

99-2-13911-4 18293510 MTRC 01-16-03

HON. KATHERINE M. STOLZ

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PIERCE COUNTY, WASHINGTON
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

JOSEPH J. KIRBY and DEBORAH A.)
KIRBY, husband and wife,)

No. 99 2 13911 4

Plaintiffs,)

vs.)

MOTION FOR
RECONSIDERATION OF
COURT'S SUMMARY
JUDGMENT RULING AND
ORDER GRANTING SUMMARY
JUDGMENT AND BRIEF IN
SUPPORT OF MOTION

THE CITY OF TACOMA, a municipal)
corporation; RAY CORPUZ and)
"JANE DOE" CORPUZ, husband and)
wife; PHILIP ARREOLA and "JANE)
DOE" ARREOLA, husband and)
wife; WILLIAM WOODARD and)
CATHERINE WOODARD, husband and)
wife; RAYMOND ROBERTS and "JANE)
DOE" ROBERTS, husband and wife;)
DAVID BRAME and "JANE DOE")
BRAME, husband and wife; and)
JAMES HAIRSTON and "JANE DOE")
HAIRSTON, husband and wife,)

DATE OF HEARING: 1-24-03

Defendants.)

Come now the plaintiffs and move the Court to reconsider
its decision of January 10, 2003, to dismiss all of plaintiffs'

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1 claims against the City of Tacoma. This motion is based upon
2 CR 59(a)(7), (8) and (9).

3 STATEMENT OF FACTS

4 On January 10, 2003, the Court heard multiple motions for
5 summary judgment by the City of Tacoma to dismiss all of
6 plaintiffs' various claims related to discrimination and
7 retaliation in the work place.

8 In their response to the various motions, the factual
9 record showed, at a minimum:

10 1. Plaintiff placed first on the competitive exam for
11 the position of captain.

12 2. Plaintiff was made temporary captain, by virtue of
13 his placement on the list.

14 3. Plaintiff had a disability at the times two
15 appointments were made to the position of captain.

16 4. Plaintiff was in excess of 50 years of age at the
17 times the two appointments were made to the position of
18 captain.

19 5. The two appointees to the position of captain were
20 seven and ten years younger than the plaintiff at the times of
21 their appointments.

22 6. The two appointees to the position of captain had no
23 disability at the times of their appointments.

24

25

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1 employer, and its managers, claiming wrongful discharge in
2 violation of public policy and violation of her First Amendment
3 rights under 42 USC §1983. Her claims were dismissed on
4 summary judgment and those rulings were upheld by the Court of
5 Appeals.

6 The Supreme Court reversed the summary judgment of the
7 wrongful termination claim, because the claim was available
8 without regard to whether plaintiff was terminable at-will or
9 only for cause. Because petitioner's grievances involved
10 purely private matters, the court affirmed the dismissal of her
11 §1983 claims.

12 The court stated that, "A cause of action for wrongful
13 discharge in violation of public policy exists where an
14 employee is fired for exercising a legal right or privilege."
15 *Id.*, at 807. The Court also stated, quoting *Thompson*, at 631:
16 "When determining whether a clear mandate of public policy is
17 violated, we consider 'whether the employer's conduct
18 contravenes the letter or purpose of a constitutional,
19 statutory, or regulatory provision or scheme.'" *Id.*

20 Other statements of note in *Smith* are the Court's
21 recognition that punitive damages could be awarded in such
22 cases (p. 805); that a cause of action could be brought for
23 such a common law tort, even if the employee has not exhausted
24 remedies before the Public Employees Relations Commission
25 (PERC) (p. 809); that an employer's committing unfair labor

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1 practices as enumerated in RCW 41.56.140 concerns a "relevant
2 public policy." *Id.* at 807.

3 Here, the city in this case arguably (for purposes of
4 summary judgment) violated two provisions of the statute, which
5 state:

6 It shall be an unfair labor practice for a public
7 employer:

8 (1) To interfere with, restrain, or
9 coerce public employees in the exercise
10 of their rights guaranteed by this
11 chapter;

* * * *

(3) To discriminate against a public
employee who has filed an unfair labor
practice charge;

* * * *

12 Another important case on this issue is *White v. State of*
13 *Washington*, 131 Wn.2d 1 (1997) (copy attached). There, the
14 allegedly aggrieved employee brought an action alleging she was
15 transferred in retaliation for reporting an incident of
16 suspected patient abuse at the Washington State Soldiers' Home,
17 where she was employed. She sought damages for civil rights
18 violations and wrongful transfer against public policy. The
19 trial court dismissed the wrongful transfer claim.

20 On appeal, the Supreme Court affirmed the dismissal of
21 the wrongful transfer claim. The court framed the issue as
22 follows, "White asks this court to recognize a cause of action
23 in tort for wrongful transfer in the public employment setting.
24 She proposes that this new tort be based on the same rationale
25 relied upon by this court in developing the tort of wrongful

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1 discharge in violation of public policy." *Id.* at 18. The
2 court added, "We have not yet considered whether an employee
3 should be able to recover for disciplinary actions that do not
4 result in discharge where the employer's actions violate a
5 clear mandate of public policy." *Id.*

6 The Supreme Court refused to extend the tort to actions
7 short of discharge. However, in concurring in the result,
8 Justice Madsen wrote, "[T]he majority fails to offer any
9 principled reason for refusing to recognize a tort cause of
10 action for retaliatory transfer in violation of public policy.
11 To the contrary, the policy underpinnings of the wrongful
12 discharge tort apply equally to retaliatory actions short of
13 discharge, and support such a cause of action." *Id.* at 20 -
14 21. As the court will see later, this concurrence was a herald
15 of things to come, namely, *Robel v. Roundup Corp.*, ___ Wn.2d
16 ___ (December 12, 2002) (copy attached).

17 *Robel* is the most recent pronouncement of the Supreme
18 Court in this area. Only three of the justices in the *White*
19 majority participated in the decision (one concurred; two
20 dissented). It is a case so new that it is not yet in the
21 advance sheets. As the court might recall, counsel handed the
22 case to the court on the date of argument, indicating that he
23 had only found it the day before, as a result of an internet
24 search.

25

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1 In *Robel*, the plaintiff sued her employer for a
2 disability-based hostile work environment, retaliation for
3 filing a worker's compensation claim, negligent and intentional
4 infliction of mental distress, and defamation. The trial court
5 entered judgment in favor of the plaintiff-employee, but the
6 Court of Appeals reversed and the Supreme Court took up the
7 issues. That court reversed the Court of Appeals on all
8 grounds, except that it affirmed the dismissal of the
9 defamation claim.

10 **Disability Discrimination.** Plaintiff claims he was
11 harassed after diagnosis of his disability, especially in being
12 sent to numerous, unnecessary psychiatric exams. *Robel* says
13 that to prove a case of harassment based upon disability,
14 plaintiff must prove "(1) that he or she was disabled within
15 the meaning of the anti-discrimination statute, (2) that the
16 harassment was unwelcome, (3) that it was because of the
17 disability, (4) that it affected the terms or conditions of
18 employment, (5) that it was imputable to the employer." *Robel*,
19 at 12 - 13 (NOTE: Because this case is not yet in the advance
20 sheets, the numbers cited are from the bold numbers in the
21 attached internet copy). From the record in this case, a
22 reasonable juror could believe that each element has been
23 proved. The conduct is imputable to the city, because it was
24 done by management level employees, the plaintiff's superiors.
25 See *Robel* at 17 - 18.

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1 **Retaliation.** The Robel court extended the tort of
2 wrongful discharge to include conduct short of discharge. This
3 is clearly how the dissent reads the opinion. As stated by
4 Justice Bridge, writing for the dissenters, "Without justifica-
5 tion, the majority extends the tort of wrongful discharge
6 recognized in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219,
7 685 P.2d 1081 (1984) to encompass an act by an employer short
8 of actual or constructive discharge." *Robel* at 61.

9 The majority held that the proof required of this claim
10 is that the plaintiff had to prove she filed a claim with the
11 Department of Labor and Industries, that the employer
12 "discriminated against her in some way, and that the claim and
13 the discrimination were causally connected." *Id.* at 23. In
14 this case, Lt. Kirby has to prove that he did some act
15 protected by statute (filing of grievances and/or union
16 advocacy), that the city discriminated against him in some way,
17 and that the claim and the discrimination were causally
18 connected. The record in this case creates multiple issues of
19 fact on these points.

20 **Intentional Infliction of Mental Distress (Outrage).** To
21 prevail on a claim of outrage, plaintiff must prove (1) extreme
22 and outrageous conduct, (2) intentional or reckless infliction
23 of emotional distress, and (3) severe emotional distress on the
24 part of the plaintiff. *Dicomes v. State*, 113 Wn.2d 612 (1989),
25 as cited by *Robel*, at 24.

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1 Reasonable minds could differ as to whether the
2 discipline, frivolous investigations, repeated psychiatric
3 exams, failure to promote and general bad conduct toward Lt.
4 Kirby were sufficiently extreme to result in liability. Since
5 that is the case, the issue must be submitted to a jury. *Id.*
6 at 25.

7 The claimed outrageous conduct in this case came from
8 plaintiff's superiors. In commenting on that the *Robel* court
9 stated at 26 - 27:

10 This court has recognized in an outrage claim
11 "[t]he relationship between the parties is a
12 significant factor in determining whether liability
13 should be imposed." *Contreras v. Crown*
14 *Zellerbach Corp.*, 88 Wn.2d 735, 741, 565 P.2d 1173
15 (1977). The *Contreras* court emphasized that
16 "added impetus" is given to an outrage claim
17 "[w]hen one in a position of authority, actual or
18 apparent, over another has allegedly made racial
19 slurs and jokes and comments." *Id.*; see also *White*
20 *v. Monsanto Co.*, 585 So.2d 1205, 1210 (La. 1991)
21 (stating that "plaintiff's status as an employee
22 may entitle him to a greater degree of protection
23 from insult and outrage by a supervisor with
24 authority over him than if he were a stranger.")

18 CONCLUSION

19 Based upon the authorities cited herein, especially *Robel*
20 *v. Roundup Corp.*, the court should reconsider its ruling and
21 deny the defendants' motions for summary judgment. A trier of
22
23
24
25

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1 fact should have the opportunity to sift out the respective
2 stories.

3 DATED this 14 day of January 2003.

4 MESSINA BULZOMI

5
6 By John L. Messina
7 JOHN L. MESSINA 4440
8 Attorneys for Plaintiffs

9
10 CERTIFICATION
11 I hereby certify that on 1-15-03 I deposited
12 in the mails of the United States of America and/or
13 placed with Legal Messengers and/or faxed a copy of the
14 document to which this certificate is attached, for
15 delivery to all counsel of record.
16 William A. De Franco
17
18 Messina Law Firm

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[No. 67374-8. En Banc.]

Argued June 24, 1999. Decided January 27, 2000.

KELLY SMITH, *Petitioner*, v. BATES TECHNICAL COLLEGE, ET
AL., *Respondents*.

[1] **Judgment — Summary Judgment — Review — Role of Appellate Court.** An appellate court reviewing a summary judgment engages in the same inquiry as the trial court. The court applies the standard of CR 56(c) after viewing all the facts and the reasonable inferences therefrom most favorably toward the nonmoving party.

[2] **Appeal — Conclusions of Law — Review — Standard of Review.** A trial court's conclusions of law are reviewed de novo.

[3] **Employment — Termination — Violation of Public Policy — Right of Action — Purpose.** The purpose of the tort of wrongful

termination in violation of public policy is to vindicate the public interest in prohibiting employers from violating public policy.

[4] **Employment — Termination — Violation of Public Policy — Right of Action — For-Cause Employees.** All employees, including those who may be discharged only for cause and at-will employees, may maintain an action for wrongful termination in violation of public policy.

[5] **Employment — Termination — Violation of Public Policy — Legal Right or Privilege.** An employee may not be terminated for exercising a legal right or privilege.

[6] **Administrative Law — Judicial Review — Exhaustion of Administrative Remedies — Necessity.** A party is required to exhaust available administrative remedies prior to bringing a claim in court when (1) the claim is cognizable in the first instance by an administrative agency alone, (2) the agency has clearly established mechanisms for resolving complaints by aggrieved parties, and (3) the administrative remedies can provide the relief sought by the party.

[7] **Employment — Termination — Violation of Public Policy — Right of Action — Exhaustion of Administrative and Contractual Remedies — Necessity.** An employee is not required to exhaust contractual or administrative remedies prior to seeking redress in court for wrongful termination in violation of public policy.

[8] **Public Employment — Constitutional Law — First Amendment Right — Public Employee — Adverse Employment Decision — Test.** A public employee's claim of retaliation in employment based on the exercise of a First Amendment right is not actionable unless the employee establishes that the conduct (1) is protected by the First Amendment and (2) was a substantial or motivating factor in the adverse employment decision.

[9] **Public Employment — Constitutional Law — Freedom To Petition for Redress of Grievances — Public Employee — Adverse Employment Decision — Public Concern — Necessity.** A public employee's claim of retaliation in employment based on the exercise of the First Amendment right to petition the government for a redress of grievances is not actionable if the employee's grievances do not involve matters of public concern.

JOHNSON, J., concurs in result only; TALMADGE, J., and GUY, C.J., dissent in part by separate opinion; BRADRE, J., did not participate in the disposition of this case.

Nature of Action: A state technical college employee sought damages from the technical college, the college

district, and four supervisory personnel for wrongful termination in violation of public policy, defamation, and retaliatory discharge under 42 U.S.C. § 1983 for exercising her First Amendment petition clause rights. The employee claimed that she was terminated in retaliation for filing employment related grievances and unfair labor practice complaints.

Superior Court: The Superior Court for Pierce County, No. 94-2-05451-7, Thomas Felhagle, J., on September 15, 1995, entered a summary judgment dismissing the wrongful termination claims and the 42 U.S.C. § 1983 claims against the college, dismissed the remaining 42 U.S.C. § 1983 claims after trial, and entered a judgment on a verdict in favor of the defendants on the defamation claim.

Court of Appeals: The court affirmed the judgment in an unpublished decision noted at 91 Wn. App. 1008 (1998).

Supreme Court: Holding that the employee could maintain the wrongful termination claim even though she was not an at-will employee, that the employee stated a claim for wrongful termination in violation of public policy, that the employee was not required to exhaust contractual or administrative remedies before seeking redress in court for wrongful termination, and that the employee failed to state a claim under 42 U.S.C. § 1983 for violation of her rights under the First Amendment petition clause, the court reverses part of the decision of the Court of Appeals and the judgment dismissing the wrongful termination claim, affirms part of the decision of the Court of Appeals and the remainder of the judgment, and remands the case to the trial court for further proceedings.

Eric R. Hansen, for petitioner.

Christine O. Gregoire, Attorney General, and *Paul J. Triesch*, Assistant, for respondents.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

Am Jur 2d, Administrative Law §§ 505-512; Appellate Review §§ 169, 170, 697-701; Public Officers and Employees §§ 169, 173, 177; Wrongful Discharge §§ 11, 14, 18, 23, 34.

ALR Index, Administrative Law; Appeal and Error; Discharge From Employment or Office; Exhaustion of Remedies; Labor and Employment; Public Officers and Employees.

SANDERS, J. — The question is whether the common law tort of wrongful discharge in violation of public policy extends to employees who may be terminated only for cause and, if so, whether an employee must first exhaust administrative or contractual remedies before pursuing such an action. We are also asked to decide whether a public employee establishes a cause of action under 42 U.S.C. § 1983 when a public agency discharges her in retaliation for filing an employment related grievance. We review an unpublished decision of the Court of Appeals which affirmed dismissal of the employee's claims, and reverse in part.

FACTS

Bates Technical College (Bates) is a vocational-technical institution operated by the State of Washington. RCW 28B.50.030(11). Bates employed Kelly Smith as a traffic programmer for its on-site television station, KBTC-TV, from February 1986 until February 1994.

While employed at Bates, Smith was a state technical college employee entitled to those civil service protections applicable to higher education employees. See RCW 41.56.024. Additionally, Smith was at all times a member of the Tacoma Association of Public School Professional-Technical Employees Union (the union). Under the collective bargaining law for higher education personnel, an institution of higher education and a union may elect to have their relationship and corresponding obligations governed by RCW 41.56.¹ See RCW 41.56.201. Because

¹RCW 41.56 provides statutory remedies for any alleged unfair labor practices by a state technical college employer. See RCW 41.56.140, 41.56.160. This statute also provides classified employees of Washington's technical colleges with the right to engage in union activity and to collectively bargain for rights and benefits beyond those provided by statute. See RCW 41.56.010, 41.56.122.

Smith's union apparently elected to participate in the collective bargaining process, she was subject to RCW 41.56 and the collective bargaining agreement (CBA) negotiated by her union. The CBA allowed an employee to be disciplined only "for cause" and established a grievance procedure for any claim based on an alleged violation of the CBA, written college policies, regulations and rules, or unfair and inequitable treatment.

Prior to 1991 Deborah Emond was Smith's immediate supervisor. Smith received favorable performance evaluations from Emond. Following a restructuring at Bates in September 1991, Emond became the station manager. Avon Killion was selected for the position of supervisor of programming and fundraising and became Smith's immediate supervisor.² This restructuring led to a series of problems between Smith and her supervisors.

In July 1993 Smith filed her first grievance alleging Emond violated the CBA by unilaterally changing her job description. After filing this grievance Smith's relationship with Emond began to seriously deteriorate. According to Smith, Emond refused to respond to Smith and avoided making eye contact with her. Although Smith demanded this grievance be submitted to arbitration, she withdrew her demand shortly before the arbitration was scheduled to begin.

Smith filed a second grievance to contest the docking of her pay for leaving the work area at a time other than her scheduled lunch or break period. John Thorpe, senior vice president of Bates, denied Smith's grievance, finding: "[Y]our conduct in this situation constitutes misconduct and insubordination. You are hereby reprimanded for this misconduct and insubordination and your personnel file will so reflect this." Ex. 3.

In late October 1993 Smith took medical leave, ostensibly

²According to Smith, Killion had been "very supportive of [her] and had written laudatory letters . . . that had been placed in her personnel file." Pet. for Review at 4. After Killion was dismissed for poor performance in October 1993, Paul Jackson became Smith's supervisor. Jackson ultimately recommended Smith's dismissal.

due to job stress. While on leave, Smith received two letters from Emond requesting return of certain documents, suggesting Smith had stolen them. Smith responded to the first letter by stating she did not steal the items mentioned by Emond. In a letter dated January 10, 1994, Smith was reprimanded for failing to provide the data requested by Emond. Smith grieved this reprimand. Additionally, in a memorandum addressed to Emond, Smith detailed numerous problems she experienced after returning from medical leave. According to Smith, Emond did not help her resolve these problems.

Upon her return to work, Smith began cross-training Karin Jackson as a backup in Smith's position. According to Karin Jackson, Smith allegedly made threatening remarks about several co-workers whom Smith believed were a "clique." Karin Jackson reported this alleged incident to Sally Cofchin, Bates' Director of Personnel. Cofchin and several other managers met with Smith to confront her with Karin Jackson's accusations. Although Smith admits she discussed her anger and the workplace stress, Smith contends she did not threaten any employee of Bates. In December 1993, Smith responded by grieving the allegations leveled against her.

In January 1994 Smith filed an additional grievance after being required to submit a leave slip for her late arrival to work. When asked to submit the leave slip, Smith allegedly became enraged and shouted at her supervisor and another employee. As a result of this conduct Smith was issued a reprimand, which she subsequently grieved. Smith filed yet another grievance alleging her supervisor violated the confidentiality of the grievance process by circulating her letter of reprimand to three employees of Bates.

On February 11, 1994 William Mohler, president of Bates, dismissed Smith from her employment. This action followed a meeting between management and Smith designed to avoid the dismissal. Smith filed a grievance to contest her termination under the CBA, which proceeded to arbitration. The arbitrator issued an award in favor of Smith, ruling:

[Smith] was not terminated for cause and following progressive discipline. The College shall promptly offer to restate her to her former position and shall make her whole for all direct and indirect benefits lost due to her improper termination. The College shall also remove from [Smith's] personnel [file] all records pertaining to the course of dealing leading to this case including particularly the February 2 letter warning of possible termination and all of the documents referenced in that letter.

Clerk's Papers at 88. Bates complied with the order by reinstating Smith, reimbursing her lost wages and benefits, and purging her personnel file. Smith received back pay for three months in the amount of \$10,728.00 plus accrued benefits in the amount of \$2,765.93 for social security, retirement, health insurance, and medical aid/industrial insurance.

In addition to filing these numerous grievances, Smith filed four separate unfair labor practice (ULP) complaints with the Public Employment Relations Commission (PERC). Two ULPs preceded Smith's dismissal and two followed her dismissal. In these ULPs, Smith complained of retaliation for filing her earlier grievances and challenged her dismissal by Bates.

Before PERC could address these claims, Smith filed a complaint in Pierce County Superior Court. Smith ultimately sued Bates, the college district of which it is a part, and four supervisory personnel, seeking monetary damages for wrongful discharge in violation of public policy, defamation, and violation of her First Amendment rights pursuant to 42 U.S.C. § 1983.

Bates moved for summary judgment on all the claims. The trial court granted Bates' motion in part, dismissing Smith's wrongful termination claim for failure to exhaust her remedies with PERC. The trial court also dismissed Smith's § 1983 claim as to the college, but not the individual defense motion to dismiss the trial the court granted the defense motion to dismiss the remaining § 1983 claims. The trial court reasoned: "There needs to be a public ele-

ment involved in either the speech or the petition. And since counsel for plaintiff has admitted that there is no public issue here, I think that *Binkley v. City of Tacoma*, 114 Wn.2d 373, 787 P.2d 1366 (1990)], *Gearhart v. Thorne*, 768 F.2d 1072 (9th Cir. 1985)], and the decisions from the other six circuits control." Report of Proceedings at 690. The trial court allowed the defamation claim to proceed, but the jury found Smith had not been defamed. However the trial court awarded Smith \$10,407.50 for attorneys fees incurred in the successful arbitration proceeding.

The Court of Appeals, Division Two, affirmed the decision of the superior court in an unpublished opinion. *Smith v. Bates Technical College*, No. 19937-8-II (Wash. Ct. App. May 29, 1998). We granted review confined to the issues of the common law tort of wrongful discharge in violation of public policy and 42 U.S.C. § 1983.

ANALYSIS

[1, 2] When reviewing a grant of summary judgment, we engage in the same inquiry as the trial court. RAP 9.12; *Harris v. Shi Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993). A summary judgment will be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). All facts and reasonable inferences are reviewed in the light most favorable to the nonmoving party; all questions of law are reviewed de novo. *Id.* Because the trial court decision involves questions of law, our review of both issues in this case is de novo. See *Department of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993).

I. Tort of Wrongful Discharge in Violation of Public Policy

[3] Under Washington common law, an employer could generally discharge an employee with or without cause absent an agreement to the contrary. *Roberts v. Atlantic*

Richfield Co., 88 Wn.2d 887, 891, 568 P.2d 764 (1977). However, an employer's absolute prerogative to discharge an employee has not remained unfettered. In *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), we joined a growing number of jurisdictions when we recognized a cause of action in tort for wrongful discharge in violation of public policy. "The policy underlying the exception is that the common law doctrine cannot be used to shield an employer's action which otherwise frustrates a clear manifestation of public policy." *Id.* at 231. We explained "The exception has been utilized in instances where application of the terminable at will doctrine would have led to a result clearly inconsistent with a stated public policy and the community interest it advances." *Id.* (citing *Roberts*, 88 Wn.2d at 897). To clarify the purpose underlying the public policy exception, we compared two cases from other jurisdictions:

[In *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978) a bank employee was discharged after attempting to make his employer comply with the state consumer credit and protection laws. The West Virginia Supreme Court held that despite the general rule, the bank could be liable for wrongful discharge because the discharge would otherwise frustrate a clear manifestation of public policy, protection of consumers of credit. In contrast to the result reached in *Harless*, when the interest alleged by the plaintiff/employee has been found to be purely private in nature and not of general public concern, the general rule applied and no liability attached to the employer's action. See, e.g., *Campbell v. Ford Indus., Inc.*, 274 Or. 243, 546 P.2d 141 (1976) (employee/stockholder allegedly fired for pursuing stockholders' rights against employer).

Thompson, 102 Wn.2d at 231-32. Thus, in Washington the tort of wrongful discharge is not designed to protect an employee's purely private interest in his or her continued employment; rather, the tort operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy.

The threshold issue in this case is whether the tort of

wrongful discharge extends to employees who are terminable only for cause. Affirming the summary dismissal of Smith's wrongful discharge claim, the Court of Appeals noted this remedy is "generally, if not exclusively, applied to employment at will situations." *Smith*, slip op. at 8 (quoting *Micone v. Town of Steilacoom Civil Serv. Comm'n*, 44 Wn. App. 636, 643 n.2, 722 P2d 1369 (1986)). *Smith* contends the tort of wrongful discharge should not be limited to at-will employees, but should be extended to cover employees who may be dismissed only for cause. Conversely, Bates argues the wrongful discharge doctrine does not apply to classified state employees who are protected by a CBA and statutory remedies.

At first glance, Bates' argument finds support in prior decisions that broadly suggested the common law tort of wrongful discharge applies only to at-will employees. In *Reinger v. Department of Corrections*, 134 Wn.2d 437, 951 P2d 782 (1998), we questioned the viability of the tort "where other relief is available to an affected employee." *Id.* at 445 (citing *Micone*, 44 Wn. App. at 643 n.2, and *Albright v. State*, 65 Wn. App. 763, 768-69, 829 P2d 1114 (1992)). And in *White v. State*, 131 Wn.2d 1, 929 P2d 396 (1997), we declined to extend the tort to include wrongful transfers and refused to subject each disciplinary decision of the employer to judicial scrutiny. "This is particularly true in instances like this one where an employee's rights are already protected by civil service rule, by a collective bargaining agreement, and by civil rights statutes." *Id.* at 20. Furthermore, the United States District Court for the Eastern District of Washington observed: "[T]he claim of 'discharge in violation of public policy' exists only as a narrow exception to the at-will doctrine; there is no such claim in cause-only employment." *Keenan v. Allan*, 889 F. Supp. 1320, 1367 (E.D. Wash. 1995), *aff'd*, 91 F.3d 1275 (9th Cir. 1996).³

However, we find compelling the arguments made in

³Although Bates' argument appears to find support in other jurisdictions, see, e.g., *Silva v. Abunquerque Assembly & Distrib. Freeport Warehouse Corp.*, 106

favor of extending the tort to all employees. In *Wilson v. City of Monroe*, 88 Wn. App. 113, 121, 943 P2d 1134 (1997), *review denied*, 134 Wn.2d 1028, 958 P2d 318 (1998), Division One held the cause of action for wrongful termination in violation of public policy extends to *all* employees and may be brought "notwithstanding the existence of other remedies." Allowing a former municipal employee to sue for wrongful termination in retaliation for "whistleblowing," the court reasoned, "[T]he tort cause of action for termination in contravention of public policy is not confined to at-will employment situations, but is available to all employees because the tort embodies a strong state interest in protecting against violations of public policy." *Id.* at 115-16. The court recognized the tort of wrongful discharge in violation of public policy is distinct from an action based in contract and explained:

Wilson's right to be free from wrongful termination in contravention of public policy may not be altered or waived by private agreement, and is therefore a nonnegotiable right. Furthermore, the right does not originate in the CBA provision that requires just cause for termination, or depend on interpretation of the CBA—the right is independent of any contractual agreement between Wilson and the City.

Id. at 117-18 (emphasis added) (footnote omitted).

Holding the tort of wrongful discharge in violation of public policy does not extend to employees who may be

N.M. 19, 738 P2d 513, 515 (1987); *Phillips v. Babcock & Wilcox*, 349 Pa. Super. 351, 503 A.2d 86, 38 (1986), these cases are of limited value here. Citing its own state's authority, the *Silva* court explained: "The express reason for recognizing this tort, and thus modifying the terminable at-will rule, was 'the need to encourage job security' for those employees not protected from wrongful discharge by an employment contract." *Silva*, 738 P2d at 515 (quoting *Vigil v. Arzola*, 102 N.M. 682, 699 P2d 613, 619 (N.M. App. 1983), *rev'd in part on other grounds*, 101 N.M. 687, 687 P2d 1038 (1984)). The *Phillips* court similarly recognized: "[T]he wrongful discharge cause of action was never intended to provide a forum to vindicate public policy and punish those who deviate from it." *Phillips*, 503 A.2d at 37. Rather, the Pennsylvania Supreme Court "was clearly concerned with the protection of 'corporate personnel in the areas of employment not covered by labor agreements.'" *Id.* (quoting *Gary v. U.S. Steel Corp.*, 456 Pa. 171, 181, 319 A.2d 174, 179 (1974)). As *Thompson* clearly did not adopt the tort of wrongful discharge in violation of public policy in order to "encourage job security" or to protect personnel "not covered by labor agreements," we find these cases unpersuasive.

dismissed only for cause simplistically ignores the fundamental distinction between tort and contract actions. As the court explained in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839 (1980), the theoretical reason for labeling a discharge as "wrongful" is not based on the terms and conditions of an employment contract, but rather arises out of the employer's duty to conduct its affairs in compliance with public policy. Relying on this logic, the California Court of Appeals held:

[T]here is no logical basis to distinguish in cases of wrongful termination for reasons violative of fundamental principles of public policy between situations in which the employee is an at-will employee and in which the employee has a contract for a specified term. The tort is independent of the term of employment.

Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 1166, 226 Cal. Rptr. 820, 826 (1986); see also *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988). Professor Prosser has explained:

"[W]hereas [c]ontract actions are created to protect the interest in having promises performed," "[f]ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . ."

Koehrer, 181 Cal. App. 3d at 1165, 266 Cal. Rptr. at 825 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 613 (4th ed. 1971)); see also *Foley*, 47 Cal. 3d at 667 n.7, 254 Cal. Rptr. at 216 n.7 ("What is vindicated through the cause of action is not the terms or promises arising out of the particular employment relationship involved, but rather the public interest in not permitting employers to impose as a condition of employment a requirement that an employee act in a manner contrary to fundamental public policy."). It logically follows when any employee is terminated in violation of a clear mandate of public policy, the employee should be permitted to recover for the violation of his or her legal rights.

Bates makes much of the remedies afforded Smith through her CBA. But while the contractual remedies available to certain employees redress violations of the underlying employment contract, these remedies do not protect an employee who is fired not only "for cause" but also in violation of public policy. Bates' position thus illogically grants at-will employees greater protection from these tortious terminations due to an erroneous presumption the contractual employee does not "need" such protection.

Further, Bates fails to acknowledge additional and distinct remedies would be available to Smith were she allowed to sue in tort. See *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 919, 726 P.2d 434 (1986) (damages for emotional distress are recoverable in tort action based on wrongful termination in violation of public policy). Although Bates correctly notes PERC has the authority to issue "appropriate remedial orders," RCW 41.56.160(1), Bates cites no authority for the proposition PERC is authorized to award damages for emotional distress. Further, while PERC is "empowered and directed to prevent any unfair labor practice," RCW 41.56.160(1), PERC does not have the authority to adjudicate wrongful discharge tort actions. See *State ex rel. Graham v. Northshore Sch. Dist. No. 417*, 99 Wn.2d 232, 240, 662 P.2d 38 (1983) ("The declaration of legal rights and interpretation of legal questions of province of the courts and not of administrative agencies."). Thus, Bates' assumption that Smith's pending action before PERC will fully resolve her wrongful discharge claim is wholly unsupported.

In *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280, 85 Ill. Dec. 475 (1984), the court granted union members protected by a CBA the right to sue in tort for wrongful discharge and focused on the different remedies available.

It would be unreasonable to immunize from punitive damages an employer who unjustly discharges a union employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a nonunion employee. The

public policy against retaliatory discharges applies with equal force in both situations.

Midgett, 473 N.E.2d at 1284. Similarly in *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949 (Utah 1992), the court reasoned:

When an employer's act violates both its own contractual just-cause standard and a clear and substantial public policy, we see no reason to dilute the force of the double sanction. In such an instance, the employer is liable for two breaches, one in contract and one in tort. It therefore must bear the consequences of both.

Id. at 960. We too see no justified reason to deny Smith the opportunity to recover damages for emotional distress—thereby immunizing the alleged tortious conduct of her employer—simply because her administrative and contractual remedies may partially compensate her wrongful discharge.

[4] Finally, our decision here is consistent with *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996). In *Gardner*, we extended the tort of wrongful discharge and held the employer, Loomis Armored, violated public policy by discharging an employee for disobeying a company rule in order to save a woman from a life-threatening hostage situation. As Justice Madsen correctly noted in her dissent, the majority there applied the public policy doctrine to a “for cause” employee, refusing to limit the remedy to at-will employment situations:

Loomis' employee handbook states that violation of the rule forbidding a driver from leaving an armored vehicle will be grounds for termination. Thus, the majority has applied a formerly narrow exception to the terminable-at-will doctrine to a situation where an employer provided just cause for termination and where the employment-at-will rule is inapplicable. The result of the majority's analysis is that the public policy exception to employment-at-will now applies to a fifth completely incompatible category; that is, where this court disagrees with an employer's definition of just cause for termination, as set forth in the workplace rules.

Gardner, 128 Wn.2d at 952 (Madsen, J., dissenting) (citation omitted). Thus as the *Gardner* majority opted to extend the tort of wrongful discharge in violation of public policy to a situation *outside* the employment at-will context, we now find it unnecessary to distinguish between at-will and for-cause employees as the tort is equally applicable to all.

[5] Bates contends even if the tort of wrongful discharge is extended to all employees, Smith has not stated a claim for wrongful discharge in violation of public policy. When determining whether a clear mandate of public policy is violated, we consider “‘whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.’” *Thompson*, 102 Wn.2d at 232 (quoting *Parmer v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982)). Prior judicial decisions may also establish the public policy. *Thompson*, 102 Wn.2d at 232. A cause of action for wrongful discharge in violation of public policy exists where an employee is fired for exercising a legal right or privilege. *Gardner*, 128 Wn.2d at 936 (citing *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989)).

Here, Smith alleges her termination violated the public policy against discharging an employee for pursuing a grievance. As RCW 41.56 and Washington precedent establish a public employee's pursuit of a grievance is a protected legal right, Smith has identified a relevant public policy. See RCW 41.56.140(3) (unfair labor practice for public employer to discriminate against a public employee who has filed an unfair labor practice charge); *Clallam County v. Public Employment Relations Comm'n*, 43 Wn. App. 589, 599, 719 P.2d 140 (1986) (unfair labor practice for a public employer to discharge an employee for engaging in the protected right of pursuing a grievance).

Extending the tort of wrongful discharge to all employees advances the underlying purpose of the tort by prohibiting *any* employer from frustrating the important public policies of this state. Further, allowing employees—whether

terminable at-will or for cause—to sue for wrongful discharge in violation of public policy acknowledges the fundamental distinction between an action based in tort and one based in contract. Accordingly, we hold Smith may bring an action in tort for wrongful discharge in violation of her protected legal right to file grievances.

II. Exhaustion of Remedies

Smith argues if the tort of wrongful discharge is not limited to at-will employees, employees should not be required to exhaust administrative or contractual remedies before bringing an action in tort. The Court of Appeals disagreed, holding: "Employees subject to the civil service laws must first exhaust their administrative remedies before seeking relief or appealing to superior court." *Smith*, slip op. at 8 (citing *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997)).

[6] The doctrine of exhaustion of administrative remedies is well established in Washington. In general, a party must exhaust all available administrative remedies prior to seeking relief in superior court. *Citizens for Mount Vernon*, 133 Wn.2d at 866 (citing *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992)). The court will not intervene and administrative remedies must be exhausted when: (1) a claim is cognizable in the first instance by an agency alone; (2) the agency has clearly established mechanisms for the resolution of complaints by aggrieved parties; and (3) the administrative remedies can provide the relief sought. *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984). The principle is founded on the belief that the judiciary should give proper deference to the body possessing expertise in areas outside the conventional expertise of judges. *Id.*; *Retail Store Employees Union, Local 1001 v. Washington Surveying & Rating Bureau*, 87 Wn.2d 887, 906, 909, 558 P.2d 215 (1976).

[7] Bates argues that because Smith did not pursue her,

ULPs with PERC, she did not exhaust her administrative remedies to the extent required by law. Due to this failure Bates asserts the trial court properly exercised its discretion to dismiss Smith's wrongful termination claim. But Bates' argument ignores the fundamental distinction between a wrongful discharge action based in tort and an action based upon an alleged violation of an employment contract or a CBA. As we have explained, the tort of wrongful discharge seeks to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy. Because the right to be free from wrongful termination in violation of public policy is independent of any underlying contractual agreement or civil service law, we conclude Smith should not be required to exhaust her contractual or administrative remedies.

Courts that extend the wrongful discharge tort to employees such as Smith do not require exhaustion. The court in *Wilson* held that a former municipal employee was not required to exhaust his collective bargaining remedies before bringing a wrongful discharge claim.

Wilson's right to be free from wrongful termination in contravention of public policy may not be altered or waived by private agreement, and is therefore a nonnegotiable right. Furthermore, the right does not originate in the CBA provision that requires just cause for termination, or depend on interpretation of the CBA—the right is independent of any contractual agreement between *Wilson* and the City. This is true even though resolution of the dispute may require examination of the same set of facts as would arbitration under the CBA.

Wilson, 88 Wn. App. at 117-18 (footnotes omitted). Similarly, courts in other jurisdictions have also held exhaustion is not a prerequisite to bringing a claim for wrongful discharge in violation of public policy. See *Finch v. Holladay-Tyler Printing, Inc.*, 322 Md. 197, 206, 586 A.2d 1275, 1280 (1991) (no need to resort to arbitration because issue addressed by arbitration would not be determinative of wrongful discharge claim); *Midgett*, 473 N.E.2d at 1285

(plaintiff need not plead the exhaustion of contract remedies to bring an action in tort).

The Court of Appeals recently addressed this question in a similar context. In *Milligan v. Thompson*, 90 Wn. App. 586, 953 P2d 112 (1998), a state employee argued the statute of limitations on his discrimination and tort claims tolled during the pendency of the appeal of his dismissal to the State of Washington Personnel Appeals Board (PAB). The court disagreed, reasoning because exhaustion was not required the statute of limitations was not tolled.

Nor was [the plaintiff] required to exhaust his administrative remedies before bringing his tort actions because there is no showing that those claims were initially cognizable by the PAB alone, were within its special expertise, or that the PAB could provide the relief he sought.

Milligan, 90 Wn. App. at 597; see also *Morales v. Westinghouse Hanford Co.*, 73 Wn. App. 367, 869 P2d 120 (1994).

The logic of *Milligan* applies with equal force to the instant case. Bates has made no showing PERC has the authority to adjudicate wrongful discharge tort actions or that these actions are within its special expertise. Rather, PERC is simply "empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders." RCW 41.56.160(1). Further, PERC must petition the superior court for the enforcement of its orders. RCW 41.56.160(3). And while RCW 41.56.160(2) authorizes "such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees," it does not clearly authorize all damages that would be available in a tort action. See *Cagle*, 106 Wn.2d at 919 (damages for emotional distress recoverable in tort action based on wrongful termination in violation of public policy).

Our conclusion Smith is not required to exhaust her administrative remedies is even more compelling after examining one of our recent decisions. In *Reninger v. Department of Corrections*, 134 Wn.2d 437, 445, 951 P2d

782 (1998), two prison guards resigned after being demoted and reassigned to positions they felt were unreasonably dangerous. Although they had several statutory remedies available to them, they did not challenge their reassignments under the Industrial Safety and Health Act (RCW 49.17) or civil service laws. They did appeal their dismissals to the PAB, which denied their appeal and found they had been fired for gross misconduct. *Id.* at 443. We affirmed the Court of Appeals, finding the decision of the PAB had collateral estoppel effect in the superior court proceeding for wrongful constructive discharge. *Id.* at 454.

Under *Reninger*, an employee who loses in an administrative proceeding will be collaterally estopped from attempting to prove the distinct tort of wrongful discharge in violation of public policy. Thus, if employees are required to exhaust all available administrative remedies in order to bring a civil suit for wrongful termination, the administrative remedy could be the *only* available remedy. Such a rule goes beyond the usual understanding of exhaustion as a *prerequisite* to seeking judicial relief, see *Citizens for Mount Vernon*, 133 Wn.2d at 866, and ignores the fundamental distinction between contract and tort actions.

Because a wrongful termination claim is independent of any contractual agreement or statute and PERC does not have the exclusive authority or expertise to decide tort claims, we hold Smith should not have been required to exhaust her contractual or administrative remedies before suing in superior court.

III. First Amendment Claim

The Court of Appeals also upheld the dismissal of Smith's claim under 42 U.S.C. § 1983, ruling: "[Smith's] grievances stemmed from disputed charges of insubordination and misconduct she claims were made in retaliation for Smith's actions. As in *Gearhart*, these are 'matters only of personal interest' that are not protected by the First Amendment." *Smith*, slip op. at 5 (quoting *Gearhart v. Thorne*, 768 F.2d

1072, 1073 (9th Cir. 1985)). Smith contends the First Amendment petition clause⁴ protects the right of a public employee to file an official grievance involving matters of personal interest.

[8] Under 42 U.S.C. § 1983, a public employee may state a cause of action for discharge or other discipline resulting from the exercise of rights guaranteed under the First Amendment. See *White v. State*, 131 Wn.2d 1, 10, 929 P.2d 396 (1997). A public employee who alleges retaliatory discharge from government employment must show: (1) the conduct that triggered the discharge was protected under the First Amendment, and (2) the protected conduct was a substantial or motivating factor in the adverse employment decision. See *White*, 131 Wn.2d at 10; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). If the employee is able to prove these elements, the burden then shifts to the employer to prove it would have made the same decision in the absence of the employee's protected conduct. See *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 287; *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d 1366 (1990).

Where the alleged retaliation is based on expressive conduct constituting speech, a court must first determine whether the speech can be characterized as addressing a "matter of public concern." *Connick v. Myers*, 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147. If the court determines the speech involves matters of public concern, it must then balance the employee's interest in exercising his or her right to freedom of speech

⁴The First Amendment guarantees "the right of the people . . . to petition the government for a redress of grievances." U.S. CONST. amend. I.

against the interest of the State "as an employer, in promoting the efficiency of the public services it performs through its employees." *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)).

Smith's expressive conduct here was not limited to speech. It included filing both formal grievances through her CBA and filing ULPs with PERC. Smith argues this conduct triggered the protection of the petition clause of the First Amendment—rather than the freedom of speech clause—and asks us to hold the petition clause does not implicate the "public concern" element established in *Connick*. Instead, Smith believes all employees who file internal grievances with a governmental employer receive protection from adverse employment actions, regardless of the private nature of the grievance.

Smith's argument is based upon a flawed premise. Smith apparently presumes that because she filed formal workplace grievances with "the government," this conduct triggered the petition clause of the First Amendment. But this position ignores the government's role as an employer and would accord greater rights to government employees. "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for the employee grievances not afforded by the First Amendment to those who do not work for the State." *Connick*, 461 U.S. at 147.

Smith's position would require us to elevate the protection afforded by the petition clause above that afforded by the other clauses of the First Amendment, "a premise that is undermined by the Supreme Court's repeated references to these clauses as being overlapping." *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 701 (5th Cir. 1985). As the Supreme Court observed in *McDonald v. Smith*, 472 U.S. 479, 482, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985), "[t]he right to petition is cut from the same cloth as the other

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guarantees of that Amendment, and is an assurance of a particular freedom of expression."

Moreover, seven of the eight circuit courts addressing this issue have held a public employee who alleges he or she was disciplined in retaliation for filing a grievance against the employer does not state a claim under § 1983 unless the grievance addressed a matter of public concern. *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) ("The First Amendment right to petition the government for a redress of grievances . . . is generally subject to the same constitutional analysis' as the right to free speech." (quoting *Wayte v. United States*, 470 U.S. 598, 610 n.11, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985))); *Day*, 768 F.2d at 703 ("An employee's complaint to her superior on a personal matter is no more a matter of public concern when embodied in a letter to him requesting a hearing than it is when spoken to him."); *Rice v. Ohio Dep't of Transp.*, 887 F.2d 716, 721 (6th Cir. 1989) ("[Plaintiff] was not 'speaking] out as a citizen' when he filed his reverse discrimination charge"; *vacated on other grounds* by 497 U.S. 1001, 110 S. Ct. 3232, 111 L. Ed. 2d 744 (1990); *Altman v. Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984) (per curiam) ("[A] private office dispute cannot be constitutionalized merely by filing a legal action."); *Belle v. Town of Minoqua*, 858 F.2d 1258, 1262 (7th Cir. 1988) ("[W]e decline to hold as a matter of law that the fact that [the employer] may have terminated [the employee] in retaliation for threatening to file a grievance constitutes a *per se* violation of the first amendment."); *Gearhart*, 768 F.2d at 1073 (per curiam) (grievances related to "'matters only of personal interest,' and do not invoke first amendment protection" (quoting *Connick*, 461 U.S. at 147)); *Renfroe v. Kirpatrick*, 722 F.2d 714, 715 (11th Cir. 1984) (per curiam) ("[P]laintiff's grievance is protected under the First Amendment only if it related to a matter of public concern."). Cf. *Boyle v. Burke*, 925 F.2d 497, 505-06 (1st Cir. 1991) (dicta). Only the Third Circuit has disagreed, holding a grievance or lawsuit brought by a public employee is constitutionally protected, regardless of whether it involved:

a matter of public concern. *San Filippo v. Bongiovanni*, 30 F.3d 424, 442 (3d Cir. 1994).

The Ninth Circuit recently criticized the holding of *San Filippo* in *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997), cert. denied, 524 U.S. 952, 118 S. Ct. 2368, 141 L. Ed. 2d 737 (1998).

[T]he Third Circuit's analysis . . . diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantees to public employees in order to encourage such participation. Moreover, it equates the government's conduct as employer with its conduct as government. When government as employer disciplines an employee for pursuing litigation, it does not act as "the very government" which established the mechanism for redress in accordance with its constitutional obligation, but rather in its role as an employer.

Rendish, 123 F.3d at 1223. Following the majority of the circuits, the court held, "Regardless of whether the right to grieve an employment dispute is characterized as the exercise of the right to petition or the right to free speech, the same public concern requirement applies." *Id.*

[9] We believe the better reasoned view is that a public employee's claim against a public employer under 42 U.S.C. § 1983 alleging a violation of the employee's petition clause rights under the First Amendment must satisfy the public concern requirement articulated in *Connick*. To hold otherwise could provoke judicial scrutiny to every institutional response to a comment. See *Wilson v. State*, 84 Wn. App. 332, 342-43, 929 P.2d 448 (1996). As we so recently held in *White*, the absence of a public concern in the exercise of a First Amendment right defeats a public employee's cause of action against a public employer under 42 U.S.C. § 1983. *White*, 131 Wn.2d at 20.

In the present case, the content of Smith's grievances cannot be characterized as involving matters of public concern. Accordingly, we do not need to scrutinize the

reasons for her dismissal, see *Connick*, 461 U.S. at 146, and hold the trial court properly dismissed Smith's claims against Bates and its employees under 42 U.S.C. § 1983.

CONCLUSION

As our prior case law has not clearly defined the scope of the common law tort of wrongful discharge in violation of public policy, we now expressly hold the common law tort is available to all employees without regard to whether an employee is terminable at-will or may be discharged only for cause. We also hold an employee need not exhaust contractual or administrative remedies before bringing an independent tort action for wrongful discharge in violation of public policy. Accordingly, we reverse the trial court's summary dismissal of Smith's wrongful termination claim and remand to the trial court for trial on this issue.

Although Smith's complaint alleges a violation of the petition clause of the First Amendment, we conclude a public employee states a claim under 42 U.S.C. § 1983 against a public employer for violation of First Amendment rights only if the employee's expression implicates a matter of public concern. Because Smith's grievances involved purely private matters, we affirm the trial court's dismissal of Smith's § 1983 claim.

SMITH, MADSEN, ALEXANDER, and IRELAND, JJ., concur.

JOHNSON, J., concurs in the result.

TALMADGE, J. (concurring in part/dissenting in part) — I agree with the majority that Kelly Smith failed to establish a cause of action under 42 U.S.C. § 1983 against Bates Technical College and the individual defendants (Bates) for allegedly exercising her First Amendment rights because her expression to Bates related to a purely private concern. But I dissent on the issue of whether the common law tort of wrongful discharge in violation of public policy extends

to employees like Smith, who have the protection of civil service laws or collective bargaining agreements and who may be terminated only for cause. The majority ignores the historical rationale for the tort and our case law in extending the cause of action beyond at-will employees. I would affirm the trial court's dismissal of Smith's complaint.

The majority correctly notes that under Washington common law, an employer could generally discharge an employee with or without cause absent an agreement or statutory system regulating the employment relationship to the contrary. *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 891, 568 P.2d 764 (1977). But an employer's absolute prerogative to discharge an employee is not unfettered. In fact, in recent years we have created certain exceptions to the terminable-at-will doctrine. For example, we joined most jurisdictions in recognizing a cause of action in tort for wrongful discharge in violation of a clear mandate of public policy. See *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984) (adopting this narrow exception because it properly balances the interest of both the employer and the employee). "The policy underlying the exception [to the terminable-at-will rule] is that the common law doctrine cannot be used to shield an employer's action which otherwise frustrates a clear manifestation of public policy." *Id.* at 231. Consequently, an employee has a common law cause of action in tort for wrongful discharge, even if the employee's service is at the will of the employer, if the discharge contravenes a clear mandate of public policy. See *id.* at 232. In essence, this common law tort affords job security protections to employees who, like civil servants or employees subject to a collective bargaining agreement (CBA), may have no other remedy for arbitrary employer conduct.

We have applied this exception to the terminable-at-will

rule only in cases where the public policy is clear.⁶ In fact, in only a few cases have we found a violation of public policy. See, e.g., *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 950, 913 P.2d 377 (1996) (an armored truck driver's discharge for leaving the truck to save a woman from imminent death violated public policy, although such a holding did not invalidate the defendant's work rule regarding drivers leaving the truck). See also *Bravo v. Dolson Co.*, 125 Wn.2d 745, 758, 888 P2d 147 (1995) (finding employer's discharge of nonunionized plaintiffs for engaging in "concerted activities" violated public policy); *Bennett v. Hardy*, 113 Wn.2d 912, 924-25, 784 P2d 1258 (1990) (applying the *Dicomes v. State*, 113 Wn.2d 612, 782 P2d 1002 (1989) whistleblowing analysis and finding the employer's alleged wrongdoing—unlawful age discrimination—together with the employee's reasonable response to the conduct, violated public policy). But see, e.g., *Keenan v. Allan*, 91 F.3d 1275, 1281 (9th Cir. 1996) (although public policy encourages good faith reporting of improper governmental action, because the plaintiff failed to show causation or to rebut the defendant's proffer of an alternative "overriding justification" for her dismissal, the court found no public policy violation). See also *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 876 P2d 435 (1994) (finding no violation of public policy (public safety) where the defendant failed to show he communicated his opposition to alleged violations of a certification procedure and he never personally refused to implement a company program violating "public policy").

The fundamental issue in this case is whether the common law tort of wrongful discharge extends to an employee who is terminable only for cause. Affirming the summary dismissal of Smith's wrongful discharge claim, the Court of Appeals noted this remedy is "generally, if not exclusively, applied to employment at-will situations." *Smith v. Bates*

⁶Public policy "concerns what is right and just and what affects the citizens of the State collectively." *Roberts v. Dudley*, 92 Wn. App. 652, 659, 966 P2d 377 (1998) (quoting *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P2d 1002 (1989)).

Technical College, No. 19937-8-II, slip op. at 8 (Wash. Ct. App. May 29, 1998) (quoting *Micone v. Town of Steilacoom Civil Serv. Comm'n*, 44 Wn. App. 636, 643 n.2, 722 P.2d 1369 (1986)). See also *Albright v. State*, 65 Wn. App. 763, 829 P.2d 1114 (1992). Our prior decisions confirmed this. In *Reninger v. Department of Corrections*, 134 Wn.2d 437, 445, 951 P2d 782 (1998), for example we stated:

DOC argues the doctrines of wrongful discharge or constructive wrongful discharge do not apply to employees who are not terminable at-will. Reninger and Cohen, given their civil service status, were not terminable at-will employees. Indeed, our case law has questioned the viability of such a tort where other relief is available to an affected employee. See, e.g., *Micone v. Town of Steilacoom Civil Serv. Comm'n*, 44 Wn. App. 636, 643 n.2, 722 P2d 1369 (questioning "whether the doctrine of constructive discharge even applies to employment governed by civil service rules"), review denied, 107 Wn.2d 1010 (1986); *Albright v. State*, 65 Wn. App. 763, 768-69, 829 P2d 1114 (1992) (same).

134 Wn.2d at 445 (emphasis added). Furthermore, the United States District Court for the Eastern District of Washington observed: "the claim of 'discharge in violation of public policy' exists only as a narrow exception to the at-will doctrine; there is no such claim in cause-only employment." *Keenan v. Allan*, 889 F. Supp. 1320, 1367 (E.D. Wash. 1995), *aff'd*, 91 F.3d 1275 (9th Cir. 1996). Similarly, in *White v. State*, 131 Wn.2d 1, 929 P2d 396 (1997), we declined to extend the tort to include wrongful transfers and refused to subject each disciplinary decision of the employer to judicial scrutiny. "This is particularly true in instances like this one where an employee's rights are already protected by civil service rule, by collective bargaining agreement, and by civil rights statutes." *Id.* at 20.

Other jurisdictions have also adopted the view that the common law tort of wrongful discharge applies only to at-will employees. See *Cullen v. E.H. Friedrich Co.*, 910 F. Supp. 815, 821 (D. Mass. 1995) (under Massachusetts law,

"[t]he cause of action [for wrongful discharge in violation of public policy] is only available to 'at-will' employees"; *Luehans v. Washington Univ.*, 894 S.W.2d 169, 173 (Mo. 1995) ("a wrongful discharge action is only available to an employee at-will"); *Silva v. Albuquerque Assembly & Distrib. Freeport Warehouse Corp.*, 106 N.M. 19, 738 P2d 513, 515 (1987) ("Obviously, if an employee is protected from wrongful discharge by an employment contract, the intended protection afforded by the retaliatory discharge action is unnecessary and inapplicable"); *Phillips v. Babcock & Wilcox*, 349 Pa. Super. 351, 503 A.2d 36, 38 (1986) ("[W]e hold that an action for the tort of wrongful discharge is available only when the employment relationship is at-will."); *Herrnreck v. United Parcel Serv., Inc.*, 938 P2d 863, 867 (Wyo. 1997) ("Where an employment contract is present, there does not exist any necessity for invoking a separate action for the tort of retaliatory discharge as to vindicate public policy"); *Tomlinson v. Board of Educ.*, 226 Conn. 704, 730 n.18, 629 A.2d 333, 347 n.18 (1993) (because plaintiff is not an employee at-will, she "is not entitled to invoke the common law doctrine of wrongful discharge as a separate cause of action in tort."); and *Stiles v. American Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449, 452 (1999) (Toal, J., concurring) (Wrongful discharge tort "is not designed to overlap an employee's statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists."). Cf. *Wilson v. City of Monroe*, 88 Wn. App. 113, 121, 943 P2d 1134 (1997), review denied, 134 Wn.2d 1028, 958 P2d 318 (1998).

The majority largely overlooks this great weight of authority from around the United States and allows Smith a cause of action in tort for her allegedly wrongful discharge, even though the statutory and contractual remedies worked for her. The majority affords public employees greater protection than other workers in our state and provides significant disincentives for public employees to use the statutory and contractual mechanisms created for protection of their employment rights. Why use a CBA's

arbitration clause or the Public Employment Relations Commission (PERC) when the majority permits a public employee to go to court?

In the final analysis, the common law tort of wrongful discharge in violation of public policy should be available only to persons who are terminable-at-will. This tort was designed to afford employees job security protection from employer actions in violation of public policy when those employees had no other viable protections in contract or at law; that is not the case here. For employees who have the extensive protection of civil service laws or CBAs, their job security is embodied in statutory "for cause" termination provisions and the negotiated job security of a CBA. Thus, Smith, as both a public employee and a union member, is protected administratively as well as through her negotiated CBA. RCW 28B.52.025; RCW 41.56.024. Indeed, Smith's CBA afforded her a swift, certain remedy in arbitration, which resulted in her restoration to employment, and back pay. Moreover, Smith still has unfair labor practice complaints pending before PERC, which has the authority to issue "appropriate remedial orders[.]" RCW 41.56.160(1). Furthermore, such orders are subject to considerable judicial deference. See *Municipality of Metro. Seattle v. Public Employment Relations Comm'n*, 118 Wn.2d 621, 826 P2d 158 (1992).⁹

The majority finds that employees protected by civil service or CBAs may still seek the common law cause of action because the remedies afforded by an action in court may exceed those available through civil service or a CBA. Majority at 805. This refrain from the majority was expressly rejected by this court in *Renzinger* in the context of an

⁹This is not to say that an employee's civil service or CBA protections somehow forestall a cause of action specifically created by statute. For example, in *Ricobono v. Pierce County*, 92 Wn. App. 254, 265-66, 966 P2d 327 (1998), the court held a county employee with civil service and collective bargaining remedies was entitled to sue for wrongful discharge under RCW 49.60. Washington's law against discrimination, without exhausting civil service or CBA remedies. Where the Legislature has created general statutory protections for employees, employees who are beneficiaries of civil service or CBA protection are still entitled to such remedies in court.

argument regarding the preclusive effect of administrative actions on subsequent court proceedings. The majority now tries to do by the back door what was not done in response to a more straightforward argument in *Reninger*.

The majority also believes that it can discern a clear violation of public policy here. Ordinarily, in determining whether a clear mandate of public policy has been violated, we consider "whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." *Thompson*, 102 Wn.2d at 232 (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P2d 625, 631 (1982)). In *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P2d 377 (1996), we established a framework for discerning a clear mandate of public policy. What constitutes such a clear mandate is a question of law. See *Dicomes v. State*, 113 Wn.2d 612, 617, 782 P2d 1002 (1989).

We have generally allowed public policy tort actions in four situations: (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation; (3) where employees are fired for exercising a legal right or privilege; and (4) where employees are fired in retaliation for reporting employer misconduct. See *Gardner*, 128 Wn.2d at 936 (quoting *Dicomes*, 113 Wn.2d at 618). The touchstone of these exceptions is whether the employer's discharge violates some public rather than some private interest. See *Dicomes*, 113 Wn.2d at 618 ("Although there is no precise line of demarcation dividing matters that are . . . public . . . from matters purely personal, . . . a matter must strike at the heart of a citizen's social rights, duties, and responsibilities . . ."). (quoting *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876, 52 Ill. Dec. 13 (1981)).

The majority discerns a "clear mandate of public policy" from the very statute its opinion effectively undercuts. If the public policy mandate of CBAs and PERC is so clear, the majority should simply allow that public policy to be applied as the Legislature envisioned in Kelly Smith's case.

Instead, the majority appears to suggest only the judiciary knows best.

Finally, in this case, the majority purports to short circuit the process created by the Legislature to determine if a violation of public policy has occurred. Thus, public employees need not exhaust either civil service or CBA remedies to determine if they were terminated "for cause." Rather, the courts now become available to any public employee claiming wrongful treatment. The courts are substituted for PERC or arbitrators under CBAs. This unfathomable extension of judicial power, heedless of any restraint, is not only unsupported in law, but also positively dangerous to public employers and employees. The expertise of PERC and labor arbitrators may be freely disregarded in favor of court actions before judges whose expertise in public labor law certainly is not as great. Again, we rejected this argument in *Reninger* only to see it now revived by the majority without the slightest attention being paid to principles of stare decisis. See *Reninger*, 134 Wn.2d at 450.

CONCLUSION

Our prior case law on the scope of the common law tort of wrongful discharge in violation of public policy broadly hinted the tort is confined to at-will employment because civil service statutory protections and the provisions of CBAs appropriately protected employee job security. We should expressly hold the common law tort is available only to employees who are terminable-at-will, and affirm the trial court decisions in favor of Bates.

GUY, C.J., concurs with TAMADGE, J.

CASES DETERMINED IN THE
SUPREME COURT

OF

WASHINGTON

[No. 63500-5. En Banc.]

Argued June 25, 1996. Decided January 9, 1997.

JUDY C. WHITE, *Petitioner*, v. THE STATE OF
WASHINGTON, *ET AL.*, *Respondents*.

- [1] **Judgment — Summary Judgment — Review — Role of Appellate Court.** An appellate court reviews a summary judgment by engaging in the same inquiry as the trial court.
- [2] **Judgment — Summary Judgment — Review — Interpretation of Facts.** An appellate court reviewing a summary judgment considers the evidence and the reasonable inferences therefrom most favorably toward the nonmoving party.
- [3] **Judgment — Summary Judgment — Burden on Nonmoving Party — Averment of Specific Facts — Necessity.** Once a party moving for a summary judgment has presented affidavits sufficient to establish the absence of an issue of material fact, the nonmoving party has the burden of setting forth specific facts that sufficiently rebut the moving party's contentions and that disclose the existence of a genuine issue of material fact. A nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain to be tried.
- [4] **Judgment — Summary Judgment — Determination — Single Conclusion From Evidence.** A summary judgment may be granted if reasonable minds could reach only one conclusion based on the facts in evidence.

[5] **Public Employment — Constitutional Law — Freedom of Speech — Public Employee — Adverse Employment Decision — Test.** A public employee's claim of retaliation in employment based on the exercise of a First Amendment right is not actionable unless the employee establishes that the speech or conduct (1) is protected by the First Amendment and (2) was a substantial or motivating factor in the adverse employment decision.

[6] **Public Employment — Constitutional Law — Freedom of Speech — Public Employee — Protected Speech — Test — Question of Law or Fact.** A public employee's employment-related speech is not protected by the First Amendment unless (1) the speech involves a matter of public concern and (2) the employee's free speech interest outweighs the public employer's interest in efficiently providing the public services it performs through its employees. The issue of whether a public employee's employment-related speech is protected by the First Amendment is a question of law.

[7] **Public Employment — Constitutional Law — Freedom of Speech — Public Employee — Adverse Employment Decision — Public or Private Concern — Factors.** Whether a public employee's employment-related speech involves a matter of public concern depends upon the content, form, and context of the speech as revealed by the entire record. Content is the most important consideration of the three.

[8] **Medical Treatment — Nursing Homes — Quality of Care — Suspected Abuse — Matter of Public Concern.** The protection of nursing home residents from abuse and the quality of nursing care provided to them are matters of public concern. The fact that an investigation finds a report of suspected abuse to be without merit or that the person who makes the report has a personal interest for doing so does not diminish the public concern associated with the report.

[9] **Public Employment — Constitutional Law — Freedom of Speech — Public Employee — Adverse Employment Decision — Balancing Employer and Employee Interests — Sequential Burdens.** When a public employee claims retaliation in employment in violation of the employee's First Amendment free speech right, the employee has the initial burden of showing that the speech involves a matter of public concern. If that burden is met, the public employer must then present evidence that the adverse employment decision was justified on the basis of the employer's need to promote efficiency in the workplace. The more important the employee's speech is to the public, the stronger the showing that must be made by the employer. The court's duty is to balance the competing interests and determine, as a matter of law, which of them is greater. Factors the court may consider in

performing the balancing analysis are: (1) the time, place, and manner of the employee's speech; (2) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (3) whether the employment relationship is one in which personal loyalty and confidence are necessary; and (4) whether the speech impeded the employee's ability to perform daily responsibilities. The burden of proving that the public employer retaliated against the employee in violation of the First Amendment remains on the employee.

[10] **Public Employment — Constitutional Law — Freedom of Speech — Public Employee — Adverse Employment Decision — Balancing Employer and Employee Interests — Specific Employer Interests.** The government has a legitimate interest in promoting efficiency and integrity in the discharge of its official duties and in maintaining proper discipline. As an employer, the government has wide discretion and control over the management of its personnel and internal affairs, including the prerogative to remove employees whose conduct hinders efficient operations.

[11] **Public Employment — Constitutional Law — Freedom of Speech — Public Employee — Report of Suspected Patient Abuse or Mistreatment.** A report of suspected patient abuse or mistreatment made by an employee of a government-run nursing facility is protected by the First Amendment, even if the suspected abuse is later determined to be unfounded.

[12] **Public Employment — Constitutional Law — Freedom of Speech — Public Employee — Adverse Employment Decision — Question of Law or Fact.** The determination of whether a public employee's First Amendment protected speech was a substantial or motivating factor in an adverse employment decision is a question of fact that may be decided as a matter of law on summary judgment if reasonable minds could reach only one conclusion based on the facts in evidence.

[13] **Employment — Transfer — Violation of Public Policy — Right of Action.** An employer's transfer of an employee in violation of a public policy is not an actionable tort.

MADSEN and JOHNSON, JJ., concur by separate opinion.

Nature of Action: An employee of a state-run nursing home who alleged that she had been transferred in retaliation for exercising her First Amendment free speech rights after reporting suspected patient abuse sought damages from the State and her supervisors for a violation of her civil rights and for wrongful transfer in violation of public policy.

Superior Court: The Superior Court for Pierce County, No. 91-2-11382-9, Thomas A. Swayze, Jr., J., on May 7, 1993, entered a summary judgment dismissing the action.

Court of Appeals: The court at 78 Wn. App. 824 affirmed the trial court's dismissal of the wrongful transfer claim and reversed the dismissal of the civil rights claim.

Supreme Court: Holding that the employee did not present sufficient evidence to avoid summary judgment on the civil rights claim and that the claim for wrongful transfer is not actionable, the court affirms the decision of the Court of Appeals in part, reverses it in part, and reinstates the judgment.

Law Offices of Neil J. Hoff & Associates, by Paul A. Lindemuth, for petitioner.

Christine O. Gregoire, Attorney General, and Jeffrey A. Freimund, Assistant, for respondents.

Jeffrey L. Needle and Clifford Freed on behalf of Washington Employment Lawyers Association, amicus curiae.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

Am Jur 2d, Constitutional Law §§ 501, 517-521.

ALR Index, Freedom of Speech and Press; Public Officers and Employees.

Guy, J. — An employee of a state-operated nursing home brought this action alleging that she was transferred from one position to another in retaliation for reporting an incident of suspected patient abuse. The employee seeks damages, under the federal Civil Rights Act of 1871, 42 U.S.C. § 1983, for violation of her First Amendment rights and, additionally, asks this court to recognize an action in tort for "wrongful transfer in violation of public policy." We affirm the trial court's summary dismissal of the employee's action.

FACTS

Judy White worked as a secretary/clerk typist at the

Washington State Soldiers' Home and Colony (Soldiers' Home or Home) in Orting from 1975 to 1992. The Soldiers' Home is a state-operated residence that provides nursing care services to indigent military veterans. Residents of the Soldiers' Home are voluntarily admitted and are free to leave whenever they choose.

The events that form the basis of White's lawsuit occurred in 1988, when White was working as a secretary for Evelyn Blanchard, the director of nursing services at the Soldiers' Home. From the time that Nurse Blanchard became the director of nursing services in 1984, the relationship between Blanchard and White had been strained. The relationship continually deteriorated. The record reflects mutual criticisms and distrust between the two from 1984 to late 1988.

It was in this atmosphere of mistrust and quiet hostility that the events leading up to this lawsuit occurred.

During March and April 1988, one of the patients² at the Home became increasingly agitated. On April 11, 1988, the patient burned himself by placing lit cigarettes in his pockets. He began throwing lit cigarettes on the beds of other patients, was eating objects such as plastic pudding containers, scratching himself to the point of causing open sores, and smearing his feces on his arms and on the objects around him. The staff was unable to calm him. Minimal restraints were not successful. Medication was not effective. The staff members involved in the patient's treatment believed that the patient was a danger to himself and to others. Under Nurse Blanchard's direction, the patient ultimately was placed in a "posey jacket" or straightjacket to restrain him. The restraint jacket was in place for approximately two hours and was removed when the Home's medical director refused to sign an order permitting its use.

¹The parties point to incidents of alleged misconduct, animosity and vindictiveness on the part of White and her supervisor occurring after 1988. However, these incidents are not a basis for the claims involved here and we do not consider them.

²Residents or patients at the Home are referred to by the staff as "members."

The Home's policy on use of restraints states in part:

Body restraints may be used only upon a physician's written order. In case of emergency, restraints may be applied to prevent the member from harming himself, but a physician's written order must be obtained as soon as possible.

Clerk's Papers at 160.

White observed the patient while he was in the straight-jacket. The use of restraints at the Home was rare, and White and other employees were upset that the patient had been placed in a straightjacket. The employees discussed the incident at a union meeting and White assumed that the employees who were directly involved in the incident would report it. When none of them did, White wrote a report on the incident of "patient abuse," and delivered it to the Home's medical director on May 4, 1988.³ The medical director asked Alan Harrah, superintendent of the Home, to look into the matter.

The superintendent requested that a staff member from another soldiers' home investigate the alleged abuse. This investigation resulted in a report, dated June 7, 1988, which determined that "patient abuse" did not occur and that the "staff involved were acting in the best interest of the patient." Clerk's Papers at 82.

White learned the results of the investigation in mid-July 1988 and believed the investigation and report to be a "whitewash."

Beginning in December 1987—about five months before

³White's letter to the medical director states: "As chairperson of . . . local 53 . . . I have been bombarded with questions and comments regarding the use of a straight-jacket on . . . [a] nursing care member of the Home, on April 11, 1988. From discussion held at sub-local union meeting April 12th, I expected staff most directly involved to take action — i.e.: Write an incident report regarding member abuse/file a grievance. Neither has happened — to date (6/4/88); thus this inquiry and the attached incident report." Clerk's Papers at 356. The attached incident report stated: "Member . . . in straight-jacket, in wheelchair, was trying to get in phone booth (door was open) to make a phone call — others were pulling his chair away/out of phone booth, telling him he couldn't make call because he couldn't use his hands due to straight-jacket." Clerk's Papers at 357.

White complained of the suspected patient abuse—the Home's management had begun to discuss reorganization. Management determined that Nurse Blanchard was supervising too many departments and employees. When the physical plant at the Home became computerized to allow tracking the use and maintenance of machinery, management recognized that the plant manager would need a computer literate secretary to assist with the new duties. White was one of three secretaries employed at the Home, and the superintendent recommended to management that she be transferred to the plant manager's office. She was selected for transfer because her existing duties could readily be absorbed by remaining staff, and because she had the necessary computer skills and experience to perform the job at the plant. This transfer would not result in the loss of any benefits or salary and would not affect her employment classification. However, her transfer would mean that she was no longer working in the nursing services area. The Home's reorganization also would result in a transfer of two drivers and the entire nursing care custodial department to the physical plant.

White learned of the proposed transfer in August 1988 and, in September, she and her union representative met with the Home superintendent about the transfer. At this meeting the superintendent explained the transfer and the reasons for the transfer. White expressed her belief that the transfer was the result of her involvement in reporting the suspected patient abuse described above.

White's transfer was to be effective in November 1988. The transfer meant that White's office would be moved to the plant manager's former office in the physical plant. That office was remodeled with new carpets, cabinets and drapes. White considered the office an undesirable place to work and declined to participate in the remodeling project. She described the office as "a cinder block concrete dungeon with concrete floors and windows so high you could not even see out of them." She complained that the office was hot in the summer, had inadequate heat in the winter and was noisy.

White filed a union grievance complaining about the transfer. The grievance eventually went to mediation and was settled by agreement. The settlement agreement addressed White's concerns about the physical space in which she had to work but did not result in a transfer back to her original position.

In November 1991, White filed this action against the State of Washington and against Evelyn Blanchard and Alan Harrah, individually, alleging that White had been transferred in retaliation for reporting suspected patient abuse. She seeks damages for violation of her First Amendment rights under 42 U.S.C. § 1983 and for the tort of wrongful transfer in violation of public policy.

The trial court granted the State's motion for summary judgment, dismissing all of White's claims. White appealed and the Court of Appeals affirmed the trial court's dismissal of White's wrongful transfer claim but reversed the trial court on the First Amendment claim and remanded for trial. *White v. State*, 78 Wn. App. 824, 898 P.2d 331 (1995), *review granted*, 128 Wn.2d 1024 (1996). White petitioned for review of the ruling on the wrongful transfer issue and the State petitioned for review of the First Amendment issue. This court granted both petitions for review.

ISSUES

1. Did the plaintiff-employee present a prima facie case of retaliation in violation of her First Amendment right to freedom of speech sufficient to withstand a motion for summary judgment?
2. Should the court create a cause of action in tort for wrongful transfer in violation of public policy?

DISCUSSION

[1] In reviewing a grant of summary judgment, an ap-

⁴For convenience, the defendants are referred to collectively herein as the State.

pellate court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).

[2-4] The court should consider the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving party. *Schaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). However, a nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain. After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Meyer v. University of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989). Summary judgment motions are important to the process of resolving disputes.

First Amendment Claim

The State moved for summary dismissal of White's § 1983 First Amendment claim on the ground that White was unable to present a prima facie case on this claim.

The federal Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a cause of action for damages against any person who, under color of law, subjects another to the deprivation of any right guaranteed under the Constitution. In this case, White alleges deprivation of her right to freedom of speech guaranteed under the First Amendment to the federal Constitution.

Early cases held there was no First Amendment free speech right on the part of public employees. Public employment was considered a privilege that could be conditioned or denied. See, e.g., *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892) (where Holmes, J., observed that the "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman").

Today it is clearly established that a State may not discharge or otherwise discipline an employee on a basis that infringes upon that employee's constitutionally protected interest in freedom of speech. *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987) (discharge); *Binkley v. City of Tacoma*, 114 Wn.2d 373, 381, 787 P.2d 1366 (1990) (job reassignment); *Meyer*, 105 Wn.2d at 850-51 (letter of reprimand); *Edwards v. Department of Transp.*, 66 Wn. App. 552, 558, 832 P.2d 1332 (1992) (disciplinary action).

[5, 6] The employee's right to speak out is not absolute, however. To be protected under the First Amendment, the employee's speech must involve a matter of public concern. Additionally, the interest of the employee in expressing himself or herself must outweigh the interest of the State in efficiently providing the public services it performs through its employees. *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 1884, 128 L. Ed. 2d 686 (1994); *Connick v. Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

In order to present a prima facie case of retaliation in employment based on the exercise of First Amendment rights, the public employee must demonstrate that (1) the speech involved is protected by the First Amendment, and (2) the speech was a substantial or a motivating factor in the adverse employment decision. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Bernheim v. Litt*, 79 F.3d 318, 324 (2d Cir. 1996). See also *Binkley*, 114 Wn.2d at 382

(dividing these into three steps). If the employee meets this burden, then the burden shifts to the employer to prove that it would have made the same adverse employment decision even in the absence of the employee's protected conduct. *Mt. Healthy*, 429 U.S. at 287; *Binkley*, 114 Wn.2d at 382.

Thus, the first inquiry before the court is whether the speech involved is protected by the First Amendment. This is a question of law. *Binkley*, 114 Wn.2d at 382. Two steps are involved in the court's determination of this issue: (1) the court decides the threshold issue whether the speech involved may be fairly characterized as constituting speech on a matter of public concern, and, if so, (2) the court decides whether the employee's interest in exercising his or her right to freedom of speech is greater than the interest of the government in promoting efficiency in the public service it performs. *Waters*, 114 S. Ct. at 1884; *Rankin*, 483 U.S. at 384-85.

The trial court in the present case ruled that, in light of the circumstances, employee White's report of suspected patient abuse was not a comment on a matter of public concern but was instead a critical comment about another employee's actions. The Court of Appeals reversed, holding the content of the speech—suspected abuse of a nursing home patient—was a matter of public concern and that "a topic otherwise of public concern does not lose its importance merely because it arises in the context of an employment dispute." *White*, 78 Wn. App. at 834.

[7] Whether an employee's speech addresses a matter of public concern is determined by the content, form and context of the statement, as revealed by the whole record. *Connick*, 461 U.S. at 147-48. Content is the most important factor. See, e.g., *Wright v. Illinois Dep't of Children & Family Servs.*, 40 F.3d 1492, 1501 (7th Cir. 1994).

[8] The content of White's speech—suspected abuse of a nursing home patient—involves an issue of public concern. The public concern over proper care of vulnerable nursing home patients is reflected in RCW 70.124, a statute which

requires nursing home employees to report alleged abuse or mistreatment of nursing home patients. See also *Ramirez v. Oklahoma Dept of Mental Health*, 41 F.3d 584, 593 (10th Cir. 1994) (reports of nursing home patient abuse are matters of public concern); *Lenser v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276, 283 (1992) (patient abuse in any form in government-operated hospital is a matter of public concern). The fact that an investigation finds the report of suspected abuse to be without merit does not affect the importance of the content to the public. See *Binkley*, 114 Wn.2d at 378.⁵

The State argues that even though suspected patient abuse in a state-operated nursing home may be a matter of public concern, the report here is not protected by the First Amendment because of the context within which it was made. If the public employee speaks not as a citizen about a matter of public concern but instead as an employee upon a matter of personal interest, the court is generally not the appropriate forum for reviewing the wisdom of a personnel decision taken by the public employer in response to the employee's speech or behavior. *Connick*, 461 U.S. at 147.

The State points to the history of animosity between White and Nurse Blanchard and argues that White was acting as an employee involved in a dispute with her supervisor, not as a citizen reporting a matter of public concern.

The record shows that White and Blanchard did not get along and that White criticized Blanchard on a number of

⁵This court in *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d 1366 (1990) assumed, without deciding, that the employee's speech in that case constituted speech on a matter of public concern. The speech involved there was a written Vote of No Confidence in Binkley's supervisor. One of the five charges in the statement dealt with deception and unauthorized use of government property. The charges were investigated and found to be without merit. *Binkley* noted that *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) interpreted the public concern element broadly, saying "The Court seems to be saying that even the slightest tinge of public concern is sufficient to satisfy the first step of the *Pickering* [i.e. *Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)] test." *Binkley*, 114 Wn.2d at 383 n.8.

occasions. The record also shows that White was a good employee and that her actions with respect to the patient involved in this incident were supported by the patient's family and other staff members. The fact that White may have had a personal interest in reporting the incident does not diminish the concern the public would have in this matter.

Based on the nature of the speech involved in this case, we hold that the speech involved a matter of public concern.

To fall within the scope of the First Amendment protections, the employee's interest in speaking on this matter also must be greater than the employer's interest in limiting that speech. *Rankin*, 483 U.S. at 384.

The United States Supreme Court has been careful to avoid fashioning a bright-line rule establishing what constitutes protected speech in public employee First Amendment cases. See, e.g., *Pickering*, 391 U.S. at 569. In place of a general standard, the Supreme Court has held that in determining whether speech of a public employee is a constitutionally protected expression in any particular case, the court must balance the interests of the public employee, as a citizen, in commenting upon matters of public concern, against the interest of the State, as an employer, in promoting efficiency of the public services it performs. *Mt. Healthy*, 429 U.S. at 284; *Pickering*, 391 U.S. at 568; *Binkley*, 114 Wn.2d at 382.

[9, 10] The nature of the balancing analysis required under *Pickering* and *Binkley* and the various ways of explaining the necessary analysis appear to have created some confusion with respect to which party has the "burden of proving" that the employee's interest in commenting upon the matter of public concern is greater than the employer's interest in promoting the efficiency of the public service it performs. *White*, 78 Wn. App. at 835. Many cases state that the employee has the burden of showing that his conduct was protected by the First Amendment. *Bernheim*, 79 F.3d at 324; *Johnson v. Mult-*

nomah County, 48 F.3d 420, 422 (9th Cir.), cert. denied, 115 S. Ct. 2616 (1995); *Moore v. City of Wynnewood*, 57 F.3d 924, 931 (10th Cir. 1995).

Although the *employee* has the burden of showing that the speech is on a matter of public concern, courts generally then go on to require the *employer* to demonstrate that the discharge or other disciplinary act was justified because of the employer's need to promote efficiency in the workplace. *Binkley*, 114 Wn.2d at 383. See also *Rankin*, 483 U.S. at 388; *Connick*, 461 U.S. at 149. The Supreme Court does not discuss the test in terms of burdens of proof but rather says that "it is the court's task" to balance the interests of the employee against the interests of the employer and to determine, as a matter of law, which of those interests is greater. *Waters*, 114 S. Ct. at 1884 (emphasis added); *Connick*, 461 U.S. at 142; *Pickering*, 391 U.S. at 568; *Rankin*, 483 U.S. at 385-86.

While the language of the law defining the allocation and extent of the parties' burdens in demonstrating the competing interests involved is somewhat ambivalent, the framework for deciding First Amendment cases in the public employment setting is clear. The respective burdens of the parties fall naturally, within this framework, upon the party who seeks to justify his or her actions in light of First Amendment rights and restrictions.

In the present case, the employer does not admit that it took any action to punish White for reporting the alleged patient abuse. The State's position is that the transfer of White to another department in the Home was (1) not an adverse action, and (2) was discussed and tentatively decided before the straightjacket incident and White's reporting of the incident. For purposes of performing the balancing test in this case, the court must assume that the State's transfer of White was connected to her report of suspected patient abuse. We make this assumption only for the purpose of the second step of our analysis. If her speech is determined to be protected by the First Amendment, White would still have the burden of proving that

the State transferred her in retaliation for exercising her right to speak out about the suspected patient abuse.

The government has a legitimate interest in promoting efficiency and integrity in the discharge of its official duties and to maintain proper discipline. As an employer, the government must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation. *Connick*, 461 U.S. at 150-51. Government agencies are charged by law with doing particular tasks. When someone who is paid a salary to contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain the employee. *Waters*, 114 S. Ct. at 1887-88.

In order to balance the interests of the parties, the court must be presented with evidence of the State's interests. It is at this point in the First Amendment analysis that the government employer has the burden of presenting evidence to show that it was justified in restricting the employee's right to freedom of speech. *Connick*, 461 U.S. at 152; *Binkley*, 114 Wn.2d at 383. The more important the employee's speech is to the public, the stronger the showing that must be made on the part of the employer. *Binkley*, 114 Wn.2d at 384.

Relevant factors which may be considered in the balancing analysis include (1) the time, place and manner of the employee's speech, *Connick*, 461 U.S. at 153; (2) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (3) whether the employment relationship is one in which personal loyalty and confidence are necessary; and (4) whether the speech impeded the employee's ability to perform daily responsibilities. *Wright*, 40 F.3d at 1502.

Actual disruption need not be shown and deference is given to government predictions of harm. *Waters*, 114 S. Ct. at 1887; *Meyer*, 105 Wn.2d at 851.

Here the State's evidence to justify the transfer is unrelated to White's speech. The State's position is that it transferred White as part of a reorganization of the Home. The State's argument and evidence in this regard are more properly considered under the final step of the *Binkley* test, i.e., whether the transfer would have occurred even without the exercise of First Amendment rights.

However, even if the State were able to show that White's report of suspected patient abuse had disrupted the efficiency of the nursing home operation, had further adversely affected the working relationship between White and her supervisor, and had created disharmony among co-workers, it would be difficult to find that those interests outweigh the interest of a nursing home employee in reporting suspected abuse of a patient. Such a finding would be contrary to the public policy of the state as reflected in RCW 70.124 (abuse of nursing home patients).

[11] The interest of an employee of a nursing home in reporting suspected patient mistreatment or abuse outweighs the State's interest in operating its nursing home without the disruption that may result from a report of suspected abuse of a patient. We hold the speech at issue in this case—reporting suspected patient abuse—is protected under the First Amendment.

The employee next has the burden of proving that the protected speech was a substantial or motivating factor in the adverse employment action. *Binkley*, 114 Wn.2d at 382; *Mt. Healthy*, 429 U.S. at 285; *Edwards*, 66 Wn. App. at 563.

This issue generally presents a question of fact. *Binkley*, 114 Wn.2d at 382. Because this case was decided on the State's motion for summary judgment, we consider the evidence and reasonable inferences therefrom in a light most favorable to employee White. *Schaf*, 127 Wn.2d at 21. If reasonable minds could reach but one conclusion based on the facts in evidence, summary judgment should be granted. *LaMon*, 112 Wn.2d at 199. However, if a dispute as to the facts remains, the motion should be denied. CR

56(c). White, the nonmoving party here, may not rely on speculation and must produce sufficient evidence to create a genuine issue of fact to support her contention that her report of suspected patient abuse was a substantial or motivating factor in her transfer to the physical plant. *Jordan v. City of Oakville*, 106 Wn.2d 122, 133, 720 P.2d 824 (1986). After the moving party submits affidavits in support of its motion, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Meyer*, 105 Wn.2d at 852.

[12] The State presented evidence that the transfer was part of a plan to reorganize the operation of the Soldiers' Home and that White was determined to be the best person to fill the position of plant manager's secretary. The State's evidence is that it began formulating the reorganization and began discussing the transfer of White several months before the incident that was the basis of the report of suspected abuse. White's evidence is speculative, and White essentially asks the court to infer from the timing of the transfer that the change was made in retaliation for the report. She also argues that other employees could have been selected for transfer.

Viewing the evidence in a light most favorable to White, we find White's evidence is insufficient to create a genuine issue of fact supporting her contention. *Jordan*, 106 Wn.2d at 131 (the plaintiff failed to show that the city council's decision to reduce the size of the police force and eliminate plaintiff's job was based on anything other than budgetary concerns); *O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1368 (7th Cir. 1993) (the mere fact that protected speech precedes an employment decision does not create the inference that the decision was motivated by the speech); *Nelson v. Pima Community College*, 83 F.3d 1075 (9th Cir. 1996) (the existence of a mere scintilla of evidence is not enough to create a genuine issue of fact). White did not present sufficient evidence to support a prima facie case of retaliatory action on the part of the

State, and her § 1983 claim was appropriately dismissed on summary judgment.

Wrongful Transfer

White asks this court to recognize a cause of action in tort for wrongful transfer in the public employment setting. She proposes that this new tort be based on the same rationale relied on by this court in developing the tort of wrongful discharge in violation of public policy.

The tort of wrongful discharge was created as an exception to the general rule that unless an employee has a contract for a definite term of employment, the employee may be discharged at any time without cause and without recourse. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984); *Roberts v. ARCO*, 88 Wn.2d 887, 894, 568 P.2d 764 (1977). The general rule permitted employees to be discharged unfairly in violation of public policy in some cases. To avoid sanctioning such a discharge, we created a cause of action in tort for wrongful discharge of an employee where there is a violation of a clear mandate of public policy. *Thompson*, 102 Wn.2d at 233.

In *Thompson* this court created a narrow exception to the employment-at-will doctrine. We declined to adopt a broad "bad faith" exception to the employment-at-will rule which would have implied a covenant of good faith and fair dealing in every employment contract. *Thompson*, 102 Wn.2d at 227. We found that the "bad faith" exception would be too great an intrusion into the employment relationship. *Thompson*, 102 Wn.2d at 228. We were careful to balance the importance of allowing private employers the right to operate their businesses against the importance of prohibiting wrongful actions against employees. *Thompson*, 102 Wn.2d at 232.

[13] We have not yet considered whether an employee should be able to recover for disciplinary actions that do not result in discharge where the employer's actions violate a clear mandate of public policy. Other jurisdic-

tions which have considered the issue are divided with respect to whether an employee has a cause of action, based on public policy, for disciplinary actions. No jurisdiction appears to have considered extending a public policy cause of action to a lateral job transfer which does not result in a loss of pay, rank, job classification or benefits. See, e.g., *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 645 N.E.2d 877 (1994) (refusing to extend the tort of wrongful discharge to include demotions); *Ludwig v. C & A Wall-coverings, Inc.*, 960 F.2d 40 (7th Cir. 1992) (employee cannot bring a wrongful discharge claim for retaliatory discharge when she was merely demoted); *Mintz v. Bell Atlantic Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 905 P.2d 559 (1995) (a public policy tort for failure to promote does not exist and it is unnecessary for courts to create one); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988) (expansion of tort remedies in employment actions has potential for enormous consequence in the stability of the business community); *Scott v. Pacific Gas & Elec. Co.*, 11 Cal. 4th 454, 46 Cal. Rptr. 2d 427, 904 P.2d 834 (1995) (court upheld employee's wrongful discharge claim because of an implied contractual agreement with employer not to demote without good cause); *Garcia v. Rockwell Int'l Corp.*, 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490 (1986) (employee successfully brought wrongful discharge action when employer suspended him without pay as a retaliatory measure).

Generally, other jurisdictions share the same concern as the Court of Appeals in this case, that recognizing a cause of action for wrongful disciplinary action less than discharge has the potential to expand and to generate frivolous claims. *Ludwig*, 960 F.2d at 43; *Mintz*, 905 P.2d at 562; *White*, 78 Wn. App. at 839. In *White*, the Court of Appeals reasoned that by recognizing a cause of action for employer actions short of an actual discharge, the court would be opening a floodgate to frivolous litigation and substantially interfering with an employer's discretion to make personnel decisions. *White*, 78 Wn. App. at 839-40. The Court of Appeals noted that "the courts are ill-

equipped to act as super personnel agencies." *White*, 78 Wn. App. at 840 (citing *Washington Fed'n of State Employees v. State Personnel Bd.*, 29 Wn. App. 818, 820, 630 P.2d 951 (1981)). We agree with the reasoning and the decision of the Court of Appeals.

Subjecting each disciplinary decision of an employer to the scrutiny of the judiciary would not strike the proper balance between the employer's right to run his business as he sees fit and the employee's right to job security. See *Thompson*, 102 Wn.2d at 227. This is particularly true in instances like this one where an employee's rights are already protected by civil service rule, by a collective bargaining agreement, and by civil rights statutes.

Because we hold that the civil rights claim was properly dismissed, we do not reach the State's issue on qualified immunity.

CONCLUSION

Although White's speech was protected under the First Amendment, White did not show a causal link between the speech and the lateral transfer in her employment and therefore failed to present a prima facie case sufficient to withstand a motion for summary judgment. We decline White's invitation to create a tort for wrongful transfer.

The Court of Appeals decision with respect to the First Amendment claim is reversed; the Court of Appeals is affirmed with respect to the tort of wrongful transfer.

DURHAM, C.J., and DOLLIVER, SMITH, ALEXANDER, TALMADGE, and SANDERS, JJ., concur.

MADSEN, J. (concurrency) — Although I concur in the result reached by the majority, I write separately because the majority fails to offer any principled reason for refusing to recognize a tort cause of action for retaliatory transfer in violation of public policy. To the contrary, the policy underpinnings of the wrongful discharge tort apply

equally well to retaliatory actions short of discharge, and support recognition of such a cause of action. In addition, while I agree generally with the majority's analysis of the First Amendment issue, I believe the court should expressly acknowledge that First Amendment protection should not apply where an employee knowingly and falsely reports allegations of employer misconduct for personal reasons.

When this court recognized a cause of action for discharge in violation of public policy, it did so based upon its concern that the terminable-at-will doctrine not be used to shield an employer's action which otherwise frustrates a clear mandate of public policy. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 231, 685 P.2d 1081 (1984). This exception to the terminable-at-will rule is a narrow one which, while protecting employee job security against employer actions contravening public policy, at the same time recognizes the need to protect against frivolous lawsuits and allow employers to make personnel decisions without fear of civil liability. *Thompson*, 102 Wn.2d at 232-33; *Farram v. CRISTA Ministries*, 116 Wn.2d 659, 668, 807 P.2d 830 (1991). Thus, when identifying a clear public policy basis for a wrongful discharge tort cause of action, the court undertakes a careful analysis to meet the goal of allowing a cause of action only in the most worthy circumstances, and implicitly, if not explicitly, recognizes that the risk of frivolous suits is insufficient ground to preclude the cause of action.

Five years after recognizing the wrongful discharge tort in *Thompson*, this court "firmly grasped] the doctrine of constructive discharge as a means to protect against employment discrimination." *Bulaich v. AT & T Info. Sys.*, 113 Wn.2d 254, 259, 778 P.2d 1031 (1989). In doing so, the unanimous court said that "insidious acts are able to erode the Legislature's laudable goals just as effectively, and perhaps in a more demoralizing fashion, than a direct termination would otherwise accomplish." *Id.* at 259. *Bulaich* did not involve a *Thompson* violation of public policy

claim; rather, it involved a claim of discrimination under RCW 49.60.180. Nevertheless, the court quite clearly, and wisely, concluded that outright termination is not the only way in which an employer's conduct can thwart public policy—there, public policy embodied in RCW 49.60.

The same is true of violations of public policy cognizable under *Thompson* and its progeny. The employer's wrongful action is wrongful and violative of public policy whether it is a wrongful discharge or a wrongful demotion, suspension without pay, or similar disciplinary action short of discharge. The only difference is the nature and extent of the damage suffered by the employee. *Garcia v. Rockwell Int'l Corp.*, 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490, 493 (1986) (recognizing tort action for retaliatory suspension without pay for employee's whistleblower activities). Moreover, if the court agrees that public policy demands protection of the employee and allows a wrongful discharge action, then it follows that the risk of frivolous suits is an insufficient ground to preclude the cause of action for disciplinary action less than discharge. Accordingly, the majority's fear of frivolous claims is fundamentally at odds with the recognition of the wrongful discharge tort—if the identified public policy is so important that the wrongful discharge claim should be allowed, then it is important enough to support a claim based upon lesser "insidious acts" of an employer which may just as effectively contravene a clear mandate of public policy.

Further, insofar as the wrongful discharge tort action sanctions employer conduct which frustrates a clear mandate of public policy, it has a deterrent effect on wrongful employer conduct. Under the majority's holding, however, an employer is invited to avoid potential civil liability merely by engaging in some disciplinary action other than discharge.

The majority's recitation that courts are ill-equipped to act as super personnel agencies misses the mark. In a given case, the question will be whether the employer has

engaged in disciplinary conduct violative of public policy. Courts routinely examine similar questions in a wide variety of cases, and, in particular, courts in this state routinely address issues of workplace discrimination involving employer action other than unlawful discharge.

The majority's fear of opening the "floodgates" merits little response. That argument can be made in virtually any case where it is proposed that a cause of action be recognized or extended, or where the Legislature considers legislation recognizing a new cause of action. The same argument, if accepted, would have prevented recognition of the wrongful discharge tort in the first place.

For all these reasons I am unable to agree with the majority's absolute rejection of a cause of action for wrongful transfer in violation of public policy.⁶ However, I must agree that, in this case, Ms. White is not entitled to pursue such a cause of action. She has identified a strong public policy in reporting suspected patient abuse, one which may serve as the foundation of a First Amendment claim, and one which the Oregon Court of Appeals has recognized as supporting a wrongful discharge tort claim. *Hirsovescu v. Shangri-La Corp.*, 113 Or. App. 145, 831 P.2d 73 (1992); *McQuary v. Bel Air Condolescent Home, Inc.*, 69 Or. App. 107, 684 P.2d 21, *review denied*, 688 P.2d 845 (1984). However, the majority correctly concludes, in addressing White's First Amendment claim, that she has failed to present sufficient evidence that her transfer occurred as a result of her reporting suspected patient abuse. Accordingly, she is also unable to show that her transfer was motivated by reasons contravening a clear mandate of public policy.

There is also a serious issue about whether a civil ser-

⁶If bears repeating that the first inquiry in a case where a claim is premised on employer action short of discharge is to determine whether there is a clear mandate of public policy which would justify a *Thompson* wrongful discharge claim, had the employee been discharged. The framework for that analysis was set up in *Thompson*. Only if there is such a clear mandate of public policy should the cause of action be available to redress either termination or disciplinary actions short of outright termination. See *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 951, 913 P.2d 377 (1996) (Madsen, J., dissenting).

vant such as Ms. White is entitled to pursue a public policy tort claim. The *Thompson* line of cases serves as an exception to the terminable-at-will doctrine, and nonexempt civil servants' employment is covered by a number of statutory provisions. See, e.g., *Tomlinson v. Board of Educ.*, 629 A.2d 333, 347 n.18 (Conn. 1993) (wrongful discharge tort claims fail where teacher, a tenured employee of the state, is not an employee at will). Whether or not civil servants are entitled to such a cause of action, however, the majority's holding is too broad because it denies the cause of action to all employees.

Turning briefly to the majority's analysis of White's First Amendment claim, I have to say initially that there is considerable evidence that White has cloaked a personal vendetta in First Amendment raiment. Nevertheless, the majority exercises sound judicial restraint upon this review of summary judgment and correctly concludes that a report of suspected patient abuse is speech of public concern. The majority further concludes that the State⁷ failed in this case to show any interests justifying restricting White's right to freedom of speech. The State simply insisted the transfer was not a result of White's report of suspected patient abuse. In the course of its analysis, the majority states that the fact that White's report of suspected patient abuse was found to be without merit does not affect the importance of the content of her speech to the public, and states that the fact that White may have had a personal interest in reporting the abuse does not diminish the public's concern. Majority at 12. Both of these statements are true as general propositions. I would add, however, that merely because allegations of patient abuse are made, an employee is not necessarily protected under the Constitution from disciplinary action for reporting possible patient abuse. There is a considerable body of law dealing with recklessly or knowingly false statements made by disciplined employees who pursue a constitutional

⁷I follow the convention used by the majority and refer to all the defendants collectively as the State.

tort claim founded on the First Amendment. See generally, e.g., Howard C. Nielson, Jr., Comment, *Recklessly False Statements in the Public-Employment Context*, 63 U. CHI. L. REV. 1277 (1996) (and cases cited therein). While in this case there may have been a basis in fact for White's report of suspected patient abuse,⁸ in my view, First Amendment protection should, at the least, be unavailable in the case of the knowingly false allegation made for personal reasons.

I concur in the result reached by the majority.

JOHNSON, J., concurs with MADSEN, J.

Reconsideration denied February 20, 1997.

[No. 63929-9. En Banc.]

Argued October 23, 1996. Decided January 9, 1997.

NORA AMREN, *Appellant*, v. THE CITY OF KALAMA, *Respondent*.

- [1] Open Government — Public Disclosure — Public Records — Statutory Provisions — Scope of Disclosure. The public records portion of the Fair Campaign Practices Act (RCW 42.17.250 *et seq.*) is a strongly worded mandate for the broad disclosure of public records.
- [2] Open Government — Public Disclosure — Statutory Provisions — Construction — Liberal or Strict Construction. The public records portion of the Fair Campaign Practices Act (RCW 42.17.250 *et seq.*) is liberally construed to promote full access to public records.
- [3] Open Government — Public Disclosure — Statutory Provisions — Construction — Exemptions. Statutory exemptions from public disclosure requirements are narrowly construed.

⁸I give the benefit of the doubt to Ms. White, who reported patient abuse despite a written policy permitting in emergency situations the bodily restraint of patients for brief periods pending physician review, in order to prevent the patient from harming himself. The patient in this case was restrained for two hours and the straightjacket was removed when the nursing home director refused to sign an order permitting its use.

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*59 P.3d 611; 2002 Wash. LEXIS 793, **

LINDA ROBEL, Petitioner, v. **ROUNDUP** CORPORATION, d/b/a FRED MEYER, INC., Respondent.

No. 70561-5

SUPREME COURT OF WASHINGTON

59 P.3d 611; 2002 Wash. LEXIS 793

May 31, 2001, Argued
December 12, 2002, Decided
December 12, 2002, Filed

PRIOR HISTORY: [*1] Appeal from Superior Court, Spokane County; 98-2-01028-7 Honorable Linda G. Tompkins, Judge.

Robel v. Roundup Corp., 103 Wn. App. 75, 10 P.3d 1104, 2000 Wash. App. LEXIS 2091 (2000).

DISPOSITION: Affirmed in part, and reversed in part.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner employee sued respondent employer in the trial court for a disability-based hostile work environment, retaliation for filing a workers' compensation claim, negligent and intentional infliction of emotional distress, and defamation. The trial court entered judgment in favor of the employee, but the Washington Court of Appeals reversed. The employee appealed.


OVERVIEW: The employee was given light-duty work, after claiming workers' compensation, and her co-workers and supervisors ridiculed her. The supreme court held the antidiscrimination statute, Wash. Rev. Code § 49.60.010 et seq., supported her claim of a disability-based hostile work environment. She proved the elements that (1) she was disabled within the meaning of the antidiscrimination statute; (2) the harassment was unwelcome, as she did not solicit it; (3) it was because of her disability, which was the motivating factor; (4) it affected the conditions of employment, as it created an abusive working environment; and (5) it was imputable to the employer, as the employer knew of it and did not take adequate corrective action. She proved that (1) she filed a workers' compensation claim; (2) the employer thereafter discriminated against her; and (3) the claim and the discrimination were causally connected. She proved outrage, for which the employer was vicariously liable, but her co-workers' insults were either vulgar statements not reasonably taken literally or were nonactionable opinions. Her attorney fees claim on appeal was not properly raised.

OUTCOME: The court of appeals judgments that the trial court's findings of fact did not support a disability-based hostile work environment claim, that the employee did not prove retaliation, and that the employee did not prove intentional infliction of emotional distress were reversed. The court of appeals judgment that the defamation claim was not proved was affirmed.


CORE TERMS: harassment, disability, finding of fact, deli, workers' compensation, co-worker, hostile work environment, findings of fact, manager, antidiscrimination, outrage, verbal, unchallenged, non-verbal, conclusion of law, retaliation, vicariously liable, wrongful discharge, workplace, offensive, conditions of employment, scope of employment, cause of action, supervisor, disabled, imputed, intentional infliction of emotional distress, matter of law, furtherance, customers


LexisNexis(TM) HEADNOTES - Core Concepts - ♦ [Hide Concepts](#)

 [Civil Procedure > Trials > Bench Trials](#)


 [Civil Procedure > Appeals > Standards of Review > Standards Generally](#)

HN1 ↓ Unchallenged findings of fact are verities on appeal.


 [Civil Procedure > Trials > Bench Trials](#)

 [Civil Procedure > Appeals > Standards of Review > De Novo Review](#)


HN2 ↓ Because a conclusion of law is a conclusion of law wherever it appears, any conclusion of law erroneously denominated a finding of fact is subject to de novo review.

 [Labor & Employment Law > Discrimination > Disabilities Discrimination > Coverage & Definitions](#)

HN3 ↓ See Wash. Rev. Code § 49.60.180(3).


 [Labor & Employment Law > Discrimination > Disabilities Discrimination > Coverage & Definitions](#)

HN4 ↓ The antidiscrimination statute, Wash. Rev. Code § 49.60.010 et seq., supports a disability based hostile work environment claim.

 [Labor & Employment Law > Discrimination > Disabilities Discrimination > Coverage & Definitions](#)


 [Governments > Legislation > Interpretation](#)

HN5 ↓ To determine whether the antidiscrimination statute, Wash. Rev. Code § 49.60.010 et seq., supports a disability claim based on a hostile work environment, the court may look to federal cases construing analogous federal statutes.

 [Labor & Employment Law > Discrimination > Disabilities Discrimination > Coverage & Definitions](#)

 [Labor & Employment Law > Discrimination > Title VII](#)

HN6 ↓ The language in Title VII of the Civil Rights Act, 42 U.S.C.S. § 2000e-2(a)(1), prohibits harassment that is so severe and pervasive as to alter the conditions of employment and create a hostile work environment. A hostile work environment claim under the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., is recognized and the Title VII standards are applied to these claims.

 [Labor & Employment Law > Discrimination > Title VII](#)

HN7 ↓ The antidiscrimination statute, Wash. Rev. Code § 49.60.010 et seq., which applies with equal force to sex based and disability based employment discrimination, is analogous to Title VII, 42 U.S.C.S. § 2000e, and the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq. Setting forth the elements that a plaintiff must prove to establish a work environment sexual harassment case under the antidiscrimination statute, although federal cases interpreting Title VII are not binding, they are "instructive" and "supportive."

 [Labor & Employment Law > Discrimination > Disabilities Discrimination > Coverage &](#)

Definitions

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment

HN8 ↓ A sexual harassment plaintiff, under Wash. Rev. Code § 49.60.180(3), must prove (1) that the harassment was unwelcome, (2) that it was because of sex, (3) that it affected the terms or conditions of employment, and (4) that it was imputed to the employer. This reasoning may be extended to disability claims and, under § 49.60.180(3) of the antidiscrimination statute, a plaintiff in a disability based hostile work environment case must prove (1) that he or she was disabled within the meaning of the antidiscrimination statute, (2) that the harassment was unwelcome, (3) that it was because of the disability, (4) that it affected the terms or conditions of employment, and (5) that it was imputable to the employer. The finder of fact must determine whether the plaintiff has met his or her burden as to each of these elements.

Labor & Employment Law > Discrimination > Disabilities Discrimination > Coverage &

Definitions

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment

HN9 ↓ To satisfy the element of a disability based hostile work environment claim that the harassment was unwelcome, the plaintiff must show that he or she did not solicit or incite it and viewed it as undesirable or offensive.

Labor & Employment Law > Discrimination > Disabilities Discrimination > Coverage &

Definitions

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment

HN10 ↓ In a disability based hostile work environment claim, to show that the harassment occurred because of a workplace injury requires that the disability of the plaintiff-employee be the motivating factor for the unlawful discrimination. This element thus requires a nexus between the specific harassing conduct and the particular injury or disability.

Labor & Employment Law > Discrimination > Disabilities Discrimination > Coverage &

Definitions

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment

HN11 ↓ In a disability-based hostile work environment claim, to show the harassing conduct affected the terms and conditions of employment, the harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. A satisfactory finding on this element should indicate that the conduct or language complained of was so offensive or pervasive that it could reasonably be expected to alter the conditions of plaintiff's employment.

Labor & Employment Law > Discrimination > Disabilities Discrimination > Coverage &

Definitions

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment

HN12 ↓ In a disability based hostile work environment claim, postinjury conduct must be imputable to the employer. Where an owner, manager, partner or corporate officer personally participates in the harassment, this element is met by such proof. To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or co-worker(s), the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action. Applying this passage, the jury must find either that (1) an owner, manager, partner or corporate officer personally participated in the harassment or that (2) the employer authorized, knew, or should have known of the harassment and failed to take reasonably prompt and adequate corrective action.

Labor & Employment Law > Discrimination > Disabilities Discrimination > Coverage & Definitions

HN13 ↓ Managers are those who have been given by an employer the authority and power to affect the hours, wages, and working conditions of the employer's workers.

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Retaliatory Discharge

HN14 ↓ See Wash. Rev. Code § 51.48.025(1).

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Retaliatory Discharge

HN15 ↓ When applying the antidiscrimination statute, Wash. Rev. Code § 49.60.010 et seq., to the situation of an employer who has allegedly discriminated in some way, short of discharge, against an employee because she filed a workers' compensation claim, proof of a causal connection between the filing of a claim and the allegedly retaliatory termination is required. The employee must prove (1) that she filed a claim; (2) that the employer thereafter discriminated against her in some way; and (3) that the claim and the discrimination were causally connected.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress

HN16 ↓ To prevail on a claim for outrage, a plaintiff must prove three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff. The first element requires proof that the conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Although the three elements are fact questions for the jury, this first element of the test goes to the jury only after the court determines if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress

HN17 ↓ The standard for an outrage claim is admittedly very high, by which is meant that the conduct supporting the claim must be appallingly low.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress

HN18 ↓ In an outrage claim, the relationship between the parties is a significant factor in determining whether liability should be imposed. "Added impetus" is given to an outrage claim when one in a position of authority, actual or apparent, over another allegedly makes racial slurs and jokes and comments.

Torts > Vicarious Liability > Respondeat Superior

HN19 ↓ Once an employee's underlying tort is established, the employer will be held vicariously liable if the employee was acting within the scope of his employment. An employer can defeat a claim of vicarious liability by showing that the employee's conduct was (1) intentional or criminal and (2) outside the scope of employment.

Labor & Employment Law > Employer Liability > Tort Liability > Direct & Vicarious Liability

HN20 ↓ Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of action are based on the theory that such negligence on the part of the employer is a wrong to the injured

party, entirely independent of the liability of the employer under the doctrine of respondeat superior.

Labor & Employment Law > Employer Liability > Tort Liability > Direct & Vicarious Liability

HN21 An employee's conduct will be outside the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master. This is not to say that an employer will be vicariously liable only where it has specifically authorized an employee to act in an intentionally harmful or negligent manner; likewise, an employer may not insulate itself from vicarious liability merely by adopting a general policy proscribing bad behavior that would otherwise be actionable. The proper inquiry is whether the employee was fulfilling his or her job functions at the time he or she engaged in the injurious conduct.

Labor & Employment Law > Employer Liability > Tort Liability > Direct & Vicarious Liability

HN22 When a servant steps aside from the master's business in order to effect some purpose of his own, the master is not liable.

Torts > Defamation & Invasion of Privacy > Defamation Actions

HN23 A plaintiff bringing a defamation action must prove four essential elements: falsity, an unprivileged communication, fault, and damages. Before the truth or falsity of an allegedly defamatory statement can be assessed, a plaintiff must prove that the words constituted a statement of fact, not an opinion. Because expressions of opinion are protected under the First Amendment, they are not actionable. Whether the allegedly defamatory words were intended as a statement of fact or an expression of opinion is a threshold question of law for the court.

Torts > Defamation & Invasion of Privacy > Defamation Actions

HN24 To determine whether a statement is nonactionable, a court should consider at least (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts.

Civil Procedure > Appeals > Reviewability > Notice of Appeal

Civil Procedure > Appeals > Reviewability > Preservation for Review

HN25 While Wash. R. App. P. 12.1(b) gives an appellate court the latitude to consider an issue not properly raised, the rule pertains to issues that, in the court's view, should be considered to properly decide a case.

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JUDGES: Authored by. Susan J. Owens. Concurring: Gerry L. Alexander, Charles W. Johnson, Faith E Ireland, Tom Chambers. Dissenting: Bobbe J. Bridge, Richard B. Sanders, Charles Z. Smith, Barbara A. Madsen.

OPINIONBY: Susan J. Owens

OPINION: En Banc

OWENS, J. -- This court is asked to decide whether the Court of Appeals correctly reversed a bench trial judgment for petitioner Linda Robel on her claims for disability harassment, retaliation for filing a workers' compensation claim, negligent and intentional infliction of emotional distress, and defamation. [*2] We hold that Washington's Law Against Discrimination, chapter 49.60 RCW (the antidiscrimination statute), supports an employee's disability based hostile work environment claim, and conclude that the trial court's unchallenged findings of fact satisfy the elements of such a claim. We likewise conclude that the trial court's unchallenged findings support Robel's claim that Fred Meyer retaliated against her for filing a workers' compensation claim. Regarding Robel's claim for intentional infliction of emotional distress, we reject the conclusion of the Court of Appeals that the claim should not have gone to the trier of fact. Because the trial court's findings on the elements of outrage went unchallenged, we reinstate the trial court's decision in Robel's favor on her outrage claim and, consequently, will not reach the claim for negligent infliction of emotional distress. However, because we agree with the Court of Appeals that the allegedly defamatory communications cited in the trial court's findings of fact were not capable of defamatory meaning, we affirm the reversal of the trial court's judgment on the defamation claim. We deny Robel's request for costs and reasonable attorney [*3] fees on appeal. Facts The suit arises out of Linda Robel's employment from May 31, 1995, to September 12, 1996, in the service deli at the Francis Avenue Fred Meyer store in Spokane. On July 14, 1996, Robel sustained a workplace injury and timely filed a workers' compensation claim. In late July, Robel was given a light-duty assignment, "a four-hour shift" during which she stood "at a display table outside the deli area offering samples of food items to customers." Clerk's Papers (CP) at 1333 (Finding of Fact 22). On August 1, 1996, as Robel worked at the display table, two deli workers "laughed" and "acted out a slip and fall," as "one of them yelled 'Oh, I hurt my back, L&I, L&I!'" *Id.* (Finding of Fact 23); see also Joint Ex. 201, at 30. They "audibly called [Robel] a 'bitch' and 'cunt.'" *Id.* They also "told customers she had lied about her back and was being punished by Fred Meyer by 'demoing' pizzas." *Id.* In journal entries for August 2, 3, 10, and 11, Robel wrote that assistant deli manager Amy Smith and others made fun of her, laughed, pointed, and gave her "dirty looks." Joint Ex. 201, at 30-33. Robel also noted that on August 13, Smith and other deli workers [*4] would "stare at [her], whisper out loud, & laugh, pretend to hurt their backs & laugh." *Id.* at 34.

Robel reported the incidents to her union representative, Ron Banka. According to Robel's journal, Banka came in on August 14, 1996, and set up a meeting with Steve Wissink, the store director, for Friday, August 16. After the brief meeting, Banka stopped by the deli and told Robel that Wissink was convening a meeting of all deli employees on August 19, 1996. At that meeting, Wissink warned the employees that future harassment could result in termination. On August 22, 1996, deli workers "laughed and audibly admonished each other not to harass Robel." CP at 1333 (Finding of Fact 25); Joint Ex. 201, at 35. On August 28 and 30, Robel noted in her journal that co-workers were talking about her and laughing at her, and she recorded that, on September 2, Smith and other workers "had a great time making fun of [her], calling [her] names[,] pretending to hurt their backs & yelling L&I." Joint Ex. 201, at 35-36, 38. On September 13, 1996, Robel secured a two-week work release from her doctor and gave it to Smith that same day. Before Robel left the deli, she overheard Smith comment [*5] to other deli employees, "'Can you believe it, Linda's gonna sit on her big ass and get paid.'" CP at 1333 (Finding of Fact 27); see also Joint Ex. 201, at 40.

Robel again contacted Banka, who in turn contacted Wissink on September 20, 1996. n1 On September 24, Wissink telephoned Robel to confirm the allegations. Robel "told him about the C word and Bitch[,] the little plays they were doing about [her] back." Joint Ex. 201, at 40. On September 28, 1996, Wissink terminated one employee. Robel never returned to work at Fred Meyer.

-----Footnotes-----

n1 Finding of Fact 28 (CP at 1333) does not indicate the date on which Robel contacted Banka,

nor does Robel's journal mention the contact.

-----End Footnotes-----

On February 13, 1998, Robel filed suit against Fred Meyer, stating claims for disability discrimination (RCW 49.60.180(3)), retaliation for filing a workers' compensation claim (RCW 51.48.025(1)), negligent and intentional infliction of emotional distress, and defamation. The trial [*6] court denied Fred Meyer's motion for summary judgment. At the close of a three-day nonjury trial in September 1999, the court entered 69 findings of fact and 8 conclusions of law. Finding for Robel on all five causes of action, the court awarded Robel \$ 1,902.50 in special damages and \$ 50,000.00 in general damages, along with her reasonable attorney fees and costs.

Fred Meyer appealed. The Court of Appeals reversed the trial court's judgment on all claims. Robel v. Roundup Corp., 103 Wn. App. 75, 10 P.3d 1104 (2000). We granted Robel's petition for review.

Issues (1) Does the antidiscrimination statute support an employee's disability based hostile work environment claim? If so, did the trial court's unchallenged findings of fact support its conclusion of law that Fred Meyer discriminated against Robel based upon her physical disability?

(2) Did the trial court's unchallenged findings of fact support the conclusion that Fred Meyer, in violation of RCW 51.48.025(1), retaliated against Robel for filing a workers' compensation claim?

(3) Did the Court of Appeals properly hold as a matter of law that Robel's claim for intentional infliction [*7] of emotional distress should not go to the trier of fact?

(4) Were the allegedly defamatory communications cited in the trial court's findings of fact capable of defamatory meaning?

Analysis Standard of Review. Fred Meyer assigned error to all of the trial court's conclusions of law but challenged none of its findings of fact. Br. of Appellant at 1-2. ^{HN1} Unchallenged findings are verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). This court reviews de novo Fred Meyer's challenges to the trial court's conclusions of law. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). ^{HN2} Because "[a] conclusion of law is a conclusion of law wherever it appears," any conclusion of law erroneously denominated a finding of fact will be subject to de novo review. Kane v. Klos, 50 Wn.2d 778, 788, 314 P.2d 672 (1957); see also Local Union 1296, Int'l Ass'n of Firefighters v. City of Kennewick, 86 Wn.2d 156, 161-62, 542 P.2d 1252 (1975). [*8]

Disability Discrimination. ^{HN3} Under the antidiscrimination statute, "[i]t is an unfair practice for any employer . . . [t]o discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability." RCW 49.60.180(3) (emphasis added). This court has recognized that the antidiscrimination statute prohibits sexual harassment in employment, with such claims being "generally categorized as 'quid pro quo harassment' claims or 'hostile work environment' claims." DeWater v. State, 130 Wn.2d 128, 134-35, 921 P.2d 1059 (1996) (quoting Payne v. Children's Home Soc'y of Wash., Inc., 77 Wn. App. 507, 511 n.2, 892 P.2d 1102, review denied, 127 Wn.2d 1012, 902 P.2d 164 (1995)). Whether the antidiscrimination statute supports a disability based hostile work environment claim is an issue of first impression [*9] in this state. In reviewing Robel's claim below, Division Three of the Court of Appeals assumed arguendo that the antidiscrimination statute "encompass[ed] a hostile environment claim based on a disability" but concluded that the findings of fact did not support such a claim. Robel, 103 Wn. App. at 86-87. We hold that ^{HN4} the antidiscrimination statute supports a disability based hostile work environment claim, and conclude that the trial court's

unchallenged findings of fact satisfied each element of the claim.

HN5 To determine whether the antidiscrimination statute supports a disability claim based on a hostile work environment, we may look to federal cases construing analogous federal statutes. *Fahn v. Cowlitz County*, 93 Wn.2d 368, 376, 610 P.2d 857, 621 P.2d 1293 (1980). A number of federal courts have considered whether the Americans with Disabilities Act of 1990 (the ADA, 42 U.S.C. § 12101) supports a [*10] disability claim based on the employer's creation of a hostile work environment. n2 The ADA forbids discrimination that impacts a disabled person's "terms, conditions, and privileges of employment," a phrase likewise found in Title VII of the Civil Rights Act, which forbids discrimination based on an employee's race, color, religion, sex, or national origin. 42 U.S.C. § 12112(a), § 2000e-2(a)(1). The United States Supreme Court has interpreted **HN6** the language in Title VII to prohibit harassment that is so

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n2 The Court of Appeals cited seven cases wherein federal district courts held that the ADA encompassed hostile work environment claims. *Robel*, 103 Wn. App. at 86. Six of those cases are among the twenty-one collected in Brian L. Porto, Annotation, *Actions Under Americans with Disabilities Act (42 U.S.C.A. §§ 12101 et seq.), to Remedy Alleged Harassment or Hostile Work Environment*, 162 A.L.R. FED. 603, 612-24 (2000). Of the twenty-one cases Porto summarizes, he categorizes only three as denying recognition of hostile work environment disability claims. See also *Fox v. Gen. Motors Corp.*, 247 F.3d 169 (4th Cir. 2001); *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229 (5th Cir. 2001) (claims for hostile work environment cognizable under the ADA).

-----End Footnotes----- [*11]

"severe and pervasive" as to alter the conditions of employment and create a hostile work environment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). When asked to extend to ADA plaintiffs this same protection afforded under Title VII, most federal courts have recognized a hostile work environment claim under the ADA and have applied the Title VII standards to those claims. n3

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n3 See *supra* note 2.

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HN7 The antidiscrimination statute, which applies with equal force to sex based and disability based employment discrimination, is analogous to Title VII and the ADA. Setting forth the elements that a plaintiff must prove "[t]o establish a work environment sexual harassment case" under the antidiscrimination statute, this court noted that, although federal cases interpreting Title VII were "not binding on this court," they were "instructive" [*12] and "support[ive]." *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 406 & n.2, 693 P.2d 708 (1985). In *Glasgow*, we determined that **HN8** a sexual harassment plaintiff must prove (1) that "[t]he harassment was unwelcome," (2) that it "was because of sex," (3) that it "affected the terms or conditions of employment," and (4) that it was "imputed to the employer." *Id.* at 406-07; see also *Fisher v. Tacoma Sch. Dist. No. 10*, 53 Wn. App. 591, 769 P.2d 318 (applying *Glasgow* factors to race based discrimination), review denied, 112 Wn.2d 1027 (1989). Just as the federal cases extended the Title VII hostile work environment claim (and its standards of proof) to the ADA, we may extend the reasoning in *Glasgow* to disability claims and conclude that, under the antidiscrimination statute, a plaintiff in a disability based hostile work environment case must prove (1) that he or she was disabled within the meaning of the antidiscrimination statute, (2) [*13] that the harassment was unwelcome, (3) that it was because of the disability, (4) that it

affected the terms or conditions of employment, and (5) that it was imputable to the employer. The finder of fact must determine whether the plaintiff has met his or her burden as to each of these elements. See 6A WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 330.23, at 240 (1997) (WPI).

The question thus before us is whether the trial court's findings of fact establish all five elements of Robel's disability based hostile work environment claim. The only applicable findings are those pertaining to employee conduct occurring *after* Robel's workplace injury on July 14, 1996. The first element, that Robel's injury was a disability under RCW 49.60.180(3), was not contested. ^{HN9} ¶ To satisfy the second element, proof that the conduct was "unwelcome," the plaintiff must show that he or she "did not solicit or incite it" and viewed it as "undesirable or offensive." Glasgow, 103 Wn.2d at 406; cf. 6A WPI 330.23, at 240 (requiring jury to find that plaintiff proved [*14] "[t]hat this language or conduct was unwelcome in the sense that the plaintiff regarded the conduct as undesirable and offensive, and did not solicit or incite it"). This element is fully met in the findings. No findings suggested that Robel solicited or incited the remarks made about her workplace injury. That she viewed it as undesirable and offensive was at least implicit in her reporting the conduct to Banka, but the trial court explicitly found that "[t]he harassment of Robel in the work setting was unwelcomed" and "offensive." CP at 1335-36 (Findings of Fact 41, 44).

The third element, ^{HN10} ¶ that the harassment occurred "because of" the workplace injury, "requires that the [disability] of the plaintiff-employee be the motivating factor for the unlawful discrimination." Glasgow, 103 Wn.2d at 406. This element thus requires a nexus between the specific harassing conduct and the particular injury or disability. Satisfying the element that the conduct "occurred because of [the plaintiff's disability]," the [*15] trial court found that "[t]he verbal and non-verbal harassment of Robel in the work setting subsequent to July 14, 1996, was *directly or proximately related to* her disability and/or Fred Meyer's perception of Robel as disabled." CP at 1334 (Finding of Fact 31) (emphasis added). For us to conclude that this unchallenged finding failed to satisfy the third factor, we would have to make the very fine-grained distinction that the finding's description of the harassment as "directly or proximately related to" the disability did not mean that the harassment was "because of" the disability. We decline to split that hair. Because this clear factual finding was not challenged on appeal, we are not at liberty to substitute our judgment for that of the trial court.

Of the fourth element, ^{HN11} ¶ whether the conduct affected the terms and conditions of employment, the Glasgow court explained that "[t]he harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." 103 Wn.2d at 406. [*16] As indicated in the pattern jury instruction, based on RCW 49.60.180(3) and Glasgow, a satisfactory finding on this element should indicate "[t]hat the conduct or language complained of was so offensive or pervasive that it could reasonably be expected to alter the conditions of plaintiff's employment." 6A WPI 330.23, at 240. The trial court found that "Fred Meyer created a hostile and abusive work environment" and that the environment "was offensive to Robel." CP at 1335-36 (Findings of Fact 43-44). Another finding states that "Fred Meyer discriminated against Robel *in the terms or conditions of employment* when it participated in and/or failed to bring to an end . . . the verbal and non-verbal harassment of Robel in the work setting." CP at 1336 (Finding of Fact 48). Describing the employer's conduct as "offensive" enough to affect Robel's "terms or conditions of employment" and "create[] a hostile and abusive work environment," these findings echo the critical language from Glasgow and the pattern jury instruction. We cannot pretend that the trial court failed to make the necessary findings on this element [*17] of the disability based hostile work environment claim. Because no error was assigned to these findings, we accept them as verities and forgo any reweighing of the evidence supporting them. n4

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n4 Apparently misconstruing the relevant findings of fact as conclusions of law, the Court of

Appeals embarked on its own analysis of this fourth factor and concluded that the findings of fact did not establish that the disability based harassment was sufficiently pervasive, severe, and persistent to affect the terms and conditions of Robel's employment. Robel, 103 Wn. App. at 86-87.

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The fifth element, **HN12** whether the postinjury conduct must be imputed to the employer, was explained in *Glasgow* as follows:

Where an owner, manager, partner or corporate officer personally participates in the harassment, this element is met by such proof. To hold an employer responsible for the discriminatory work environment created **[*18]** by a plaintiff's supervisor(s) or co-worker(s), the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action.

103 Wn.2d at 407. Applying this passage, the jury must find either that (1) "an owner, manager, partner or corporate officer personally participate[d] in the harassment" or that (2) "the employer . . . authorized, knew, or should have known of the harassment and . . . failed to take reasonably prompt and adequate corrective action." *Id.* (emphasis added); see also 6A WPI 330.23, at 240-41.

The trial court found that "Fred Meyer, through the acts of its *managers*, participated, authorized, knew and/or should have known of the verbal and non-verbal harassment of Robel in the work setting subsequent to July 14, 1996." CP at 1335 (Finding of Fact 38) (emphasis added); see also CP at 1336 (Finding of Fact 46) (stating that "Fred Meyer's management personnel improperly participated in and/or allowed the verbal and non-verbal harassment in the work setting"). The trial court clarified in its oral **[*19]** review of the findings that deli manager Potts and assistant deli manager Smith were management personnel for purposes of employer liability. n5 The court also found that "Fred Meyer's remedial action . . . was not of such a nature to have been reasonably calculated to end the harassment" and that "[i]ts investigations and termination of [one co-worker] without further management corrections were inadequate." CP at 1335 (Finding of Fact 40). Moreover, the court specifically found that the postinjury harassment was "imputed to Fred Meyer." *Id.* (Finding of Fact 39) (emphasis added). These uncontested findings of fact satisfy both options derived from *Glasgow*.

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n5 In re Marriage of Booth, 114 Wn.2d 772, 777, 791 P.2d 519 (1990) (in absence of written finding, appellate court may look to oral opinion). **HN13** Managers are those who have been given by the employer the authority and power to affect the hours, wages, and working conditions of the employer's workers. The trial court referred to Smith as "a management representative of Fred Meyer" and likewise referred to deli manager Evelyn Potts as "management employee Potts." Report of Proceedings (RP) at 550, 551, 553. Smith, as "assistant deli manager," made the work assignments in the deli and joined Potts in interviewing Robel for transition into a 40-hour position. CP at 1330 (Finding of Fact 6); RP at 179; Joint Ex. 201, at 20. Fred Meyer failed to assign error to the trial court's findings that management-level employees participated in the harassment.

-----End Footnotes----- **[*20]**

We therefore conclude that RCW 49.60.180(3) supports a disability based hostile work environment claim and that the Court of Appeals erred when it ignored the trial court's unchallenged findings of fact on the five essential elements of the claim. We reverse the Court of Appeals and reinstate the trial court's judgment in Robel's favor on this claim.

Retaliation for Filing Workers' Compensation Claim. Washington's Industrial Insurance Act provides ^{HN14} that "[n]o employer may discharge or *in any manner discriminate against* any employee *because* such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title." RCW 51.48.025(1) (emphasis added). Robel asserts that, although Fred Meyer did not discharge her for filing her workers' compensation claim, the company did "in [some] manner discriminate against" her "because" she filed her workers' compensation claim. *Id.*; see *City of Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995) [*21] (courts "are duty-bound to give meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous"). The trial court made the following unchallenged findings:

34. Fred Meyer has a policy that *retaliation* by supervisors against employees is precluded when complaints are raised by employees. Fred Meyer failed and/or refused to enforce this policy in response to the verbal and non-verbal harassment of Robel in the work setting.

35. Fred Meyer's actions and/or inactions in regard to the verbal and non-verbal harassment of Robel in the work setting subsequent to July 14, 1996, was an *unlawful act of retaliation in response to her filing and/or pursuing an industrial insurance claim under RCW 51, et seq., a statutorily protected activity.*

36. The verbal and non-verbal harassment of Robel in the work setting subsequent to July 14, 1996, constituted an unlawful and adverse employment action against her.

37. There exists a *direct causal connection* between Robel's protected activity and the adverse employment action.

CP at 1334-35 (Findings of Fact 34-37) (emphasis added).

Without commenting on these unchallenged findings, [*22] which respond directly to the antidiscrimination statute, the Court of Appeals determined that Robel would have to provide "either (a) proof of a policy or practice of the employer, known to the employee, by which the employer retaliates against employees who exercise their rights under the workers' compensation law; or (b) [proof] that the employee sustains an on-the-job injury, and is directly threatened with retaliation if the employee claims benefits under the workers' compensation law for the injury." *Robel*, 103 Wn. App. at 88 (quoting *Johnson v. Safeway Stores, Inc.*, 67 Wn. App. 10, 13, 833 P.2d 388 (1992)).

The reliance on *Johnson* is insupportable. At issue there was the employer's conduct in preventing an employee from filing a claim, a circumstance not presented here. In fact, no prior cases have ^{HN15} applied the antidiscrimination statute to the present situation--that of an employer who has allegedly discriminated in some way, short of discharge, against an employee because she filed a workers' compensation claim. By analogy with *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 68, 821 P.2d 18 (1991), [*23] which required proof of a causal connection between the filing of a claim and the allegedly retaliatory termination, Robel was required to prove that she had filed a claim, that Fred Meyer thereafter discriminated against her in some way, n6 and that the claim and the discrimination were causally connected. Because the findings of fact satisfy these elements and were not challenged on appeal, we reverse the Court of Appeals on the retaliation claim and reinstate the trial court's judgment in Robel's favor.

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n6 The unchallenged findings of fact refer to "[t]he verbal and non-verbal harassment of Robel in the work setting subsequent to July 14, 1996," as well as "Fred Meyer's actions and/or inactions in regard to [such] harassment." CP at 1334-35 (Findings of Fact 35-36). Although we are not called upon to weigh the sufficiency of the evidence supporting these unchallenged findings, we do note that the record shows incidents spanning the period August 1, 1996, through September 13,

1996. See *supra* at pages 2-4.

-----End Footnotes----- [*24]

Intentional Infliction of Emotional Distress. Robel's complaint stated causes of action for both negligent and intentional emotional distress, basing those claims on the same averments. In the trial court's oral review of its findings, it stated that, "[w]ith regard to the negligence and intentional infliction claim, [it] would recognize [that the] conduct rises to the level of being intentional, particularly as it relates to management of [sic] employee Smith and conduct that took place in the direct presence of management employee Potts." Report of Proceedings (RP) at 553. The trial court entered judgment in Robel's favor on both claims, but the Court of Appeals reversed.

HN16 To prevail on a claim for outrage, a plaintiff must prove three elements: "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff." n7 The first element requires proof that the conduct was "*so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*" *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). Although the three elements are fact questions for the jury, this first element of the test goes to the jury only after the court "determine[s] if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." *Id.* Here, the trial court entered factual findings in Robel's favor on the three elements, CP at 1336-37 (Findings of Fact 51, 52, 57, 59, 60), but the Court of Appeals reversed, determining as a matter of law that "reasonable minds could not differ on whether the conduct was so extreme as to result in liability." *Robel*, 103 Wn. App. at 90.

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n7 *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (citing *Dicomes*, 113 Wn.2d at 630; RESTATEMENT (SECOND) OF TORTS § 46 (1965)). Robel's complaint alleges intentional infliction of emotional distress; outrage encompasses causes of action based on reckless and intentional conduct.

-----End Footnotes----- [*26]

While **HN17** the standard for an outrage claim is admittedly very high (by which we mean that the conduct supporting the claim must be appallingly low), we disagree with the Court of Appeals on the threshold legal question and conclude that reasonable persons could deem the employer's conduct, as set forth in the unchallenged findings, sufficiently outrageous to trigger liability. In some contexts, perhaps the language directed at Robel could be dismissed as merely "rough" and "insulting," as the Court of Appeals characterized it, *Robel*, 103 Wn. App. at 90, but we believe that reasonable minds (such as the one exercised by the trial judge) could conclude that, in light of the severity and context of the conduct, it was "*beyond all possible bounds of decency, . . . atrocious, and utterly intolerable in a civilized community.*" *Dicomes*, 113 Wn.2d at 630 (quoting *Grimsby*, 85 Wn.2d at 59). This court has recognized that **HN18** in an outrage claim " [*27] [t]he relationship between the parties is a significant factor in determining whether liability should be imposed." *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 741, 565 P.2d 1173 (1977). The *Contreras* court emphasized that "added impetus" is given to an outrage claim "[w]hen one in a position of authority, actual or apparent, over another has allegedly made racial slurs and jokes and comments." *Id.*; see also *White v. Monsanto Co.*, 585 So. 2d 1205, 1210 (La. 1991) (stating that "plaintiff's status as an employee may entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger"). Robel was called *in her workplace* names so vulgar that they have acquired nicknames, such as "the C word," for example. Joint Ex. 201, at 40; cf. *Taylor v. Metzger*, 152 N.J. 490, 706 A.2d 685, 695-

96 (1998) (holding that, in light of "power dynamics of the workplace," jury could reasonably find "extreme and outrageous" a sheriff's utterance of a single racial slur about subordinate officer). Thus, [*28] on the threshold question of law, we conclude that reasonable minds could differ on whether the conduct was sufficiently extreme to warrant the imposition of liability on the employer. The claim was properly before the finder of fact, and the trial court's unchallenged factual findings on the elements of intentional infliction of emotional distress are verities on appeal.

Fred Meyer argued to the Court of Appeals that, "[i]n Washington, an employer is generally not, as a matter of law, liable for an intentional tort committed by an employee." Opening Br. of Appellant at 33 (citing *Kuehn v. White*, 24 Wn. App. 274, 278, 600 P.2d 679 (1979)). This point of view gravely distorts the law of vicarious liability in this state. Our case law makes clear that, ^{HN19} once an employee's underlying tort is established, the employer will be held vicariously liable if "the employee was acting within the scope of his employment." *Dickinson v. Edwards*, 105 Wn.2d 457, 469, 716 P.2d 814 (1986). An employer can defeat a claim of vicarious liability [*29] by showing that the employee's conduct was (1) "intentional or criminal" and (2) "outside the scope of employment." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 56, 929 P.2d 420 (1997) (emphasis added), quoted with approval in *Snyder v. Med. Servs. Corp. of E. Wash.*, 145 Wn.2d 233, 242-43, 35 P.3d 1158 (2001). *Niece* and, by extension, *Snyder* simply do not stand for the proposition that intentional or criminal conduct is per se outside the scope of employment. n8

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n8 In *Niece*, this court took pains to say that there may be other bases of employer liability for the criminal conduct of employees quite apart from vicarious liability:

^{HN20} Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of action are based on the theory that "such negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of respondeat superior." *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 43, 747 P.2d 1124 (1987) (quoting 53 Am. Jur. 2d *Master and Servant* § 422 (1970)), review denied, 110 Wn.2d 1016 (1988).

Niece, 131 Wn.2d at 48 (alteration in original).

-----End Footnotes----- [*30]

^{HN21} An employee's conduct will be outside the scope of employment if it "is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." RESTATEMENT (SECOND) OF AGENCY § 228(b) (1958); see also RESTATEMENT, *supra*, § 228(a). This is not to say that an employer will be vicariously liable only where it has specifically authorized an employee to act in an intentionally harmful or negligent manner; likewise, an employer may not insulate itself from vicarious liability merely by adopting a general policy proscribing bad behavior that would otherwise be actionable. The proper inquiry is whether the employee was fulfilling his or her job functions at the time he or she engaged in the injurious conduct. For example, in *Kuehn*, the employee, a truck driver, stepped outside the scope of his employment when, following an exchange of obscene gestures, he ran the plaintiff's car off the road and, after both vehicles had stopped, assaulted the plaintiff with a pipe. The *Kuehn* court observed that, [*31] ^{HN22} when a servant "steps aside from the master's business in order to effect some purpose of his own, the master is not liable." 24 Wn. App. at 277. Similarly, this court has also determined that, where an employee's acts are directed toward personal sexual

gratification, the employee's conduct falls outside the scope of his or her employment. For example, in *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993), the court held that the actions of a doctor who, for his own personal sexual gratification, had manually obtained sperm samples from his male patients during examination were not within the scope of the doctor's employment. n9

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n9 Indeed, prior to *Snyder*, Washington case law regarding intentional torts and vicarious liability was mostly confined to sexual misconduct; naturally, the courts have held that the sexual acts of employees are not within the scope of employment. See *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999) (holding that diocese could not be held vicariously liable for sexual abuse by priests); *Niece*, 131 Wn.2d 39, 929 P.2d 420 (holding that group home was not vicariously liable for the rape of a disabled resident by an employee); *Blenheim v. Dawson & Hall, Ltd.*, 35 Wn. App. 435, 667 P.2d 125 (1983) (holding that employer could not be held vicariously liable where employees acted for their own purposes by assaulting and raping a dancer at a company Christmas party).

-----End Footnotes----- [*32]

Here, Fred Meyer was vicariously liable for the offending conduct of its deli employees. First, unlike the employee in *Kuehn*, who left his post and effectively ceased to be an employee, the Fred Meyer deli workers tormented Robel on company property during working hours, as they interacted with co-workers and customers and performed the duties they were hired to perform. Nothing in the record suggests that the abusive employees left their job stations or neglected their assigned duties to launch the verbal attacks on Robel. Nor was the employees' conduct in this case directed toward deriving personal sexual gratification, an exceptional circumstance that could have taken the conduct outside the scope of their employment.

In sum, we conclude that Fred Meyer is vicariously liable, that reasonable minds could find the complained-of conduct outrageous, and that the uncontested findings satisfied the three elements of outrage. Consequently, we reverse the Court of Appeals and reinstate the trial court's judgment for Robel on her claim for intentional infliction of emotional distress. Robel's success on this claim makes unnecessary our consideration of Robel's companion claim for negligent [*33] infliction of emotional distress.

Defamation. ^{HN23} A plaintiff bringing a defamation action must prove "four essential elements: falsity, an unprivileged communication, fault, and damages." *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124, 73 L. Ed. 2d 1339, 102 S. Ct. 2942 (1982). Before the truth or falsity of an allegedly defamatory statement can be assessed, a plaintiff must prove that the words constituted a statement of fact, not an opinion. Because "expressions of opinion are protected under the First Amendment," they "are not actionable." *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 39, 723 P.2d 1195 (1986) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (observing that "[u]nder the First Amendment there is no such thing as a false idea")). Whether the allegedly defamatory words were intended as a statement of fact or an expression of opinion is a threshold question of law [*34] for the court. *Id.*

The trial court found that "[t]he defamatory communications by Fred Meyer's employees included that Robel was a 'bitch,' a 'cunt,' a 'fucking bitch,' a 'fucking cunt,' a 'snitch,' a 'squealer,' and/or a 'liar,' and the comment that 'only idiots demo.'" CP at 1337 (Finding of Fact 63). The Court of Appeals reasonably rejected as nonactionable opinions the vulgar names Robel's co-workers called her. *Robel*, 103 Wn. App. at 92 (noting that "some statements . . . cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse" (quoting RESTATEMENT (SECOND) OF TORTS § 566, cmt. e (1977))). The Court of Appeals concluded that the remaining words--"snitch," "squealer," "liar," and "idiot"--were

arguably defamatory statements of fact but that Robel's claim failed because the trial court had made no finding of damages arising from the defamation claim.

We conclude, however, that none of the allegedly defamatory words could carry defamatory meaning in this case. The vulgarisms, along with the word "idiot," were plainly abusive words not intended to be taken literally as [*35] statements of fact. To determine whether the words "snitch," "squealer," and "liar" should likewise be viewed as nonactionable opinions, we consider the "totality of the circumstances" surrounding those statements: ^{HN24}"To determine whether a statement is nonactionable, a court should consider at least (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts." Dunlap v. Wayne, 105 Wn.2d 529, 539, 716 P.2d 842 (1986) (regarding as a nonactionable opinion, not a statement of fact, opposing counsel's statement to plaintiff's employer that plaintiff had been soliciting a kickback).

Applying the *Dunlap* court's three-factor test and its reasoning, we hold as a matter of law that, as with the vulgarisms and the word "idiot," the words "snitch," "squealer," and "liar" likewise constituted nonactionable opinions. Regarding the first factor, medium and context, at issue here were oral statements made in circumstances and places that invited exaggeration and personal opinion. [*36] Those engaging in the name-calling were Robel's co-workers and superiors-- individuals who were potentially interested in discrediting her complaints to management about questionable food handling practices in the deli or who were personally interested in ostracizing Robel in the workplace.

The second *Dunlap* factor, the audience, likewise suggests that the remarks are to be regarded as nonactionable opinions. According to the trial court's finding, "[t]he defamatory communications were published to Fred Meyer's customers and/or Robel's co-workers and/or Robel's management personnel." n10 As an audience, Robel's co-workers and managers were certainly "prepared for mischaracterization and exaggeration." Dunlap, 105 Wn.2d at 541. They would have been aware of the animosity between Robel and other co-workers. Such words as "snitch," "squealer," and "liar" would have registered, if at all, as expressions of personal opinion, not as statements of fact. Likewise, customers hearing the comments would reasonably perceive that the speaker was an antagonistic or resentful co-worker.

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n10 CP at 1338 (Finding of Fact 64). The use of "and/or" in this finding, taken literally, would mean that the audience could have been any one of the three or all three--customers, co-workers, managers. Because a previous finding provides that unnamed deli workers "told customers [Robel] had lied about her back and was being punished by Fred Meyer by 'demoing' pizzas," we can conclude that the audience included unidentified "customers." CP at 1333 (Finding of Fact 23).

-----End Footnotes----- [*37]

Analysis of the third factor, whether the words implied undisclosed defamatory facts, yields the same result--an unsurprising result since the context and audience often ensure that any implicit facts will be perceived as "merely a characterization of those facts." Ollman v. Evans, 242 U.S. App. D.C. 301, 750 F.2d 970, 985 (D.C. Cir. 1984). To the extent the words were published to deli workers, that audience would have known the facts ostensibly underlying the epithets "snitch," "squealer," and "liar"--that Robel had been recording in her journal what she believed were questionable practices in the deli and that she had voiced her complaints to management. Likewise, the remark made to customers--that Robel was "'demoing' pizzas" because she had "lied about her back"--implies no undisclosed defamatory facts; rather, the remark overtly explains why the resentful, unprofessional co-worker regarded Robel as a "liar." CP at 1333 (Finding of Fact 23).

Because we conclude that all of the utterances identified in the finding were nonactionable opinions, we affirm the reversal of the trial court's judgment on Robel's defamation claim.

*Robel's Request for Attorney Fees [*38] on Appeal.* In a supplemental brief filed with this court, Robel requested costs and a reasonable attorney fee. Because no fee request was made in her petition for review, the issue was not properly raised before this court. See RAP 13.7(b). We also note that Robel based the fee request made in the supplemental brief on RCW 51.52.130, a statute that she did not cite below as a basis for a fee award. ^{HN25} While RAP 12.1(b) gives this court the latitude to consider an issue not properly raised, the rule pertains to issues that, in our view, "should be considered to properly decide a case." Because Robel's fee request is not such an issue, we deny the request. CONCLUSION

On Robel's claims of disability discrimination, retaliation for filing a workers' compensation claim, and intentional infliction of emotional distress, we reverse the Court of Appeals and reinstate the trial court's judgment in Robel's favor. We affirm the reversal of the trial court's judgment for Robel on her defamation claim and deny Robel's request for attorney fees on appeal.

The [*39] Court of Appeals decision is affirmed in part and reversed in part.

DISSENTBY: Bobbe J. Bridge

DISSENT: BRIDGE, J. (dissenting in part)--The incidence of harassment and discrimination in the workplace is terrifying and real. Its occurrence is remediable at law. The remedy, however, must be applied against those truly culpable for the injury caused. Our case law precedent is clear that an employer is not responsible for resolving issues between employees in conflict--no matter how hurtful to the putative victim of the conflict. An employer becomes liable when he or she *participates* through an identifiable agent or takes *no* action in the face of repeated harassment which is attributable to a protected classification, and which is committed in the furtherance of the perpetrator's employment. If these conditions are not present, the culprit at law must be the offending employee, "deep-pocket" considerations aside. Empathy for those for whom going to work becomes a nightmare is insufficient to hold otherwise noncomplicit employers liable for the harm done by rogue employees. With these considerations in mind, I turn to the case at bar.

Linda Robel began work at Fred Meyer n1 in the deli department [*40] in December 1995. The following month, Robel and co-worker Tiffany Ware had a falling out over Ware's relationship with Robel's son. Unfortunately for Robel, Ware was a close friend of the deli's assistant manager, Amy Smith. The unhappy result of this situation was that the mutual animosity between Robel and Ware inevitably spilled over into the workplace, subjecting Robel to various verbal taunts and tricks by her co-workers. Robel was distressed by her co-workers' abusive behavior, but that behavior was clearly the result of a personality conflict, not action by or on behalf of her employers. Nor, as Robel claims, was the behavior caused by her back injury or her filing a workers' compensation claim--in fact, much of the offensive behavior predated both of these events. This clash, no matter how distasteful, is insufficient to support a claim for outrage or negligent infliction of emotional distress against Robel's employer. In fact, once the responsible agent of her employer became aware of the situation, action was taken. Ultimately, Robel's "harasser" was fired. Therefore, I respectfully dissent from the majority's holdings as to disability discrimination, retaliation, and outrage. [*41] I concur with the majority's holding that a defamation claim is not actionable on these facts.

-----Footnotes-----

n1 Roundup Corp. does business as Fred Meyer, Inc. For consistency, I will use the name "Fred Meyer" when referring to Roundup Corp.

-----End Footnotes-----

STANDARD OF REVIEW

The majority asserts that because Fred Meyer has failed to challenge the trial court's findings of fact, we must accept them as verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). However, a conclusion of law is a conclusion of law wherever it appears, even if it is erroneously labeled a finding of fact. Kane v. Klos, 50 Wn.2d 778, 788, 314 P.2d 672 (1957); Local Union 1296, Int'l Ass'n of Firefighters v. City of Kennewick, 86 Wn.2d 156, 161-62, 542 P.2d 1252 (1975). Conclusions of law are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). Furthermore, mixed questions of law and fact are subject to review despite a party's failure to assign error [*42] to the finding. State v. Niedergang, 43 Wn. App. 656, 660-61, 719 P.2d 576 (1986).

We have stated that a "finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." Leschi v. Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774, 804 P.2d 1 (1974) (quoting NLRB v. Marcus Trucking Co., 286 F.2d 583, 590-91 (2d Cir. 1961) (quoting Louis L. Jaffee, Judicial Review: Question of Law, 69 HARV. L. REV. 239, 241 (1955))). See also State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981) ("Where findings necessarily imply one conclusion of law the question still remains whether the evidence justified that conclusion.") (citing Cline v. Altose, 158 Wash. 119, 126, 290 P. 809 (1930)). In contrast, a conclusion of law is a "determination [that] is made by a process of legal reasoning from facts in evidence." Niedergang, 43 Wn. App. at 658-59.

This court has had several opportunities to evaluate whether findings of fact were in actuality, conclusions of law. In Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982), [*43] we held that a trial court's finding of fact that "[a] dual agency relationship was not established at any time during [the] transaction" was actually a conclusion of law. In Woodruff v. McClellan, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980), we held that a trial court's finding of fact that defendants properly rescinded the earnest money agreement was actually a conclusion of law because the term "rescission" carried a legal implication. See also Cline, 158 Wash. at 126 (in landlord-tenant action, finding of fact that actions of parties adequately established respondent's right to a damage award was actually a conclusion of law because it necessarily implied that there was a constructive eviction); Niedergang, 43 Wn. App. at 660 (holding that trial court's finding of fact that defendant's automobile was parked outside curtilage of his house was at least mixed question of law and fact because "curtilage" could only be determined by examining facts of case); Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc., 21 Wn. App. 194, 197, 584 P.2d 968 (1978) (holding trial court's finding of fact that plaintiff had cured [*44] the breach was actually a conclusion of law).

Applying the above definitions, I agree with Fred Meyer that many of the trial court's findings of fact are truly conclusions of law and are as such subject to review. I will address the erroneously labeled findings as they are relevant.

DISABILITY DISCRIMINATION

Although I agree with the majority that Washington's antidiscrimination statute supports a disability based hostile work environment claim, I disagree that the findings of fact in this case support such a claim.

Adopting the framework established in Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985), the majority holds that a "plaintiff in a disability based hostile work environment case must prove (1) that he or she was disabled within the meaning of the antidiscrimination statute, (2) that the harassment was unwelcome, (3) that it was because of the disability, (4) that it affected the terms or conditions of employment, and (5) that it was imputable to the employer." Majority at 9.

The uncontested findings of fact do not support the majority's conclusion that Robel was harassed

because of her disability. The trial court found [*45] that "[t]he verbal and non-verbal harassment of Robel in the work setting subsequent to July 14, 1996, was directly or proximately related to her disability and/or Fred Meyer's perception of Robel as disabled." n2 The majority, however, was unwilling to draw a distinction between "directly or proximately related to" and "because of" the disability. Majority at 10. Under current Washington law, this distinction must be made.

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n2 Clerk's Papers (CP) at 1334 (Finding of Fact 31).

-----End Footnotes-----

In *Glasgow*, this court indicated that to satisfy the "because of" prong, the prohibited classification must be the "motivating factor for the unlawful discrimination." 103 Wn.2d at 406 (emphasis added). In the context of disability harassment, the question the court must ask is whether "the employee would have been singled out and caused to suffer the harassment if the employee had" not been disabled? *Id.* In Robel's case, the answer is clearly yes.

Because the trial court's findings [*46] of fact were not challenged, we must accept its finding that the harassment after Robel's injury was "directly or proximately related to her disability." n3 However, this finding alone is insufficient to support the conclusion that the harassment was "because of" Robel's disability. The harassment suffered by Robel began long before she became disabled. As early as January 1996, Robel began to experience hostility from her co-workers. This hostility continued and worsened in the months that followed, and included a particularly nasty confrontation with Tiffany Ware. At that time, Robel was not disabled. After Robel suffered a lower back injury, requiring that she work only a light duty shift, only one incident referenced Robel's disability. These facts clearly indicate that Robel would have been harassed even if she had remained able-bodied. Given the ongoing pattern of harassment and its genesis in significant personality differences, had Robel not suffered her back injury, it is unfortunate but likely that the adverse treatment would have endured in another form.

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n3 CP at 1334 (Finding of Fact 31).

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In *Doe v. Department of Transportation*, 85 Wn. App. 143, 149, 931 P.2d 196 (1997), the Court of Appeals held that the plaintiff had failed to establish that his supervisor's comments, although sexual in nature, were motivated by the plaintiff's gender. The court found that the supervisor had instead singled out people "who appeared to be particularly offended by his conduct regardless of the victims' sex." *Id.*

In evaluating hostile work environment claims under the federal Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, several circuit courts have similarly held that isolated incidents of harassment were not motivated by plaintiffs' disabilities even though at least some of the harassing conduct may have been related to the plaintiffs' disabilities. See *Wallin v. Minn. Dep't of Corr.*, 153 F.3d 681, 688 (8th Cir. 1998) (holding that plaintiff failed to establish that harassment was due to his disabilities even though three incidents were related to his disability); *Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 725-26 (8th Cir. 1999) (holding that plaintiff failed to establish that alleged [*48] harassment was "because of" his disability even though two isolated incidents may have been connected to his mental condition; "[i]nsensitivity alone does not amount to harassment").

Where federal courts have upheld disability discrimination claims based on a hostile work

environment, the harassment did not begin until after the employee suffered the disability or the employer became aware of it. See, e.g., Fox v. Gen. Motors Corp., 247 F.3d 169, 172-73 (4th Cir. 2001) (plaintiff, who had worked for defendant for many years, did not suffer harassment until after he received light work load due to his back injury); Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 236 (5th Cir. 2001) (finding that plaintiff and her supervisor had been good friends prior to supervisor's discovery that plaintiff was HIV (human immunodeficiency virus) positive and that harassing treatment of plaintiff did not begin until thereafter). Plainly, such was not the case for Robel.

Therefore, I would hold that Robel failed to establish that she was harassed *because* of her disability, an essential element of her disability [*49] discrimination claim. n4

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n4 Because I find that the harassment suffered by Robel was not motivated by her disability, I see no need to address whether the harassment was properly imputed to Fred Meyer under the *Glasgow* framework. However, I believe the majority's attempt to qualify Potts as a "manager" as the term is used in *Glasgow* is inappropriate. This court has never defined the term "manager" for the purpose of hostile work environment actions and I do not believe it is proper to make such broad assertions as to whom is covered by the term in this case, especially given the trial court's failure to make a specific finding on the issue. See 6A WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 330.23, at 243 cmt. (1997) ("There is no Washington case which examines the term 'manager' for purposes of imputing liability to the employing entity."); Henningsen v. Worldcom, Inc., 102 Wn. App. 828, 837-38, 9 P.3d 948 (2000).

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OUTRAGE

The tort of outrage requires the plaintiff to show: (1) [*50] extreme or outrageous conduct by the defendant; (2) that the conduct was intentional or reckless; and (3) that the plaintiff actually suffered severe emotional distress as a result. Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (citing Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987)). The conduct at issue must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." 113 Wn.2d at 630 (emphasis omitted) (quoting Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)).

Although whether the defendant's conduct is sufficiently outrageous is a question of fact for the jury, before a claim of outrage can go to the jury, the court must first determine "if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." 113 Wn.2d at 630. In deciding this threshold question, the majority reversed the Court of Appeals concluding that on these facts "reasonable persons could deem the employer's conduct . . . sufficiently outrageous to trigger liability. [*51] " Majority at 18. The majority applied this standard to the wrong set of facts, relying on the conduct of Robel's co-workers. However, Robel's action is against Fred Meyer, not her co-workers. Thus, the correct inquiry is whether *Fred Meyer's* conduct in responding to the co-workers' behavior was "sufficiently extreme [as] to result in liability?" I believe that it was not.

First, when the findings of fact are taken as a whole, Fred Meyer's direct action and/or inaction was not sufficient to result in liability. Although the trial court found that "Fred Meyer through its action and/or inaction allowed and/or fostered the verbal and non-verbal harassment in the work setting," n5 it also found that when Robel chose to complain about the harassment or other problems in her department, Fred Meyer generally responded to her concerns. For example, when Robel first complained about the food handling problems in the deli to the store's director, Steve Wissink, Wissink undertook an investigation and found that the problems were insubstantial.

Similarly, when Tiffany Ware was awarded a 40-hour position in the deli, the United Food and Commercial Workers Union successfully challenged the [*52] action on behalf of Robel. After her injury, Robel, through her union representative again reported incidents of harassment to Wissink, who then met with the deli employees and informed them that harassment would not be tolerated. When Wissink was informed that the harassment had continued, he conducted another investigation and eventually fired Ware.

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n5 CP at 1336 (Finding of Fact 47).

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Fred Meyer's responses certainly were not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Dicomes, 113 Wn.2d at 630 (emphasis omitted) (quoting Grimsky, 85 Wn.2d at 59). Fred Meyer's actions were in no way as severe as those of Robel's co-workers, which the majority admitted was a "close call" in terms of creating the requisite level of outrageousness. Majority at 18.

It is not for this court to second guess what actions should have been taken. In examining [*53] the applicability of the tort of negligent infliction of emotional distress in the workplace, we have observed that "employers, not the courts, are in the best position to determine whether such disputes should be resolved by employee counseling, discipline, transfers, terminations or no action at all." Snyder v. Med. Serv. Corp., 145 Wn.2d 233, 245, 35 P.3d 1158 (2001) (emphasis added) (quoting Bishop v. State, 77 Wn. App. 228, 234, 889 P.2d 959 (1995)). There seems to be no reason why the same latitude should not be given to employers in the context of the tort of outrage.

Second, in answering the threshold question of whether Fred Meyer's conduct was "sufficiently extreme" as to result in liability, Robel's co-workers' actions should not be imputed to Fred Meyer. Although the trial court found that "[t]he verbal and non-verbal harassment of Robel in the work setting is imputed to Fred Meyer and causally related to her emotional distress," n6 this "finding of fact" is actually a conclusion of law and thus subject to review. Whether an action may be imputed to another party can be determined only by applying [*54] the relevant facts to the law. *Cf.* Niedergang, 43 Wn. App. at 658. Therefore, whether an act of an employee may be imputed to an employer is ultimately a question of whether the employer may be held vicariously liable for the acts of its employees acting outside the scope of their employment. We have already answered this question in the negative. Snyder, 145 Wn.2d at 242. See also Niece v. Elmview Group Home, 79 Wn. App. 660, 664, 904 P.2d 784 (1995) ("When an employee's intentionally tortious or criminal acts are not in furtherance of the employer's business, the employer is not liable as a matter of law . . ." (emphasis added)), *aff'd*, 131 Wn.2d 39, 929 P.2d 420 (1997).

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n6 CP 1332 (Finding of Fact 19).

-----End Footnotes-----

In Niece, we held that "current Washington law clearly rejects vicarious liability for intentional or criminal conduct outside the scope of employment." 131 Wn.2d at 56. Again, in Snyder, we stated that " [*55] [w]hen an employee's intentionally tortious or criminal acts are not in furtherance of the employer's business, the employer is not liable as a matter of law, even if the employment situation provided the opportunity or means for the employee's wrongful acts." 145 Wn.2d at 242 (emphasis added) (quoting Niece, 79 Wn. App. at 664). See also McGrail v. Dep't of Labor & Indus., 190 Wash. 272, 277, 67 P.2d 851 (1937) (under traditional agency principles, principal

may be liable for acts of its agents only if agent was "engaged in the performance of the duties required of him by his contract of employment or by the *specific direction of his employer*, or, as sometimes stated, whether he was engaged at the time *in the furtherance of the employer's interests*" (emphasis added).

In *Snyder*, the plaintiff claimed outrage based solely on the acts of her immediate supervisor, Hall. 145 Wn.2d at 242. Hall's behavior toward the plaintiff and other employees was described as "authoritarian," "belligerent," and "harassing-type supervisor" and was severe enough as to cause some employees to quit. 145 Wn.2d at 236-37. [*56] Hall specifically threatened Snyder n7 and, on one occasion, "poked" Snyder in the chest. 145 Wn.2d at 237. Snyder and Hall's employer, Medical Service Corporation (MSC), did nothing to stop Hall's offensive behavior even though MSC was aware of it. 145 Wn.2d at 236-37. Because MSC had a policy forbidding "its supervisors to use physical force or threats of physical force," we concluded that Hall's actions were outside the scope of her employment, and thus, MSC could not be vicariously liable for Hall's actions. 145 Wn.2d at 243.

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n7 After giving Snyder a raise, Hall told her that if she told anyone where she got the raise from, Hall would "literally hunt Ms. Snyder down and 'kill her.'" *Snyder*, 145 Wn.2d at 237. In addition, when Snyder told Hall that she would not work an unpaid Saturday, Hall accused Snyder of insubordination. *Id.*

-----End Footnotes-----

Here, the actions by Robel's co-workers n8 were clearly outside the scope of their employment. Like the employer in *Snyder* [*57] , Fred Meyer had a policy forbidding "harassment, threats, and intimidation involving one employee versus another." n9 Furthermore, it did not direct its employees to harass Robel. n10 Although these comments and actions may have been offensive to Robel, they were not "in furtherance of" Fred Meyer's business. In fact, unlike the actions by Hall in *Snyder* which tended to involve "work-related topics--pay and unpaid overtime work," *Snyder v. Medical Services Corp.*, 98 Wn. App. 315, 324, 988 P.2d 1023 (1999), the actions and comments by Robel's co-workers were largely unrelated to the workplace.

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n8 Although the majority repeatedly emphasizes the titles of employees Potts and Smith ("deli manager" and "assistant deli manager" respectively), the law of agency does not differentiate between various levels of employees. See 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: *Tort Law and Practice* §§ 3.2, 3.3, at 82-84 (quoting RESTATEMENT (SECOND) OF AGENCY § 220 (1958) ("[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.")). Therefore, the fact that Smith participated in the abusive behavior or that Potts was aware of it is irrelevant as to whether liability should be imposed on Fred Meyer. [*58]

n9 CP at 1336 (Finding of Fact 50).

n10 The trial court found that "Fred Meyer, through the acts of its managers, participated, authorized, knew and/or should have known of the verbal and non-verbal harassment of Robel in the work setting subsequent to July 14, 1996." CP at 1335 (Finding of Fact 38). However, this finding, when compared with other findings of the trial court, is insufficient to establish that Fred Meyer "directed" its employees to treat Robel badly. See, e.g., CP at 1334 (Finding of Fact 30) ("Subsequent to . . . July 14, 1996, Robel was subjected to verbal and non-verbal harassment in the work setting by co-employees and Fred Meyer's management personnel, notwithstanding a directive to cease.").

-----End Footnotes-----

Despite the majority's assertion, merely because an employee is "on duty" does not mean that the employee was acting within the scope of his or her employment. See majority at 20-22. Washington courts have generally required more than the fact that an employee was "on duty" in order to hold his or her employer vicariously liable for the employee's *intentionally tortious* [*59] acts. "When an employee's intentionally tortious or criminal acts are not in furtherance of the employer's business, the employer is not liable as a matter of law, even if the employment situation provided the opportunity or means for the employee's wrongful acts." Niece, 79 Wn. App. at 664 (emphasis added). See also 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: *Tort Law and Practice* § 3.7, at 89 (2d ed. 2000) ("intentional torts of servants are not, generally as a matter of law, considered within the scope of employment or in furtherance of a master's business"); Hein v. Chrysler Corp., 45 Wn.2d 586, 600, 277 P.2d 708 (1954) ("An employee who willfully and for his own purposes violates the property rights of another . . . is not acting in the furtherance of his employer's business.").

Numerous Washington cases have refused to impose liability on an employer for the intentional torts committed by their employees even though the employee was "on duty" at the time of the tort. See, e.g., Hein, 45 Wn.2d at 598-600 (holding employer not vicariously liable for employees malicious inducement of a breach of [*60] contract even though employees used employer's business to induce breach because employees not acting within scope of employment); Niece, 79 Wn. App. at 664 (group home employee not acting within scope of employment when he sexually assaulted a patient); Kuehn v. White, 24 Wn. App. 274, 277-79, 600 P.2d 679 (1979) (employer not liable for employee truck driver who assaulted another motorist in a roadside argument even though truck driver's employment technically created the opportunity for the conflict). Under the majority's reasoning, an employer would essentially be strictly liable for all intentionally tortious actions committed by an employee who was "on duty" regardless of whether the actions were in furtherance of the employer's business. This position is clearly not supported by Washington law. See Niece, 131 Wn.2d at 54-56 (rejecting nondelegable theory of employer liability for intentional acts of its employers acting outside the scope of their employment).

Because we have declined to hold employers vicariously liable as a matter of law in exactly this type of situation, Robel's co-workers' actions cannot be imputed to Fred [*61] Meyer. The circumstances here are virtually indistinguishable from our recent decision in Snyder except insofar as the employee's actions in that case were arguably more egregious and the employer's actions less responsive. Yet, there was no liability for the employer in Snyder. The actions of Robel's co-workers may not be used to determine that reasonable minds could differ as to whether Fred Meyer's actions were sufficiently extreme as to warrant liability.

RETALIATION

Without justification, the majority extends the tort of wrongful discharge recognized in Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984) to encompass an act by an employer short of actual or constructive discharge. The majority merely substitutes the word "discrimination" for "discharge." However, the majority fails to define any limitation to the tort or to provide any justification expanding the tort beyond acts of discharge. I would continue to limit successful wrongful discharge claims to those that can show actual or constructive discharge.

In Thompson, we emphasized that the wrongful discharge exception to the employment at will doctrine was narrow and required [*62] balancing the interest of the employer to be protected against frivolous lawsuits with the interest of the employee to be protected against employer actions that contravene a clear public policy. Id. at 223, 232-33. Wrongful discharge claims have generally been allowed in four circumstances: "(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." Warnek v. ABB Combustion Eng'g Servs., Inc., 137 Wn.2d 450, 461, 972 P.2d 453 (1999) (emphasis added) (quoting Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 936, 913 P.2d 377 (1996)).

Although RCW 51.48.025(1) states that "[no] employer may discharge or in any manner discriminate against an employee because such employee has filed or communicated to the employer any intent to file a claim for compensation [*63] or exercises any rights provided under this title," the statute does not provide a direct cause of action for an aggrieved employee. It does, however, provide the requisite public policy used by this court to establish an action for wrongful discharge in Wilmot v. Kaiser Aluminum & Chemical Corp., 118 Wn.2d 46, 821 P.2d 18 (1991). In Wilmot, we held that a plaintiff could make out a prima facie case for retaliatory discharge by showing "(1) that he or she exercised the statutory right to pursue workers' benefits under RCW Title 51 or communicated to the employer an intent to do so or exercised any other right under RCW Title 51; (2) that he or she was discharged; and (3) that there is a causal connection between the exercise of the legal right and the discharge." Id. at 68. In determining whether our common law tort of wrongful discharge is broad enough to cover adverse employer actions less than actual discharge, we must look at the purpose of the public policy issue, as well as the tort itself.

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n11 Under RCW 51.48.025(2), "[a]ny employee who believes that he or she has been discharged or otherwise discriminated against by an employer in violation of this section may file a complaint with the director alleging discrimination within ninety days of the date of the alleged violation. . . . (3) [i]f the director determines that this section has not been violated, the employee may institute the action on his or her own behalf." There is no indication that Robel filed such a claim with the director in this case.

-----End Footnotes----- [*64]

In White v. State, 131 Wn.2d 1, 18, 929 P.2d 396 (1997), we addressed for the first time whether an adverse employer action less than actual discharge is actionable where the action violates a clear mandate of public policy. There, we were asked to adopt a cause of action for wrongful transfer in violation of public policy where the transfer did not result in a loss of pay, rank, job classification, or benefits. Id. at 7, 18. In declining to adopt such an action, we stated that recognizing a cause of action for employer actions short of actual discharge would open "a floodgate to frivolous litigation and substantially interfer[e] with an employer's discretion to make personnel decisions." Id. at 19 (citing White v. State, 78 Wn. App. 824, 839-40, 898 P.2d 331 (1995)).

In Warnek, we addressed the related issue of whether wrongful discharge encompassed an action for wrongful refusal to rehire. 137 Wn.2d at 461-62. The plaintiffs in Warnek alleged that the defendant had refused to rehire them after they had been laid off because they had filed workers' compensation [*65] claims in another state. Id. at 453. We held that prior Washington case law did not provide a cause of action for a former employee who had previously filed a workers' compensation grievance. Id. at 458. We emphasized that the plaintiffs had failed to establish the requisite element that they be "fired" or "discharged." Id. at 461.

Other jurisdictions have been similarly reluctant to expand the tort of wrongful discharge to include lesser disciplinary actions. See Ludwig v. C & A Wallcoverings, Inc., 960 F.2d 40, 42-43 (7th Cir. 1992) (rejecting tort of retaliatory demotion); Sanchez v. Philip Morris Inc., 992 F.2d 244, 249 (10th Cir. 1993) (refusing to adopt tort of wrongful failure to hire); LaFriniere v. Group W Cable, Inc., 670 F. Supp. 897, 898 (1987) (finding no cause of action for wrongful demotion under Montana law); Zimmerman v. Buchheit of Sparta, Inc., 164 Ill. 2d 29, 645 N.E.2d 877, 206 Ill. Dec. 625 (1994) (refusing to extend tort of wrongful discharge to include demotions or

discrimination for employee pursuing workers' compensation claim); Mintz v. Bell Atl. Sys. Leasing Int'l, Inc., 183 Ariz. 550, 553, 905 P.2d 559 (1995) [*66] (rejecting tort of wrongful failure to promote in violation of public policy); Burris v. City of Phoenix, 179 Ariz. 35, 43, 875 P.2d 1340 (1993) (rejecting new tort of wrongful failure to hire); Williams v. Dub Ross Co., 1995 OK CIV APP 9, 895 P.2d 1344, 1347 (Okla. Ct. App. 1995) (refusing to expand public policy doctrine to include wrongful failure to hire). n12 In the few jurisdictions to extend the wrongful discharge action, the plaintiffs all suffered actual adverse employment actions. See Brigham v. Dillon Cos., 262 Kan. 12, 20, 935 P.2d 1054, 1059-60 (1997) (recognizing cause of action for retaliatory demotion); Powers v. Springfield City Sch., 1998 Ohio App. LEXIS 2827, 1998 WL 336782, at *5-6 (recognizing cause of action for wrongful denial of promotion). n13

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n12 See also Michael D. Moberly & Carolann E. Doran, *The Nose of the Camel: Extending the Public Policy Exception Beyond the Wrongful Discharge Context*, 13 LAB. LAW. 371, 372 (1997) (finding that although public policy exception to employment at will doctrine has been recognized in 39 states, "it rarely has been applied in cases involving employer actions other than discharge"). [*67]

n13 Although California has recognized a cause of action for wrongful demotion, it did so by finding that the plaintiff had an implied contractual agreement with the employer not to demote without good cause. Scott v. Pac. Gas & Elec. Co., 11 Cal. 4th 454, 466, 46 Cal.Rptr.2d 427, 904 P.2d 834 (1995).

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In Zimmerman, the Illinois Supreme Court addressed the identical question presented in this case: whether the statutory prohibition on employers discriminating against an employee who files a workers' compensation claim gives rise to a common law cause of action. 164 Ill. 2d at 31. Although the Illinois court had recognized a wrongful discharge action in such situations, it refused to adopt a cause of action for lesser disciplinary actions, holding that to do so would "replace the well-developed element of discharge with a new, ill-defined, and potentially all-encompassing concept of retaliatory conduct or discrimination." Id. at 39.

The basic premise behind the wrongful discharge claim as related to the workers' compensation statute is to ensure [*68] that employees are able to utilize the benefits offered by that statute. When an employee successfully files for workers' compensation *and* retains his or her position, this purpose is effectuated. However, when an employee is wrongfully discharged for filing or expressing an intent to file a workers' compensation claim, the purpose is frustrated. Without the claim for retaliatory discharge, the employee would be placed in the position of choosing between his or her job and seeking the remedies afforded under the workers' compensation statute. See Zimmerman, 164 Ill. 2d at 33. The same choice would not arise to an employee who faces a lesser disciplinary action. Extending the wrongful discharge cause of action to lesser disciplinary actions would allow an employee to obtain greater rights than the workers' compensation statute otherwise allows. This would upset both the balance struck by the workers' compensation statute and by the tort of wrongful discharge generally.

But even if I agreed that wrongful discharge should be extended to lesser employer actions, I cannot agree that the conduct here meets the majority's test. Robel has simply not met her burden [*69] to prove that Fred Meyer discriminated against her in some way or that the discrimination was causally connected to her workers' compensation claim. See majority at 15-16.

The findings of fact do not support the conclusion that Fred Meyer "discriminated" against Robel n14 because she filed a workers' compensation claim. n15 After suffering a back injury at work, Robel successfully filed for workers' compensation. There is no indication that Fred Meyer

attempted to prevent her from filing this claim or that she was in any way denied benefits. The record also clearly shows that Fred Meyer accommodated her injury by giving her a light duty shift. In fact, only the "slip and fall" incident is even related to Robel's filing of a workers' compensation claim. n16

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n14 As noted above, the majority does not define the term "discrimination" as used in this context. I would interpret this term to require an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action.

n15 Because the words "retaliation" and "unlawful" in findings of fact 35 and 36 carry a legal implication, they are more accurately characterized as a legal conclusion. See cf. Woodruff, 95 Wn.2d at 396. Thus, these conclusions are subject to review. [*70]

n16 CP at 1333 (Finding of Fact 23) ("On or about August 1, 1996, Robel was at the display table, and Ware and another deli worker laughed, acted out a slip and fall. Robel testified one of them yelled "Oh, I hurt my back, L&I, L&I."").

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Finally, to satisfy the third prong of the *Wilmot* test adopted by the majority, Robel must show that the discharge was *motivated by the plaintiff's protected activity*. Wilmot, 118 Wn.2d at 68. Although tracking the language of the *Wilmot* test, the trial court's finding that there was "a direct causal connection between Robel's protected activity and the adverse employment action," n17 does not clearly establish that the workers' compensation claim motivated the adverse actions of Robel's co-workers. Taken as a whole, the record shows a pattern of negative treatment by Robel's co-workers that began nearly six months before she filed her claim and involved many statements completely unrelated to her claim. n18 Therefore, I disagree with the majority that Robel satisfied her burden to prove the second two elements of her retaliation [*71] claim.

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n17 CP at 1335 (Finding of Fact 37).

n18 See, e.g., CP at 1330-33, 1337-38 (Findings of Fact 7, 12, 15, 25, 63, 65).

-----End Footnotes-----

CONCLUSION

Although Robel was treated horribly by her fellow Fred Meyer employees, the adverse treatment was attributable to personality conflicts among these employees and not to management action or inaction. Thus, I do not believe that such treatment gives rise to any sustainable claim against her employer under Washington law. I therefore respectfully dissent from the majority's opinion to the contrary.

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