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EXPEDITE
 No Hearing Set
 Trial is Set
Date: March 16, 2015
Time: 9:00 a.m.
Judge/Calendar: Gary R. Tabor

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

STEPHEN CHAUSSEE, an individual,

Plaintiff,

vs.

STATE OF WASHINGTON,

Defendant.

Case No.: 11-2-01884-6
Hon. Gary Tabor

PLAINTIFF'S TRIAL BRIEF

I. INTRODUCTION

Plaintiff Stephen Chaussee is a long-time employee of the State of Washington with Washington State Ferries. During his time as Foreman of the Bainbridge Island Eagle Harbor facility, he was responsible for supervising Jack Nannery. Between approximately 2006 and 2008, Nannery engaged in numerous improper governmental actions.

As Chaussee's concerns over Nannery's misconduct grew, he reported them to upper management and sought his managers' assistance. Five weeks later, an

1 anonymous whistleblower complaint was filed with the State Auditor's Office.

2 Chaussee was not the whistleblower, but he was perceived as such by management.

3 After the whistleblower complaint was filed, Chaussee was targeted by upper
4 management, repeatedly retaliated against, and eventually demoted in 2009, allegedly
5 for not accurately verifying Nannery's timesheets in 2008. Chaussee grieved his
6 demotion through his union and prevailed. He has been reinstated, but suffered, and
7 continues to suffer, retaliation as the perceived whistleblower.
8

9 The State is collaterally estopped from raising the same issues it used to justify
10 Chaussee's demotion, which the arbitrator already determined to be invalid.
11 Additionally, manager Day's claim that he saw a handwritten copy of the anonymous
12 whistleblower complaint in May 2009 is raised for the first time in the Motion and its
13 veracity is a genuine issue of material fact. Chaussee requested the SAO investigation
14 files and the whistleblower complaint was not produced because it is confidential.
15

16 **II. STATEMENT OF FACTS**

17 **A. Background**

18 Chaussee was the Foreman for the Carpenter Shop and oversaw Leads
19 Nannery and John Envoldsen. Chaussee was supervised by Bob Orr, the Terminal
20 General Foreman, and at times, Steve Carpine, the Vessel General Foreman. One
21 level above Orr and Carpine was RJ Kelly, the Port Engineer. Kelly reported to Vern
22 Day, Senior Port Engineer, and Day reported to Paul Brodeur, Director of
23 Maintenance, Preservation, and Engineering. Paula Hammond was the Secretary of
24 WSDOT and was charged with receiving whistleblower complaints and working with
25

1 the State Auditor's Office to determine a resolution plan if the SAO found that
2 reasonable cause existed that an improper governmental action at WSDOT had
3 occurred.

4 Stephen Chaussee has been employed by the State of Washington, Washington
5 State Ferries, for over 30 years. He continues to be employed by WSF. In August
6 1996, Chaussee became the Foreman of the Carpenter Shop at the Eagle Harbor
7 Maintenance Facility on Bainbridge Island. For over 13 years, Chaussee worked as the
8 Carpenter Shop Foreman without incident and received positive performance
9 evaluations.
10

11 Chaussee kept a journal of work activities where he contemporaneously took
12 notes on work events and work issues in journal books provided by the State for that
13 purpose.

14 Jack Nannery has been a WSF employee for approximately 30 years as well,
15 and between 1996 and mid-2009, he worked under Chaussee's supervision as the
16 Carpenter Shop Terminal Leadman. For the most part, Nannery, as the Lead, oversaw
17 the Journey level workers.
18

19 The Lead position oversees work done by Journey level workers at various job
20 sites throughout the ferry system. The typical process was that Chaussee and Nannery
21 would meet in the morning to discuss what jobs needed to be done that day and in
22 what order. If there was an emergency job that came in, the priorities would have to be
23 adjusted accordingly. Nannery was not required to come back to the office after
24 visiting his last job site each day. According to Vern Day, Nannery worked out in the
25

1 field and that management had no idea when Nannery actually terminated work for the
2 day. Because the Lead was not required to come back to the Carpenter Shop at the end
3 of the day, and at times, the timesheets needed to be turned into payroll ahead of time,
4 the time keeping system was essentially an honor system and sometimes employees
5 would have to estimate their hours.

6 For approximately 12 years, in addition to his position at WSF, Nannery
7 worked as a volunteer baseball coach, first at North Kitsap High School, and starting
8 in 2008, at Kingston High School.

9
10 In 2006, Chaussee counseled Nannery against using Nannery's WSF truck to
11 drive to baseball games or practices and told Nannery not to do so in the future.

12 Several months later, another employee informed Chaussee that she saw Nannery's
13 WSF truck parked at the baseball field. Later, Chaussee saw Nannery removing the
14 state logo from the side of his vehicle. Chaussee reported Nannery's use of state
15 vehicles to Day. Thereafter, in 2006, Day took away Nannery's use of a WSF vehicle,
16 as well as all other WSF employees' vehicles for commuting.

17
18 By early 2008, it was becoming apparent among the WSF Maintenance
19 Facility staff that Nannery was not working full days because of his baseball coaching
20 schedule. Nannery would show up at the office in his baseball uniform. Chaussee
21 counseled Nannery not to wear his uniform at work unless he was changing at the end
22 of the day. Additionally, Chaussee was receiving reports about Nannery not
23 completing projects or not showing up at projects where he was supposed to work.
24 Chaussee confronted Nannery about these reports and Nannery became extremely
25

1 angry and confrontational; Chaussee did not engage him. Over time, between 2006
2 and 2008, Chaussee developed a belief that Nannery was not working full days.

3 Also in early 2008, an issue arose among the Carpenter Shop staff as to
4 whether employees could flex their time by not taking a lunch break or other breaks
5 and end their shifts early. On February 21, 2008 and June 5, 2008, Carpenter Shop
6 staff meetings were held by Chaussee where employees were informed that they were
7 not able to forego breaks and to leave early. Employees were informed that, according
8 to union contract rules, only 15 minutes before or after a shift could be flexed. Staff
9 members, including Nannery, signed meeting attendance forms to confirm their
10 attendance.
11

12 **B. Chaussee Reports Nannery's Misconduct**

13 On March 28, 2008, Chaussee met with Day, Kelly, and Don Gillespie, the
14 Eagle Harbor Lock Shop Lead, to discuss a proposal to separate the Lock Shop from
15 the Carpenter Shop. During the meeting, Chaussee informed the group that he did not
16 believe Nannery was working full days because of his baseball coaching schedule and
17 that there had been reports of work not being done that was assigned to Nannery. In
18 response to Chaussee's report, Day snickered and stated that there was "money
19 available in the budget" to look into Nannery's conduct. Day told Chaussee that he
20 would look into it and Chaussee believed that Day would handle the situation.
21 However, neither Day nor Kelly ever followed up with Chaussee regarding
22 Chaussee's complaints about Nannery.
23

24 **C. The Whistleblower Complaint is Filed** 25

1 On May 6, 2008, an anonymous whistleblower complaint was filed with the
2 State Auditor's Office alleging that Nannery had used state resources for personal use,
3 that he left work early to fulfill his baseball coaching duties, and that he falsified time
4 sheets to state that he had worked a full day. The filing contains dozens of photos
5 showing Nannery at various baseball games.

6 On the morning of May 14, 2008, an SAO investigator, accompanied by Day,
7 confiscated Nannery's work laptop from the Carpenter Shop office. Chaussee was
8 present in the room when Nannery's computer was taken. Shortly thereafter, all
9 employees at the Eagle Harbor Maintenance Facility heard through rumor or through
10 management that Nannery was under investigation.

11
12 **D. The Retaliation Parallels the SAO Whistleblower Investigation**

13 On May 16, 2008, Chaussee had a flat in the Eagle Harbor Parking lot in the
14 place he always parked. The parking lot is regularly swept for debris because it's a
15 Superfund cleanup sight. So now, the federal government monitors the parking lot.
16 Upon examination, Chaussee found a screw imbedded in the side of his right rear tire.
17 This could only have happened if someone put it there. This happened three more
18 times in the coming year (last time was 9/12/11)—one screw was on the inside side of
19 the tire and two in the tread. A cordless screw gun could easily do this. Such devices
20 are kept on site. Chaussee told Day and Kelly about the incidents, and nothing was
21 done.
22

23
24 On May 19, 2008, Jack Nannery asked questions about Chaussee's views of
25 working through lunch, and taking time at the end of the day. At the time, Chaussee

1 thought nothing of that, but responded that he follows the contract, and suggested he
2 ask Vern.

3 On May 29, 2008, Day met with SAO about the charges against Nannery. In
4 the days before the meeting, Day concerned about the whistleblower investigation,
5 began asking employees the name of the whistleblower. He asked Dave Siebert, a
6 technician working in the Lockshop the names of the whistleblower. Mr. Siebert told
7 Day that it was an inappropriate question. About that time, Day also asked Don
8 Gillespie, lead at the lock shop, who the whistleblower was.
9

10 In May and June 2008, Chaussee received several additional complaints from
11 Maintenance Shop employees related to Nannery not being where he was supposed to
12 be during the workday and not performing work duties.

13 On July 22, 2008, a WSDOT Information Technology employee came into the
14 Lock Shop after hours and asked Chaussee if she could log into Nannery's computer.
15 Chaussee informed her that he could not authorize her to do so, that he had not been
16 informed she would be coming, that it was after hours, and that he was late to leave.
17 Chaussee left and latched the door from the outside. It was a fire door that could not
18 be locked from the inside. The woman remained in the room, which was not locked.
19

20 On July 31, 2008, Day issued Chaussee a Letter of Expectation/Written
21 Warning, finding that Chaussee violated WSF Code of Conduct No. 14, "Discourtesy
22 to Others," for allegedly acting rudely to the IT employee and seemingly locking her
23 in a room.
24
25

1 On September 10, 2008, Chaussee used the restroom aboard the Sealth, but it
2 was not marked and the plumbing was open and it spilled out onto the deck. Chaussee
3 cleaned up the mess as soon as possible.

4 On September 22, 2008, plaintiff returned from vacation to find that his office
5 chair had been removed and in its place was a toilet with toilet paper and simulated
6 waste. Chaussee immediately reported the incident to management, but Kelly
7 responded by joking about it being Chaussee's "throne" and stated that Chaussee
8 could have been written up for the incident on the Sealth. Day stated that the doors on
9 the Sealth should have been taped and tagged, but that someone failed to do so.
10 Nannery denied any involvement in placing the toilet in Chaussee's office.
11 Management did not otherwise get involved or investigate the incident.

13 On September 25, 2008, Chaussee was informed that the cable truck was
14 leaking transmission fluid and overheating at a Superfund site. Chaussee arranged for
15 it to be fixed and asked Nannery who was driving the truck and why it was not
16 checked out. Nannery became defensive. Chaussee reported the problems with the
17 cable truck to Day and Kelly.
18

19 Also on September 25, 2008, Chaussee found another screw in the tire of his
20 personal vehicle while it was parked in the paved employee parking lot. This screw
21 also caused a flat tire. Chaussee had three or four flat tires caused by screws in his
22 tires while parked in the Eagle Harbor parking lot during the few months after the
23 whistleblower complaint was filed. Each of the flat tire incidents was reported to Day
24 and or Kelly.
25

1 On October 2, 2008, Chaussee discussed the issue of the cable truck neglect
2 with Nannery. Later that day, Chaussee met with Day and Kelly regarding the cable
3 truck. Day and Kelly accused Chaussee of talking down to the crew and Day stated
4 that Chaussee could have been written up for the Sealth bathroom accident, though he
5 later admitted the doors should have been taped and locked.

6 On November 18 and 19, 2008, Chaussee informed Kelly of his concerns
7 related to another employee's drinking problem and asked Kelly for assistance. Kelly
8 ignored these requests.
9

10 Another Eagle Harbor employee, Dana Trotten, would sit in his truck and
11 watch Chaussee from 2:45-3:20 pm. Trotten was getting off work before Chaussee and
12 he would leave when Chaussee left work. Chaussee felt intimidated.

13 **E. In March 2009, A Citizen Sends Nannery Baseball Photos Sent To**
14 **WSDOT Management Putting Pressure on Day to Take Action**

15 Mr. Smith sent multiple emails to WSDOT management attaching photos of
16 Nannery at baseball games. This put pressure on WSDOT management to find the
17 whistleblower. Exhibits 55 and 56. These are business records received in the usual
18 course of business, or not offered for truth, only for effect on recipients.
19

20 **F. SAO Investigation Puts Day on Report**

21 On April 1, 2009, SAO investigators met with Day and Nannery, and gave
22 them a draft of the investigative report. The investigation found reasonable cause to
23 believe that improper governmental action had occurred in that Nannery left work
24 early to coach baseball while his timesheets indicated he worked an eight-hour day.
25 The report also indicated that Nannery claimed there was an unwritten agreement for

1 him to do so, but management denied that. Other documents indicated that the senior
2 port engineer (Day) stated it may have been the practice in the past, but was not the
3 practice now, and it was prohibited by the union contract. *This entry essentially put*
4 *Day on report.*

5 On May 11, 2009, the final report was transmitted to WSDOT management.

6 **G. The Beddo/Day Whistleblower Investigation Scapegoats Chaussee (Ex. 71**
7 **& 81)**

8 On May 11, 2009, Ferry Management met to develop a plan to address the
9 findings in the SAO report. Day needed to focus responsibility away from himself, so
10 he focused on Chaussee—the perceived whistleblower. When the SAO report was
11 issued in May 2009, it was not made available to Eagle Harbor Maintenance Facility
12 staff, and Chaussee was not aware of its release. Shortly thereafter, also in May 2009,
13 Jackie Beddo, WSF HR Representative for the Maintenance Shop, approached
14 Chaussee and stated that she and Day would like to ask Chaussee some questions.
15 Chaussee was not informed of the purpose of the May 20, 2009 meeting prior to the
16 meeting and no union representatives were present.

17 On June 5, 2009, the State Auditor sends the 800 page whistleblower file to
18 Kathleen Flynn Mahaffey at WSDOT. Exhibit 74.

19 On June 3, 2009, Nannery takes vacation days owing to media coverage. Ex
20 73.

21 On June 10, 2009, (Ex. 75) management expresses desire to give the 800-page
22 file to Nannery.

1 On June 17, 2009, Day and Beddo try to change the job descriptions to make
2 Chaussee responsible. Ex. 79 and 77.

3 During the meeting, Beddo and Day questioned Chaussee as to Nannery's
4 misconduct related to leaving early and not properly reporting his time. They accused
5 Chaussee of not adequately reviewing Nannery's time reporting or adequately
6 supervising him. The State admits that the Beddo/Day Nannery investigation
7 "morphed" into an investigation of Chaussee's supervisory skills and oversight of
8 Nannery.
9

10 Beddo and Day told Chaussee to keep the information confidential and that his
11 responses would be confidential. Chaussee Dec. Later that day, Don Gillespie asked
12 Chaussee what the meeting was about and Chaussee stated only, "Jack Nannery."

13 Day and Beddo interviewed all of the Maintenance Facility employees,
14 compiled a spreadsheet of employee answers to standard questions, and issued a
15 report, called the "Nannery Fact Finding Report," on June 19, 2009, which also
16 contained "whistleblower" in the heading. The report falsely accused Chaussee of
17 having a hands-off, 'I don't care' attitude."
18

19 **H. WSDOT's Plan to Demote Chaussee Traced to June 2009**

20 On June 22, 2009, WSDOT management drafted a disciplinary letter for
21 Chaussee that threatened demotion. Exhibit 82.

22 On July 16, 2009, management makes plan that allow Nannery to save face.
23 Ex. 85.
24
25

1 On July 20, 2009, Nannery was suspended for one week without pay and
2 demoted *one level* from Carpenter Shop Terminal Leadman to Journeyman.

3 Chaussee received a pre-disciplinary hearing letter dated August 4, 2009
4 informing him of his opportunity to respond to allegations of “insubordination” for
5 breaching confidentiality by discussing the May 20, 2009 meeting with Gillespie and
6 “poor work performance” for his supervision and management of Nannery.

7
8 On August 11, 2009, Chaussee submitted his written response to the pre-
9 disciplinary letter. In the response, Chaussee defended his actions with relation to
10 Nannery’s absenteeism, which Chaussee reported to management in March 2008, and
11 the fact that he had not revealed any other information discussed in the May 20, 2009
12 meeting to Gillespie, other than the fact that the meeting concerned Nannery, who
13 Gillespie and the rest of the Maintenance Facility staff knew was under investigation.
14 Chaussee also sent an email to Brodeur informing him that he had previously reported
15 Nannery’s misconduct to Day and Kelly, that Day had snickered, said he had the
16 money in his budget to address the issue, and that he would look into it.

17
18 On September 1, 2009, Chaussee received a demotion letter from Paul
19 Brodeur. The demotion was *two levels* down, from Carpenter Shop Foreman to
20 Carpenter Shop Journeyman, and was effective immediately. Day and Kelly
21 recommended to Brodeur that Chaussee be demoted.

22
23 The demotion letter erroneously confused the 2008 and 2009 baseball seasons,
24 falsely implied that Chaussee had given Gillespie shop safety meeting attendance
25 sheets after the May 20, 2009 meeting for the purpose of bringing them to his

1 interview with Day and Beddo, and falsely stated that Chaussee had been disciplined
2 for locking a co-worker in the Carpenter Shop and acting rudely. Nannery's absences
3 during the 2008 baseball season were the focus of the SAO investigation and plaintiff
4 reported Nannery's 2008 absences to management in March 2008. In 2009, Chaussee
5 had received a copy of the baseball schedule in April 2009 and checked the schedule
6 against Nannery's timesheets.

7
8 Chaussee pursued the grievance process through his union, the Pacific
9 Northwest Regional Council of Carpenters. The Step 1 union grievance was denied by
10 letter from Brodeur on October 12, 2009 following an October 8, 2009 meeting. The
11 Step 2 union grievance was denied by letter from Paul Ganalon, Labor Relations
12 Manager, on December 22, 2009. On May 11, 2010, Labor Relations Manager Jeff
13 Pelton sent the union representative a letter reinstating Chaussee back up one level, so
14 that his demotion was then from Foreman to Lead worker. In a revised letter dated
15 May 16, 2010, Brodeur removed the "insubordination" charge, finding there was not
16 enough evidence to substantiate the charge.¹ Chaussee and his union further appealed
17 the one-level demotion.
18

19 On June 3, 2011, an arbitration hearing was held between the union and the
20 state. On September 14, 2011, Arbitrator Edwin R. Render issued his decision.

21 The arbitration hearing testimony centered around two fundamental sets of
22 allegations. The first was that the Grievant failed to do his job as a carpenter
23 foreman . . . The second matter about which there was considerable testimony
24 related to the Grievant's abrasive leadership style. Several employees testified

25 ¹ The insubordination charge for talking about the Day "investigation" is even more nonsensical given the SAO investigator's testimony that in her experience one cannot be punished for talking about the actual whistleblower investigation.

1 that he was overbearing, intimidating, and a bully. It must be noted at the
2 outset that this allegation and reason for demotion is not set out with any
specificity in the September 1, 2009 notification of demotion.

3 Exhibit 165.

4 The arbitrator specifically found:

- 5 1. What Mr. Nannery did was a clear violation of Item 5 of the Rules of Conduct
6 of the State. Mr. Chaussee's job description plainly states he is only authorized
7 to issue oral and written warnings.
- 8 2. Mr. Nannery's offense called for discharge. Under Mr. Chaussee job
9 description, Mr. Chaussee was required to report Mr. Nannery's misconduct to
higher management and let higher management discipline him. This is exactly
10 what the Grievant did.

11 *Id.* at 35-36. Chaussee was reinstated to his Foreman position, but he continues to be
12 perceived as the whistleblower and continues to experience retaliation and harassment.

13 **III. ARGUMENT**

14 To establish his claim under the statute, Chaussee must show that:

- 15 1. He is a whistleblower;
- 16 2. He has been demoted (which brings a presumption of retaliation); and
- 17 3. The State cannot rebut that presumption by proving by a preponderance
18 of the evidence that there have been a series of documented personnel
19 problems or a single, egregious event, or that the agency action or
actions were justified by reasons unrelated to the employee's status as a
whistleblower and that improper motive was not a substantial factor

20 RCW 42.40.050.

21 Here, since Chaussee was demoted solely for not properly monitoring
22 Nannery's timesheets, and that issue was resolved by the arbitrator after a full hearing
23 on the merits, the State cannot contest the third element of the claim.
24
25

1 **A. Chaussee Meets the Definition of a Whistleblower under RCW**
2 **42.40.020(10)(a) and is Able to Establish a Presumption of Whistleblower**
3 **Retaliation under RCW 42.40.050(2)**

4 Whistleblowers include:

5 An employee who is perceived by the employer as reporting,
6 whether they did or not, alleged improper governmental action to the
7 auditor or other public official,

8 and

9 An employee who in good faith provides information to the
10 auditor or other public official in connection with a whistleblower
11 investigation

12 and

13 An employee who is believed to have reported asserted
14 improper governmental action to the auditor or other public official, or
15 to have provided information to the auditor or other public official in
16 connection with an investigation, but who, in fact, has not reported
17 such action or provided such information.

18 RCW 42.40.020(10). Chaussee meets the definition of a whistleblower according to
19 the statute because Day, Kelly, Brodeur, and perhaps Hammond perceived him to be
20 the individual responsible for filing the whistleblower complaint with the SAO on
21 May 6, 2008 related to Nannery. The SAO never revealed the actual source of the
22 whistleblower complaint and was required to keep the source confidential. RCW
23 42.40.040(2). Day's claim in a Motion, that for the first time that in May 2009 he saw
24 a handwritten copy of the whistleblower complaint and recognized that the
25 handwriting was not Chaussee's is unworthy of belief, and in any case, creates a
genuine issue of material fact for trial. Day never mentioned this fact during his
deposition or during the union arbitration. Chaussee has never seen the whistleblower
complaint and has no way to verify what it looks like or whether it was even

1 handwritten. The whistleblower complaint could have been written by a SAO
2 employee verbally transcribing the whistleblower's complaint or it could have been
3 submitted online.

4 Chaussee was the obvious choice as the perceived whistleblower because he
5 had openly complained to his supervisors about Nannery not working full days just
6 five weeks prior to the complaint being filed with the SAO. He was Nannery's
7 immediate supervisor and in a position to know Nannery's schedule. Chaussee had
8 repeatedly counseled Nannery not to wear his baseball uniform to work, not to drive
9 the WSF truck to baseball practice, and questioned him as to why certain work was
10 not performed. Day did not tell the SAO investigator about Chaussee or his 2008
11 report because he assumed that she was aware of that because Chaussee was the
12 whistleblower. There can be no other interpretation. Then, all of the discipline
13 followed and focused on the very wrongdoing that Chaussee reported to Day, which
14 became the focus of the SAO investigation.
15

16
17 The second part of the definition is also satisfied because the SAO did initiate
18 an investigation pursuant to RCW 42.40.040 in response to the May 6, 2008
19 whistleblower complaint. RCW 42.40.050 states:

20 (1)(a) Any person who is a whistleblower, as defined in RCW
21 42.40.020, and who has been subjected to workplace reprisal or
22 retaliatory action is presumed to have established a cause of action for
23 the remedies provided under chapter 49.60 RCW.

(b) For the purpose of this section, "reprisal or retaliatory action"
means, but is not limited to, any of the following:

- 24 (i) Denial of adequate staff to perform duties;
- (ii) Frequent staff changes;
- 25 (iii) Frequent and undesirable office changes;
- (iv) Refusal to assign meaningful work;

- 1 (v) Unwarranted and unsubstantiated letters of reprimand or
2 unsatisfactory performance evaluations;
3 (vi) Demotion;
4 (vii) Reduction in pay;
5 (viii) Denial of promotion;
6 (ix) Suspension;
7 (x) Dismissal;
8 (xi) Denial of employment;
9 (xii) A supervisor or superior behaving in or encouraging
10 coworkers to behave in a hostile manner toward the
11 whistleblower;
12 (xiii) A change in the physical location of the employee's
13 workplace or a change in the basic nature of the employee's job,
14 if either are in opposition to the employee's expressed wish;
15 (xiv) Issuance of or attempt to enforce any nondisclosure policy
16 or agreement in a manner inconsistent with prior practice; or
17 (xv) Any other action that is inconsistent compared to actions
18 taken before the employee engaged in conduct protected by this
19 chapter, or compared to other employees who have not engaged
20 in conduct protected by this chapter.

21 **(2) The agency presumed to have taken retaliatory action under**
22 **subsection (1) of this section may rebut that presumption by**
23 **proving by a preponderance of the evidence that there have been a**
24 **series of documented personnel problems or a single, egregious**
25 **event, or that the agency action or actions were justified by reasons**
unrelated to the employee's status as a whistleblower and that
improper motive was not a substantial factor.

(3) Nothing in this section prohibits an agency from making any decision exercising its authority to terminate, suspend, or discipline an employee who engages in workplace reprisal or retaliatory action against a whistleblower. However, the agency also shall implement any order under chapter 49.60 RCW (other than an order of suspension if the agency has terminated the retaliator).

Chaussee experienced numerous acts of reprisal and retaliatory action after being the perceived whistleblower, including unwarranted and unsubstantiated letters of reprimand, demotion, reduction in pay, a supervisor behaving or encouraging coworkers to behave in a hostile manner toward the whistleblower, a change in the

1 basic nature of Chaussee's job duties against his expressed wish, and actions
2 inconsistent with actions taken before the perceived whistleblowing.

3 First, Chaussee received an improper Letter of Expectation/Written Warning
4 for allegedly being discourteous to a coworker. Chaussee denies these charges. Taken
5 in the light most favorable to the plaintiff, the Letter of Expectation/Written Warning
6 was retaliatory because the charges were not legitimately warranted. Second,
7 Chaussee found multiple screws in the tires of his personal vehicle while it was parked
8 in the employee parking lot. Chaussee complained about the tire incidents to
9 management, but no investigation was undertaken.

11 Management acted in a way to encourage employees to treat Chaussee in a
12 hostile way when it failed to investigate the tire incidents and failed to investigate or
13 discipline employees when Chaussee's office chair was removed and replaced with a
14 toilet, toilet paper, and simulated waste. Management instead stated that Chaussee
15 could have been written up for using the toilet on the Sealth, even though it was not
16 marked. Management further ignored Chaussee's concerns and request for assistance
17 related to an employee who Chaussee felt had a drinking problem and was thought to
18 be drinking at work.

20 Lastly, management retaliated against Chaussee when it demoted him from
21 Carpenter Shop Foreman to Carpenter Shop Journeyman, finding that Chaussee did
22 not properly review employee Nannery's timesheets. As discussed below, an
23 arbitrator has already determined that management did not have just cause to demote
24

1 Chaussee for its articulated reasons and the State should be collaterally estopped from
2 using those same reasons to justify Chaussee’s demotion now.

3 Because Chaussee both meets the definition of a whistleblower in RCW
4 42.40.020(10)(a) and retaliatory acts were taken against him shortly after he was the
5 perceived whistleblower, he “is presumed to have established a cause of action for the
6 remedies provided under chapter 49.60 RCW.” RCW 42.40.050(1)(a).

7
8 **B. The Agency Cannot Rebut the Presumption Under the Statute**

9 Under RCW 42.40.050(2) the agency “may rebut that presumption by proving
10 by a preponderance of the evidence that there have been a series of documented
11 personnel problems or a single, egregious event, or that the agency action or actions
12 were justified by reasons unrelated to the employee’s status as a whistleblower and
13 that improper motive was not a substantial factor.”

14 The State is precluded from seeking to rebut the presumption with testimony
15 about the demotion by collateral estoppel. The State’s citation to RCW 49.60 case law
16 is inapplicable here since the statute sets out the relative burdens.

17
18 **C. Collateral Estoppel Bars the State from Alleging the Same Issues Are a
19 Legitimate Reason for Chaussee’s Demotion When Those Reasons Have
20 Already Been Determined Invalid by the Arbitrator**

21 The State cannot contest that Chaussee was improperly demoted. Nor can the
22 State challenge that:

- 23 3. What Mr. Nannery did was a clear violation of Item 5 of the Rules of Conduct
24 of the State. Mr. Chaussee’s job description plainly states he is only authorized
25 to issue oral and written warnings.
4. Mr. Nannery’s offense called for discharge. Under Mr. Chaussee job
description, Mr. Chaussee was required to report Mr. Namery’s misconduct to

1 higher management and let higher management discipline him. This is exactly
2 what the Grievant did.

3 **D. Chaussee Has Suffered Damages**

4 Under *Bunch*, medical testimony is not required for WLAD damages. “The
5 county argues that Bunch never consulted a healthcare professional, and no one close
6 to him testified about his anxiety. That is true, but such evidence is not strictly
7 required; our cases require evidence of anguish and distress, and this can be provided
8 by the plaintiff’s own testimony.” *Bunch v. King Cnty. Dep’t of Youth Servs.*, 155
9 Wn.2d 165, 181, 116 P.3d 381, 390 (2005).

10 *Bunch* also addresses the level of evidence necessary for a verdict on
11 emotional harm:

12
13 Bunch argues the ‘range of substantial evidence’ standard is
14 meaningless in the context of noneconomic damages. While
15 noneconomic damages especially are within a properly instructed jury’s
16 discretion, *Bingaman*, 103 Wn.2d at 835, 699 P.2d 1230, there must be
17 evidence upon which the award is based: ‘The plaintiff, once having
18 proved discrimination, is only required to offer proof of actual anguish
19 or emotional distress in order to have those damages included in
20 recoverable costs pursuant to RCW 49.60.’ *Dean v. Municipality of
Metro. Seattle–Metro*, 104 Wn.2d 627, 641, 708 P.2d 393 (1985). The
21 distress need not be severe. *Nord v. Shoreline Sav. Ass’n*, 116 Wn.2d
22 477, 485, 805 P.2d 800 (1991). The Court of Appeals has applied this
23 standard in the context of employment discrimination. *See Herring v.
24 Dep’t of Soc. & Health Servs.*, 81 Wn. App. 1, 25, 914 P.2d 67 (1996).

25 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. The record contains the 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.

1 *Id.* at 180. The Court will instruct the jury on damages using the WPI:

2 WPI 330.81 Damages—Employment Discrimination—Economic and Non-
3 Economic

4 It is the duty of the court to instruct you as to the measure of damages. By
5 instructing you on damages, the court does not mean to suggest for which party
6 your verdict should be rendered.

7 If your verdict is for the plaintiff, (name of plaintiff), you must determine the
8 amount of money that will reasonably and fairly compensate the plaintiff for such
9 damages as you find were proximately caused by the acts of the defendant[s],
10 (name of defendant(s)).

11 You should consider the following elements:

12 [The emotional harm to the plaintiff caused by the [defendant's] [defendants']
13 wrongful conduct, including [emotional distress] [loss of enjoyment of life]
14 [humiliation] [pain and suffering] [personal indignity, embarrassment, fear,
15 anxiety, and/or anguish] experienced and with reasonable probability to be
16 experienced by the plaintiff in the future.]

17 The burden of proving damages rests with the party claiming them, and it is for
18 you to determine, based upon the evidence, whether any particular element has
19 been proved by a preponderance of the evidence.

20 Any award of damages must be based upon evidence and not upon speculation,
21 guess, or conjecture. The law has not furnished us with any fixed standards by
22 which to measure [emotional distress] [loss of enjoyment of life] [humiliation]
23 [pain and suffering] [personal indignity, embarrassment, fear, anxiety, and/or
24 anguish]. With reference to these matters, you must be governed by your own
25 judgment, by the evidence in the case, and by these instructions.

26 IV. CONCLUSION

27 Plaintiff will prevail and will prove damages.

28 ///

29 ///

30 ///

1 DATED this 16th day of March 2015.

2
3 THE SHERIDAN LAW FIRM, P.S.

4
5
6 By: s/John P. Sheridan
7 John P. Sheridan, WSBA # 21473
8 Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document on the following individual(s):

Counsel for Defendant State of Washington

Joseph Diaz
Alicia O. Young
Attorney General of Washington
Torts Division
7141 Cleanwater DR SW
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- Via Facsimile
- Via First Class Mail
- Via Email
- Via Messenger
- Via Overnight Delivery

DATED this 16th day of March, 2015, at Seattle, Washington.

s/Patti Lane
Patti Lane, Legal Assistant