The Honorable John W. Lohrmann
Trial Date: January 15, 2019

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

LINDA ROBB,

Plaintiff,

vs.

BENTON COUNTY, a State public body, and FRANKLIN COUNTY, a State public body,

Defendants.

Case No.: 16-2-00406-8

PLAINTIFF'S TRIAL BRIEF

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I. INTRODUCTION

This case involves a claim of wrongful discharge in violation of public policy and retaliation under the Washington Law Against Discrimination.[1] The Plaintiff, Linda Robb, is a 51 year old woman. She is a licensed Mental Health Professional with the State of Washington and has also obtained her National Board Certification in Counseling. She began her career at Lourdes Counseling Center as a Mental Health Therapist. She worked in that position for 6 years before making the transition to Catholic Family & Child Services (hereinafter "Catholic Family") as the Clinical Director.

On May 21, 2014, the Benton and Franklin County Boards of Commissioners unanimously voted to hire Ms. Robb for the position of Human Services Director. She was offered the job on May 14, 2014 and officially hired on July 7, 2014. After working for the Counties for a little over a year, Ms. Robb reported sexual harassment by Benton County Commissioner Shon Small to then Franklin County Human Resources Manager Janet Taylor who began an investigation in May 2015. Ms. Robb also spoke out against the conflict of interest in the proposed privatization of the Human Services Crisis Response Unit ("CRU") and kept both boards informed of important issues under her supervision. Ms. Robb's activities supported the WLAD policy to eradicate discrimination and the municipal whistleblower statute's policy encouraging employees to report improper governmental actions. RCW 49.60.210 (WLAD retaliation), RCW 42.41 (municipal whistleblower statute).

[1] Plaintiff has elected not to go forward on the disparate treatment and hostile work environment claims.

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Once Benton County learned of Ms. Robb's complaint and Ms. Taylor's investigation, they began their own investigation into undefined allegations of misconduct by Ms. Robb. Without notice to or approval by Franklin County (both Boards were charged with jointly supervising Ms. Robb), Benton County sent Ms. Robb home on administrative leave and then pressured Franklin County to vote to join in terminating her. Ms. Robb was publicly humiliated when County Commissioners were quoted in news articles publicly pronouncing that they had lost confidence in her. She was not terminated for any misconduct. Immediately following her termination, the investigation into Ms. Robb's claims of sexual harassment was dropped. Thus, Benton County Commissioner Shon Small was never cleared of the allegations.

Consistent with the relevant jury instructions, at trial Ms. Robb will prove that a substantial factor motivating the Counties to terminate her employment was her performing a public duty and/or reporting what she reasonably believed to be employer misconduct (WPI 330.51); and that a substantial factor in the decisions to send her on administrative leave and then to terminate her was Ms. Robb's opposing what she reasonably believed to be discrimination or [sexual harassment] (RCW 49.60.210).

Ms. Robb will prove economic losses in excess of $1 million through the expert testimony of forensic labor economist Dr. Paul Torelli, who will testify live at trial, and she will prove non-medical damages as outlined in WPI 330.81.01 for Benton and Franklin Counties' wrongful conduct, including stress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced

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and with reasonable probability to be experienced by Ms. Robb in the future.[2]

II. STATEMENT OF FACTS

A. Background.

Before she was hired as Director of Human Services at Benton and Franklin Counties, Ms. Robb was employed at Catholic Family as the Clinical Director. There, she worked for the Agency Director, Maureen McGrath, who found Ms. Robb to be a gifted clinician and an insightful manager.

In April 2014, Ms. Robb interviewed with County Public Administrators David Sparks and Fred Bowen for the role of Director of the Department of Human Services. At the time of Ms. Robb's employment, Human Services was a department administered by both Benton and Franklin Counties physically located in Prosser, Benton County. The practice at the time was that Benton County handled all administrative matters for the Department, including personnel and payroll matters, and provided 70% of the administrative funding, while Franklin County provided the remaining 30%. Despite the disparity in funding, each county informally maintained equal say in all departmental matters, including personnel.

As Human Services Director, Ms. Robb was responsible for the operation, oversight, budgets, funding, the application of public funds and contracts, and providing community

[2] The defendants have violated CR 11 in their Motion in Limine #8, which **falsely claims**, "In Washington, a plaintiff can only recover for emotional distress if such distress is manifested by objective symptomatology" and "be susceptible to medical diagnosis and proved through medical evidence." **This is an intentional misrepresentation of the law**. See Bunch v. King Cnty. Dep't of Youth Servs., 155 Wn.2d 165, 180, 181 (2005) (plaintiff is only required to offer proof of actual anguish or emotional distress in order to have those damages included in recoverable costs; medical "evidence is not strictly required; our cases require evidence of anguish and distress, and this can be provided by the plaintiff's own testimony").

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and county administration policy direction, and support as well as recommending improvements for existing services. Because she reported equally to both the Benton and Franklin County Boards of Commissioners, Mr. Robb was frequently required to attend board meetings and keep both Boards informed of her work.

B. Initial Reporting of Problems with the Crisis Response Unit.

On August 14, 2014, Benton County Commissioner Small responded to an email Ms. Robb sent to both Boards informing them of a $92,000 shortfall. Small criticized Ms. Robb for doing her job: "if you have concerns please contact Commissioner Koch or myself prior to a blanket email goes out that projects we have a 'BROKEN ARROW!' that is **now view for public**." Small was worried that the public might find out and he was apparently concerned about the other board members learning of the shortfall as well.

Ms. Robb inquired of others as to why Small was treating her that way and asked whether she was wrong to have sent the email to all the commissioners. Benton County Administrator David Sparks informed her that she did not make any mistakes in sending the email. Mr. Sparks told her that, "Small can be mean to strong women like you." Mr. Sparks further told her that Shon Small was mean. Mr. Sparks described Commissioner Small's behavior on several occasions saying that Commissioner Small "was sexist and did not respect women." Deputy County Administrator Loretta Smith Kelty told Ms. Robb that Small does not like her, that there had been two executive sessions initiated by Small about Ms. Robb, but that Mr. Sparks had defended her. Ms. Smith Kelty stated that she was fearful of her job because of Shon Small. On several other occasions, when Ms. Robb complained to Ms. Smith Kelty about Commissioner Small, Ms. Kelty stated that he was "very sexist."

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Ms. Robb told her that she felt like you had to have a penis in order to survive working at Benton County and that it was a hard core "old boys club." Ms. Kelty stated her agreement "on all this."

C. Second Reporting of Problems with the Crisis Response Unit.

In March 2015, Ms. Robb learned that Small had been working behind the scenes to privatize the CRU and had specifically directed others at the Counties to not inform her. Once the cat was out of the bag, some of the commissioners asked Ms. Robb to "gather more information" and to find out what other providers were thinking about privatization. Ms. Robb did a presentation to the Boards about the potential liability and other issues. Commissioner Small became furious at Ms. Robb over the presentation and categorized her objective analysis of the transition as "one-sided." Small believed that by giving the presentation and gathering information, Ms. Robb was "calling him out."

From that point forward, Small looked for ways to attack Ms. Robb. For example, on May 19, 2015, in front of other Board members, Small wrongfully accused her of not keeping him informed of issues with Detox, another department under her supervision. Following Commissioner Small's troubling remarks, Ms. Robb approached him to privately discuss the issues raised. He stated, "you don't need to explain anything to me… as far as I am concerned you are a pathetic liar and human being and I will never trust anything you say. You are a miserable liar and person and I do not want to ever see or listen to you again." Ms. Robb began to feel as though Small was resentful that she was a woman. He would frequently say that when Ed Baker had been in her position things were better and that *he* understood. Whenever anything went wrong with Human Services, he would tell Ms.

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Robb that she was acting just like Carrie Huie Pascua who, to Ms. Robb's knowledge, was the only other female who had held her position. Commissioner Peck also told Ms. Robb that at one point he had heard Shon Small discuss Ms. Robb's gender inappropriately but did not give her the exact words Small had used.

D. Linda Robb Reports Shon Small's Sexual Harassment to Franklin County Human Resources Manager Janet Taylor and Is Put on Administrative Leave And Then Terminated.

Fearing retaliation, Ms. Robb went to Franklin County HR Manager Janet Taylor to report Small's behavior. She sent Ms. Taylor an email describing Mr. Small's behavior and during a May 22, 2015 meeting, Ms. Taylor took copious notes of Ms. Robb's reports. On May 27, 2015, Ms. Taylor called an executive session of the Franklin County Board and informed the Board of the complaints Ms. Robb had made. Ms. Taylor informed the Board that her recommendation was, "based on my investigation, I came to conclude that if Ms. Robb's allegations were true, the conduct she alleged resulted in the creation of a hostile work environment. It was my intention to recommend that an outside investigator be employed as the allegations involved a Benton County elected official." Ms. Taylor also "recommended to [the] board members that they have communications with the Benton County Board and let them know that this concern had been raised and that…[she] was going to see if there was any…smoke behind this concern[.]"

Benton County knew or believed that Ms. Robb made a harassment complaint against Small, and that Ms. Taylor was continuing her investigation of the issue. They waited until the right time and then outmaneuvered Ms. Taylor.

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In July 2015, Ms. Taylor went on vacation to Europe. During that first week of July, David Sparks and Loretta Smith Kelty, the employees whom Ms. Robb had confided in regarding Mr. Small's sexist and aggressive treatment of her, instructed Benton County HR Manager Lexi Wingfield and Steven Hallstrom "to do some research… [and] gather[] information about Joel Miranda." The buzz was that Ms. Robb's administrative assistant, Joel Miranda, was a felon and that Ms. Robb had concealed that fact from the Counties.

The investigation was a sham. Although they did Google searches and uncovered newspaper articles and court file documents showing Miranda had in fact been charged and convicted of several felonies in Florida, the information was already well known to the Counties and to Ms. Wingfield in particular. In fact, prior to beginning his job, Mr. Miranda had filled out a background check authorization form in which he *disclosed the case number and court* of his prior conviction. It was Ms. Wingfield's job to do that investigation and there is no evidence that it was not done back in 2014. Also, Human Services employee named Tracy Diaz testified that when she was trying to keep Ms. Robb from hiring Mr. Miranda, she reported his conviction to Ms. Wingfield. This complaint was also memorialized in a letter drafted by Ms. Diaz. At no time prior to Ms. Robb's complaints to HR regarding Shon Small was Mr. Miranda's criminal convictions regarded as a problem by Benton County. Despite the multiple documents showing the Counties' prior knowledge of Mr. Miranda's convictions, Ms. Robb was blamed for Mr. Miranda's hire. Ms. Robb had not even been interviewed as part of Hallstrom's "investigation."

On July 16, 2018, Mr. Sparks requested that Lexi Wingfield send the "research" materials she had gathered on Mr. Miranda's criminal convictions to Shawn Sant, Franklin

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County Prosecuting Attorney. That same day, Benton County, without informing Franklin County, placed Ms. Robb on administrative leave citing "misconducts."

Recently, Plaintiff's counsel uncovered a smoking gun piece of evidence in this case. This evidence is an email string originally hidden from Plaintiff and her attorneys relating to Mr. Miranda's criminal record and the decision to place Ms. Robb on administrative leave. This email chain had previously been hidden, despite all documents related to Ms. Robb's administrative leave having been requested back in 2016. Franklin County produced the string, but redacted it. Furthermore, the redacted document was hidden among thousands of other documents, many of which were redacted, until recently it surfaced as an exhibit to a CR 30(b)(6) declaration, which was produced after an order by Special Master Judge Sharon Armstrong (ret.). When Defendants produced it for the first time unredacted, the critical middle page was missing. One week after the deposition, Franklin County produced the missing middle page, which is a smoking gun showing that Franklin County's Prosecutor was livid about Benton unilaterally placing Robb on administrative leave. He wrote in part:

> I had requested information last Thursday, July 16, 2015, about the current situation with Ms. Robb's employment and apparent issues prompting Benton County to place her on administrative leave pending a joint meeting by our boards. Not only did this email go unanswered but **Benton County chose to take *unilateral action* without providing Franklin County any information for this action against a Bi-County employee**. This appears inconsistent with bi-county structure of each Board having an equal voice in management of bi-county operations… I only received information about Mr. Miranda but **did not see anything showing a causal connection to Ms. Robb on how she had purportedly misled any of our Boards or had committed any misconduct justifying the action taken by Benton County.** I am unable to evaluate whether or not there is a basis for action as I have not received relevant documentation. It is imperative that I have full information well in advance of the upcoming Board meeting in order to review and brief my Board. With the recent exodus of employees from the Human Services Department, removal of the Director likely places us at great

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> risk of failing to provide required services as required by law. I do not want either of our counties to be at risk of losing any State or Federal funding by this action.

No justification by either of the Defendants has been given on the record as to why this document was hidden for so long. Notes taken from an August 5, 2015 Benton County Board of Commissioners Meeting would later reveal that Shon Small was "offended by [Shawn] Sant's request for info[rmation]."

By the time Ms. Taylor returned from Europe, Ms. Robb had been placed on administrative leave and Franklin County had moved her out of the Human Resources department. Despite the move, Ms. Taylor continued her HR functions into August.

On August 5, 2015, Ms. Taylor in her continued HR functions issued a document stating that "[b]ased on information to date, there is insufficient information to support any action against Robb, let alone termination. Information we have to date appears to be incomplete. [Franklin County] requested additional information from [Benton County]. Recommend not taking action until additional information can be obtained from Benton County."

The Counties learned from Mr. Sant's July 20th email and from Ms. Taylor's findings. Once they knew that they would not be able to accuse Ms. Robb of misconducts based on Mr. Miranda's hiring, they changed course.

On August 5, 2015, the Boards voted to terminate Ms. Robb but not for misconduct. The discussion around her termination focused heavily on the firing of Ms. Diaz, who had worked to sabotage Ms. Robb's hiring of Mr. Miranda. Ms. Robb was provided with her letter of termination on August 6, 2015. Despite the private discussions about Ms. Robb's purportedly improper termination of Tracy Diaz, that is not the stance the Counties took

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publicly. The letter which was provided to Ms. Robb stated that the Boards of Commissioners did not have confidence in her ability to lead the agency in a manner consistent with their vision and goals. This sentiment was echoed in a Tri-City Herald article which had been published a day earlier which quoted Commissioner Delvin as saying that "Benton County officials [had] lost confidence in Robb because of ongoing management issues within the bicounty department…"

Although much of Benton County's discussion surrounding Ms. Robb's termination was centered around the termination of Tracy Diaz, the Board did not discuss and ignored a September 22, 2014 letter written by Benton County Deputy Prosecuting Attorney Stephen Hallstrom, which had defended Robb for the firing and exonerated her of any wrongdoing. All members of the Board of Commissioners, along with David Sparks, were copied on the letter.

After Ms. Robb was terminated, her position was filled by a man by the name of Kyle Sullivan, and the investigation of Commissioner Small never happened.

III. ISSUES

Whether Plaintiff was Wrongfully Discharged By Benton County in Violation of Public Policy?

Whether Plaintiff was Retaliated Against by Defendant Benton County in Violation of the Washington Law Against Discrimination?

Whether Plaintiff was Wrongfully Discharged By Franklin County in Violation of Public Policy?

Whether Plaintiff was Retaliated Against by Defendant Franklin County in Violation of the Washington Law Against Discrimination?

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IV. ARGUMENT AND AUTHORITY

A. Plaintiff Will Prevail In Her Claim of Wrongful Discharge In Violation of Public Policy

To succeed on the tort claim for wrongful discharge, Ms. Robb must show that her "discharge clearly contravened public policy." Rose v. Anderson Hay & Grain Co., 184 Wn.2d *268*, 275 (2015), *citing* Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232 (1984) ("[T]o state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened."). Availability of the tort for wrongful discharge is well-established in four scenarios:

> (1) where employees are fired for refusing to commit an illegal act;
>
> (2) where employees are fired for performing a public duty or obligation, such as serving jury duty;
>
> (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and
>
> (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.

Rose, 184 Wn.2d at 276.

Thus, under the jury instructions, Ms. Robb prevails by "proving that a substantial factor motivating the employer to terminate her employment was her refusing to commit an unlawful act, performing a public duty, exercising a legal right or privilege, or reporting what she reasonably believed to be employer misconduct." *See* WPI 330.50.

Ms. Robb asserts that she reasonably believed that as part of her job as head of Human Services, she had a public duty to keep the commissioners apprised of issues related to her department. On two occasions in particular, she alleges that she properly informed County officials of such issues. On August 12, 2014, Linda Robb reported to the Benton and Franklin

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County Commissioners, and to their respective county administrators that there was an ongoing deficit in the Crisis Response Unit amounting to $92,000. She further expressed her fears that the CRU may need to be closed due to serious funding issues. Subsequently, on April 7, 2015, Ms. Robb, along with Gordon Cable, presented information to the board showing that privatization of the CRU would cost the Counties a considerable amount of money in administrative and other costs, lead to the potential loss of State and Federal funding, and result in money recently spent on renting and upgrading the CRU facility and upgrading the electronic medical records going to waste. She also informed the counties that there could be liability issues if the counties contracted for delivery of mental health services without having full oversight of the services and that it could have negative effects on the health and safety of the community. The same presentation was given to the Franklin County Board of Commissioners on April 8, 2015. This disclosure of the CRU budgetary problems and her reasoned opposition to privatization was wrongfully perceived by Mr. Small as Robb "calling him out" and he soon launched a deeply personal and vicious series of attacks against her.

On May 22, 2015, Ms. Robb reported Mr. Small's concerning behavior to HR Director Janet Taylor along with her concerns about gender discrimination at the Counties. It was not until after the Counties learned of Ms. Robb's disclosure to Ms. Taylor that she began to experience adverse employment actions, including being placed on administrative leave and then terminated from her position.

B. There is a Public Policy Against Employment Discrimination Based on the Local Government Whistleblower Law and the Washington Law Against Discrimination

It is a question of law "whether … a clear mandate of public policy exists" for purposes of claiming wrongful discharge in violation of public policy. *Sedlacek v. Hillis*, 145 Wn.2d

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379, 388, 36 P.3d 1014 (2001). "The clarity element merely requires that the plaintiff establish a clear statement of public policy, ***not*** that the plaintiff demonstrate that the public policy was [actually] violated." *Hubbard v. Spokane County*, 146 Wn.2d 699, 708-09 (2002).

Here, there are two statutes that provide a clear expression of public policy as a basis for the wrongful discharge tort claim: (1) the Local Government Whistleblower Protection Act; and (2) the Washington Law Against Discrimination. The Local Government Whistleblower Protection Act provides in part:

> It is the policy of the legislature that local government employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions of local government officials and employees. The purpose of this chapter is to protect local government employees who make good-faith reports to appropriate governmental bodies and to provide remedies for such individuals who are subjected to retaliation for having made such reports.

RCW 42.41.010. " 'Improper governmental action' means any action by a local government officer or employee: that is . . . an abuse of authority, is of substantial and specific danger to the public health or safety, or is a gross waste of public funds." RCW 42.41.020(1)(a). Under the statute, retaliatory action means:

> Any adverse change in a local government employee's employment status, or the terms and conditions of employment including denial of adequate staff to perform duties, frequent staff changes, frequent and undesirable office changes, refusal to assign meaningful work, unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations, demotion, transfer, reassignment, reduction in pay, denial of promotion, suspension, dismissal, or any other disciplinary action; or hostile actions by another employee towards a local government employee that were encouraged by a supervisor or senior manager or official.

RCW 42.41.020(3).

This statute was implicated when Ms. Robb made her disclosures regarding the mismanagement of the CRU which included both the initial $92,000 shortfall

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and the subsequent plan to privatize the unit which would result in a gross waste of public money and the potential loss of State funding.

The public policy underlying the Washington Law Against Discrimination is also implicated in Ms. Robb's wrongful discharge claim. The WLAD provides, in part:

> The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of . . . sex [is] a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.010. Martini v. Boeing Co., 137 Wn.2d 357, 376–77, 971 P.2d 45, 55 (1999) (allowing the possibility of damages for back pay where an employer has violated the law against discrimination provides an incentive for *employers* to work with employees in the workplace to eradicate discrimination. Furthermore, the law against discrimination provides a remedy for the employee who had been discriminated against and the liberal interpretation provision of the statute operates to protect that remedy); Roberts v. Dudley, 140 Wn.2d 58, 66 (2000) (affirming public policy against sex discrimination in employment).

The strong public policy in these statutes are clear, employees like Ms. Robb are to be protected from termination brought on by their reporting of improper governmental actions and/or sex discrimination.

C. The Jury Will Find a Substantial Factor in Plaintiff's Termination Was Her "Performing a Public Duty," or "Reporting What She Reasonably Believed to Be Employer Misconduct"

> We recognize that causation in a wrongful discharge claim is not an all or nothing proposition. The employee 'need not attempt to prove the employer's sole motivation was retaliation.' *Wilmot,* 118 Wash.2d at 70, 821 P.2d 18. Instead, the employee must produce evidence that the actions in furtherance of public policy were "*a* cause of the firing, and [the employee] may do so by circumstantial evidence." *Id.* This test asks whether the employee's conduct

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> in furthering a public policy was a " 'substantial' " factor motivating the employer to discharge the employee.

Rickman v. Premera Blue Cross, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015), *as amended* (Nov. 23, 2015).

Here, Ms. Robb reported Mr. Small's discriminatory and aggressive behavior to the HR Director Janet Taylor on May 22. Shortly thereafter, on May 27, Ms. Taylor informed the Franklin County Board of Commissioners of Ms. Robb's complaints, recommended that an outside investigator may be needed, and encouraged the board to have communications with Benton County about these concerns.

Understanding that Ms. Taylor was taking Ms. Robb's allegations seriously, while Taylor was away on vacation, Lexi Wingfield and Stephen Hallstrom were enlisted by David Sparks and Loretta Smith Kelty to dig up negative information on Ms. Robb's hiring of her administrative assistant. This information, which was not "news" to the Counties, was then presented in a misleading way to cast Ms. Robb as having committed misconduct by allegedly hiding Mr. Miranda's criminal record from Benton County. In spite of Shawn Sant informing Benton County that there appeared to be a lack of causal connection between Mr. Miranda and *nothing* to show that "she had … misled any of our Boards or had committed any misconduct," Ms. Robb remained on administrative leave and the investigation against her continued.

Once Benton County realized that their reasoning for placing Ms. Robb on administrative leave was not supported by Ms. Taylor and Mr. Sant, the story changed. Executive Session notes reveal that Benton County next blamed Ms. Robb for the firing of a former employee – a decision they had earnestly defended through a letter of Mr. Hallstrom

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a year before on September 22, 2014. The Counties had no legitimate basis for their actions only "old news" and stale allegations that lacked credibility as a basis for their decision in August 2015. Publicly, the Counties announced that they had lost confidence in Ms. Robb.

"[T]he trier of fact [will] reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose" and treat it as "affirmative evidence of guilt." Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 184, 36 P.3d 1014 (2001) Although the Defendants' reasons for placing Ms. Robb on Administrative leave and for her subsequent termination have been a moving target, what is clear is that no adverse actions had been taken against Ms. Robb until after her reports of Shon Small's hostility was made to Ms. Taylor. "That an employer's actions were caused by an employee's engagement in protected activities may be inferred from proximity in time between the protected action and the allegedly retaliatory employment decision." Cornwell v. Microsoft Corp., _ Wn.2d _, 430 P.3d 229, 236 (Wash., Nov. 29, 2018) (citation omitted). The jury will find causation.

D. Statutory Remedies for the Wrongful Discharge Are No Bar to the Claim.

There is no defense to the tort claim based on the fact that statutory remedies for the wrongful discharge are available to Plaintiff under the Local Whistleblower Law or the WLAD, since the legislature did not design those remedies to be "exclusive." *See* Rose, 184 Wn.2d at 283 ("The common law is free standing, and absent clear legislative intent to modify the common law, its remedies are generally not foreclosed merely because other avenues for relief exist. … [T]he exclusivity requirement respects the legislature's choice to either preclude or supplement the common law remedies as it deems necessary."); *and* RCW 49.60.020 ("Construction of Chapter—Election of other remedies. The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing

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contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of …sex…other than a law which purports to require or permit doing any act which is an unfair practice under this chapter. Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights."); *and* Reese v. Sears, Roebuck & Co., 107 Wn.2d 563, 578 (1987) ("By amending RCW 49.60 to remove the election of remedies bar, Laws of 1973, ch. 141, § 2, the Legislature intended the statute to preserve all remedies an employee may have for an alleged violation of his civil rights."), overruled on other grounds by Phillips v. City of Seattle, 111 Wn.2d 903 (1989).

E. Plaintiff Will Prevail In Her Claim of WLAD Retaliation

The same evidence and arguments used to prove that Plaintiff's termination was pretextual and based on conduct furthering public policies against gender discrimination is also evidence from which the jury will find that Plaintiff's complaints of sex-based aggressions made towards her were a "**substantial factor**" in her placement on administrative leave and subsequent termination. *See* WPI 330.05 (WLAD retaliation burden of proof).[3]

Just like her wrongful discharge tort claim, in order to prevail on her WLAD retaliation

[3] *See, e.g.*, *Martini v. Boeing Co.*, 137 Wn.2d 357, 366, 971 P.2d 45 (1999) ("[I]t is clear that each of these acts amounts to a different violation of the law against discrimination and gives rise to a separate cause of action under the statute. This would be true ***even if the claim for discrimination and the claim for discharge arose from the employer's same act.***") (emphasis in original); *see also, e.g.*, Hansen v. Boeing Co., 903 F. Supp. 2d 1215, 1218 (W.D. Wash. 2012) (holding that "[t]aking an adverse action against a disabled employee because she requested or utilized a reasonable accommodation is a form of disability discrimination in violation of the WLAD's anti-discrimination provision," as well as a violation the antiretaliation provision, RCW 49.60.210), *cited with approval by* Hartman *v. Young Men's Christian Ass'n of Greater Seattle*, 191 Wn. App. 1005 (2015); *and* EEOC Compliance Manual § 2-IV(C)(1)(b) (May 2000) ("An incident may be part of a hostile work environment even if it is also a discrete act.").

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claim,

> It is not necessary that the conduct complained of actually be unlawful. '[A]n employee who opposes employment practices ***reasonably believed*** to be discriminatory is protected by the 'opposition clause' whether or not the practice is actually discriminatory.' *Graves v. Dep't of Game,* 76 Wn.App. 705, 712, 887 P.2d 424 (1994) …. Thus, whether Ms. [Robb] can prove that her belief was well founded (i.e., that [Shon Small] actually engaged in sexual harassment) is not dispositive of the viability of her retaliatory discharge claim. Rather, she need demonstrate only that her belief was reasonable under the circumstances.

See, e.g., Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 619, 60 P.3d 106 (2002).

Thus, Ms. Robb will easily show that she engaged in WLAD protected activity. The jury will readily find that such protected activity was a "substantial factor" in the Counties' adverse employment actions (Robb's placement on administrative leave and subsequent termination). Frequently in these cases, the employer's motivation for its actions must be shown by circumstantial evidence, because the employer is not likely to announce retaliation as its motive:

> Direct, 'smoking gun' evidence of discriminatory animus is rare, since "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *United States Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 74 L.Ed.2d 403 (1983), and "employers infrequently announce their bad motives orally or in writing." *deLisle v. SMC Corp.,* 57 Wn.App. 79, 83, 786 P.2d 839 (1990). Consequently, it would be improper to require every plaintiff to produce "direct evidence of discriminatory intent." Aikens, 460 U.S. at 714 n.3, 103 S.Ct. 1478. Courts have thus repeatedly stressed that "[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden.:" *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn.App. 852, 860, 851 P.2d 716, review denied, 122 Wn.2d 1018, 863 P.2d 1352 (1993).

Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 179-80, 23 P.3d 440, 445 (2001), *overruled on other grounds by McClarty v. Totem Elec*., 157 Wn.2d 214, 137 P.3d 844 (2006).

Circumstantial evidence is just as relevant, powerful, and important as direct evidence and is given equal weight under the law. The Washington Patterned Jury Instructions provide, in part, that, "the law does not distinguish between direct and circumstantial evidence in terms

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of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other." WPI 1.03.

In doing so, the jury will be asked to consider the gender-based comments of Shon Small and even comments made outside of the decisional process or when uttered by a non-decision-maker, as they remain "circumstantial evidence of probative or discriminatory intent." *See Scrivener v. Clark College*, 181 Wn.2d 439, 450, n.3, 334 P.3d 541 (2014) (rejecting "stray remarks" doctrine, as its "unnecessary and categorical exclusion of evidence might lead to unfair results").

Thus, relevant circumstantial evidence of gender discrimination includes Mr. Small's statements including the inappropriate remarks he made to Commissioner Peck regarding Ms. Robb's gender and his statements that Ms. Robb was acting "just like Carrie Huie Pascua." The jury may also consider statements made by non-commissioners including David Sparks who told Ms. Robb that Mr. Small "was sexist and did not respect women" and Ms. Smith Kelty who informed Ms. Robb that Mr. Small did not like her. Such conduct "tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group. … [E]vidence of the employer's discriminatory attitude in general is relevant and admissible to prove [unlawful] discrimination. " *See Heyne v. Caruso*, 69 F.3d 1475, 1479–80 (9th Cir. 1995). While "proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual," it "may add 'color' to an employer's decision making process." *Ruiz v. Posadas de San Juan Assoc.*, 124 F.3d 243, 249 (1st Cir.1997). The sexist comments by Small are not

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simply support for Ms. Robb's "reasonable belief" that she was reporting conduct in violation of the WLAD; Small's sexist behavior is also admissible evidence supporting the substantial factor / causation element of Robb's retaliation claim. *See, e.g., Hawkins v. Hennepin Technical Center,* 900 F.2d 153, 156 (8th Cir.) (1990) (reversing trial court for excluding prior acts of sex harassment in retaliation case, stating that "an atmosphere of condoned sexual harassment in a workplace increases the likelihood of retaliation for complaints [of sexual harassment] in individual cases").

Furthermore, "it is permissible for the trier of fact to infer the ultimate fact of discrimination [and retaliation] from the falsity of the employer's explanation." Hill, 144 Wn.2d at 184, quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 747, 332 P.3d 1006 (2014) (quoting Reeves, 530 U.S. at 147. "[T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Hill*, 144 Wn.2d at 184, quoting *Reeves*, 530 U.S. at 147. Additionally, "when [the employer's] explanations ... change over the course of an action ... [the fact-finder] may consider this as evidence that the employer's proffered explanation is pretextual." *Dumont v. City of Seattle*, 148 Wn. App. 850, 869, 200 P.3d 764,

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772 (2009). Taking all of the evidence together, the jury will find the Counties liable under the WLAD for retaliation.

F. Ms. Robb Has Suffered Damages Caused by The Defendants

Ms. Robb was a professional who performed the duties of her position even when she received humiliating and deeply abhorrent treatment for it. Had Ms. Robb either been a man or stood idly by as Commissioner Small privatized the CRU at the expense of taxpayers and Benton and Franklin County's most vulnerable populations, she would likely still be employed by the Counties today.

Ms. Robb will testify about her damages caused by Defendants. Plaintiff's expert, Dr. Paul Torelli, will testify regarding back and front pay damages caused by the discrimination and retaliation. Ms. Robb will also testify about the non-medical damages outlined in the Washington Patterned Instructions. WPI 330.81 (6th Ed.) provides in part:

> If you find for the plaintiff, you should consider the following elements:
>
> (1) The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;
>
> (2) The reasonable value of lost future earnings and fringe benefits; and
>
> (3) The emotional harm to the plaintiff caused by one or both of the defendants' wrongful conduct, including pain and suffering, **emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish** experienced and with reasonable probability to be experienced by the plaintiff in the future.
>
> 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

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> reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

Id.

As to the non-medical damages outlined above, medical testimony is not required to obtain noneconomic damages under the WLAD: "'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 her non-medical damages. The non-medical emotional harm damages will be proved through testimony regarding plaintiff's level of stress, humiliation, etc. on a scale of 1-10. Recent cases show comparable

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or higher damages.

Emotional harm verdicts may be hundreds of thousands or a million dollars. For example, in Hairston v. City of Seattle, a 1995 case involving race discrimination, harassment, and retaliation case brought under the WLAD, a jury awarded Ms. Hairston $400,000.00 for emotional distress with no lost wages claimed. Plaintiff was employed by the City at time of trial. *See* Pham v. City of Seattle, 120 Wn. App. 1038 n.1 (2004) (Heney's conduct was the focus of a prior discrimination action against City Light by employee Lois Hairston, an African–American woman).

In Trinh, Bailey, and Rodriguez v. City of Seattle, 145 Wn. App. 1011 (2008), a three plaintiff race discrimination/hostile work environment case against Seattle City Light, after a 6 week trial, the jury awarded Trinh and Bailey $1.48 million in damages. Later, the judge awarded plaintiffs more than $700,000.00 in attorney fees and costs (Mr. Rodriguez had settled pretrial). Mr. Trinh was awarded $772,000 in emotional harm alone.

In Corey v. Pierce County, 154 Wn. App. 752, 225 P.3d 367 (2010), a former Pierce County prosecutor was awarded over $3 million, after a jury found that she had been wrongfully terminated in January 2004. The prosecutor, Barbara Corey, was a 20-year veteran of the prosecutor's office. After she announced that she might run for county prosecutor, Corey alleged that County Prosecutor Gerry Horne engaged in repeated discriminatory acts against her, including allegedly "manufacturing" a criminal investigation and leaking information to the media that suggested Corey was fired for mishandling public money.

In 2015, the jury in Chaussee v. State, Cause No. 11-2-01884-6 (Thurston County)

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awarded Mr. Chaussee $1 million in emotional harm damages, even though he was still employed with the State, and this award was without medical testimony or economic losses.

In October 2017, the jury in Atwood v. Mission Support Alliance, Cause No. 15-2-01914-4 (Benton County) awarded Ms. Atwood damages in the amount of $8.1 million against Hanford contractor Mission Support Alliance (MSA) for retaliation and discrimination. The jury awarded $2.1 million in lost wages, and $6 million in emotional harm damages, which was based on nonmedical and medical testimony.

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

Ms. Robb will ask the jury in the verdict form to recommend to the Court that Ms. Robb be reinstated to her position as Director of the Human Services department, with protections against further retaliation. There is little case law regarding granting or denying injunctive relief pursuant to the WLAD. However, federal cases interpreting Title VII are "persuasive authority for the construction of RCW 49.60".[4] In Wheeler v. Catholic Archdiocese of Seattle, 65 Wn. App. 552, 829 P.2d 196 (1992), rev'd on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994), Division One of the Court of Appeals described how the right to reinstatement under the WLAD derives from federal law:

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

[4] Oliver v. Pac. Nw. Bell Tel. Co., 106 Wn.2d 675, 678 (1986).
[5] *Accord* Blaney v. Int'l Ass'n of Machinists And Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 215 (2004).

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

Wheeler, 65 Wn. App. at 573; *see also* Williams v. City of Valdosta, 689 F.2d 964, 977 (1st Cir. 1982) (reinstatement is a remedy to which plaintiff "is normally entitled . . . absent special circumstances"); Garza v. Brownsville Independent School District, 700 F.2d 253, 255 (5th Cir. 1983) ("reinstatement or hiring preference remedies are to be granted in all but the unusual cases"); Brooks v. Travelers Ins. Co., 297 F.3d 167, 170 (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 request a segregated verdict or special interrogatories on the alternatives of reinstatement and front pay, the trial court was without a basis for determining whether the jury's verdict included an award of front pay. Thus, the trial court did not abuse its discretion in refusing to order reinstatement." *Id.*, at 574. The same issue will not present itself in Ms. Robb's case, as plaintiff's proposed jury verdict form will ask the jury to award separate amounts for back pay and front pay, and to also advise the Court on whether the jury finds reinstatement with protections against further retaliation and discrimination to be an appropriate remedy, in lieu of the jury's front pay award.

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RESPECTFULLY submitted this 7th day of January, 2019.

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CERTIFICATE OF SERVICE

I, Alea Carr, certify that on January 7, 2019 I filed the foregoing document with the Clerk of the Court by sending the document via FedEx overnight, and served the following persons via email pursuant to an existing electronic service agreement between the parties:

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