 F.2d 225, 233 (10th Cir. 1989)
(reinstatement “is ordinarily to be granted”).

In *Wheeler*, the Court of Appeals ultimately held that, “[b]ecause Wheeler failed to

⁷ *Accord Blaney v. Int'l Ass'n of Machinists And Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 215 (2004).

1 request a segregated verdict or special interrogatories on the alternatives of reinstatement and
2 front pay, the trial court was without a basis for determining whether the jury's verdict
3 included an award of front pay. Thus, the trial court did not abuse its discretion in refusing to
4 order reinstatement." *Id.*, at 574. The same issue will not present itself in Detective Santhuff's
5 case, as plaintiff's proposed jury verdict form will ask the jury to award an amount for front
6 pay, and to separately advise the Court on whether the jury finds reinstatement with protections
7 against further retaliation and discrimination to be an appropriate remedy, "in lieu of the jury's
8 front pay award." Pl.'s proposed Special Verdict Form (Question No. 7).

10 **F. The Court May Order A Civil Penalty and/or Disciplinary Action Against Nobach**

11 Plaintiff will also ask the jury to recommend that the Court should order WSP to
12 suspend Lt. Nobach without pay for 30 days and/or issue him a civil penalty, in addition to any
13 other equitable relief the Court may deem appropriate. *See* Pl.'s Special Verdict Form
14 (Question No. 8); *accord* Compl. (Sub # 1), at 23, ¶¶ 4.5-4.16. The Washington Law Against
15 Discrimination and State Whistleblower Protection Act authorize these remedies. *See* RCW
16 49.60.250 (authorizing "order to the state employer to suspend the retaliator for up to thirty
17 days without pay" and imposition of "a civil penalty upon the retaliator of up to five thousand
18 dollars"); *see also* RCW 49.60.010 ("The provisions of this chapter shall be construed liberally
19 for the accomplishment of the purposes thereof."); *and see* RCW 42.40.050(3) ("Nothing in this
20 section prohibits an agency from making any decision exercising its authority to terminate,
21 suspend, or discipline an employee who engages in workplace reprisal or retaliatory action
22 against a whistleblower. However, *the agency* also *shall implement any order under chapter*
23 *49.60* (other than an order of suspension if the agency has terminated the retaliator).
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DATED this 24th day of August 2020.

THE SHERIDAN LAW FIRM, P.S.

By: s/Mark W. Rose

John P. Sheridan, WSBA No. 21473

Mark W. Rose, WSBA No. 41916

Andra Kranzler, WSBA No. 44098

Justin O. Abbasi, WSBA No. 53582

705 Second Avenue, Suite 1200

Seattle, WA 98104

Phone: 206-381-5949

jack@sheridanlawfirm.com

mark@sheridanlawfirm.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Mark Rose, certify that on August 24, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECR E-Filing system, and served the following persons using the Court’s e-Service application:

ROBERT W. FERGUSON

Attorney General

ANDREW BIGGS

Assistant Attorney General

Office of the Attorney General – Torts Division

800 5th Avenue, Suite 2000

Seattle, WA 98104

Andrew.biggs@atg.wa.gov

TORSeaEF@atg.wa.gov

JenniferO@atg.wa.gov

MargaretK@atg.wa.gov

Attorneys for Defendants

Dated this 24th day of August, 2020.

By: s/ Mark Rose

Mark Rose