IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TERESA E. L. BIENICK, a single individual, and KATHERINE SHIPMAN-THOMPSON, a single individual, Appellants, v. STATE OF WASHINGTON, and DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondents.	No. 39229-1-II UNPUBLISHED OPINION

Armstrong, J. — Teresa Bienick and Katherine Shipman-Thompson appeal the trial court's summary judgment dismissal of their whistleblower retaliation and discrimination claims. Because Bienick and Shipman-Thompson do not qualify as whistleblowers under the statute or establish a cause of action for workplace discrimination, we affirm.

FACTS

Bienick began working for the mental health division of Department of Social and Health Services in 2003, first as a fiscal program manager and then as a contracts administrator. Shipman-Thompson worked as the chief financial officer and then as the accounting manager for the mental health division at all times relevant to this lawsuit. The two have been close friends since 1987.

On August 2, 2004, John Pelkey became chief of finance in the mental health division where he supervised Bienick and Shipman-Thompson. Before Pelkey started as its finance chief, the mental health division negotiated a contract with Fairfax Hospital, a private mental health

hospital in Seattle. Several in the division, including Ramona Bushnell, who drafted the contract, expressed concern that the agreement might constitute an improper loan of state funds because it authorized a one-time advance of $310,000 for vaguely specified services. Pelkey shared his concern with division director Karl Brimner, who directed him to execute the contract. In September 2004, Pelkey e-mailed Bienick and Bushnell that they would be protected if they signed the Fairfax contract. They were the only two in the office with signing authority. When Bushnell asked not to sign because she could not do so in good faith, Pelkey turned to Bienick. According to Pelkey, Bienick agreed to sign the contract, saying she was a team player. According to Bienick, she signed the contract because Pelkey told her to "or else." Clerk's Papers (CP) at 96.

Bienick and Shipman-Thompson discussed the Fairfax contract with Kathleen Brockman, the Department's chief administrative officer, during a September smoking break.[1] Bienick expressed concern about the State recovering the money, but Brockman doubted the State would pursue it. Shipman-Thompson asked if the issue could be resolved internally because she preferred to resolve issues internally rather than externally.

Bienick and Shipman-Thompson spoke with an auditor's staff member, Marie Steffan, in October 2004. Bienick told Steffan she would not take any action as long as she reported to Pelkey. Steffan explained that auditor's office employee Sandra Miller was the person to call if they wished to file a whistleblower complaint, and she told them how to contact Miller. Bienick contacted Miller, again stating she would not file a whistleblower complaint while under Pelkey's

[1] The plaintiffs assert that Brockman was the whistleblower contact for the Department, but the State contends that she did not become so until the whistleblower statute was amended in 2008 to allow designated public officials, as well as the auditor, to receive whistleblower complaints.

supervision. Miller explained that she could file a complaint at any time within a year of the alleged improper activity.

In the meantime, Bienick was having difficulty with one of her subordinates. The division of access and equal opportunity investigated the conflict from October to December 2004, and the human resources division informed Pelkey that Bienick should not supervise anyone during the investigation. According to Pelkey, he informed Bienick of this before she left for a week's supervisor training in mid-October. Bienick testified that she did not learn her supervisory authority had been limited until she returned from the training and Shipman-Thompson called her at home.

When Bienick reported to work the next day, she confronted Pelkey about a second contract she believed was being pushed through without proper procedures. Bienick told Pelkey that if he did not rescind that contract, she would be forced to go to the governor and the auditor about both the Fairfax contract and the second contract. Pelkey stopped the conversation and sent Bienick home. Bienick testified that in doing so, he raised his hand in a threatening gesture and chased her into the elevator.

Shipman-Thompson later escorted Bienick back into the office to retrieve her personal effects. Bienick was placed on home assignment during the pending investigation, and Brimner suspended her contract-signing authority at that time. When she returned to the office in November, Pelkey allegedly isolated her in her office, became increasingly angry with her, and called her derogatory names such as "digger" and "catch bucket." CP at 337-38.

In February 2005, Shipman-Thompson and Bienick initiated a meeting with Pelkey about

another employee's leave time request. Pelkey became enraged, raised his hand to stop the conversation, and left the room. Shipman-Thompson testified that his behavior intimidated and frightened the two women, but she also testified that she followed Pelkey to his office to continue the conversation. She also stated that she regularly complained to Jack Morris, the assistant director of the mental health division, about how Pelkey was treating her and Bienick.

One of Shipman-Thompson's complaints concerned a change to an organization chart Pelkey made in April 2005 in which he replaced Bienick with a temporary employee as contract manager. After Shipman-Thompson complained, the May chart reinstated Bienick as contract manager. Also in April 2005, human resources division investigator Barbara Bowdish completed a management review of the fiscal office. Her review included attendance problems and irregular hours. Bowdish recommended that management develop core working hours for all staff. Brimner and Pelkey adopted this recommendation, and on April 19, 2005, Pelkey notified all division staff working fewer than five days a week that five-day workweeks were now expected. This directive implicated Shipman-Thompson and one other employee. Shipman-Thompson asked Pelkey to continue to allow her to work four ten-hour days because of family needs, but he declined to do so. Shipman-Thompson asserted that Pelkey changed her work schedule because he was angry about her standing up for Bienick. According to both Bienick and Shipman-Thompson, Pelkey also promised them five percent salary increases, but he refused to conduct the job evaluations necessary to implement the raises.

In June 2005, Pelkey considered reassigning contracting authority back to Bienick, but he decided not to after receiving strong opposition from contract support services. Mary Anne

Lindeblad succeeded Brimner and became the interim director of the mental health division that same month. On July 29, she informed Pelkey that Bienick would report to interim assistant division director Norm Webster. Lindeblad later reassigned Pelkey to a nonsupervisory role. Webster transferred Bienick to the division of business and finance, with no loss of pay or benefits, and with what he termed her concurrence. Lindeblad later approved retroactive 2.5 percent raises for both Bienick and Shipman-Thompson. Shipman-Thompson retained her position as chief fiscal officer until she retired in 2006.

On August 1, 2005, Bienick filed a whistleblower complaint with the auditor's office. She testified that she waited to file the complaint until Pelkey no longer supervised her because she feared he would harm her as a result. The auditor confirmed that Bienick's complaint warranted a preliminary investigation under the Whistleblower Act, chapter 42.40 RCW. The investigation concluded that Brimner had improperly directed that money be paid to a contractor without documentation that services had been performed.

In 2007, Bienick and Shipman-Thompson filed this lawsuit, asserting claims of whistleblower retaliation, discrimination, and negligent infliction of emotional distress. The trial court granted the State's motion for summary judgment; Bienick and Shipman-Thompson appeal the dismissal of their whistleblower and workplace discrimination claims.

ANALYSIS

I. Summary Dismissal of Whistleblower Retaliation and Discrimination Claims

A. Standard of Review

We review a summary dismissal de novo. *Owen v. Burlington N. & Santa Fe R.R. Co.*,

153 Wn.2d 780, 787, 108 P.3d 1220 (2005); *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 617, 60 P.3d 106 (2002). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). Genuine factual issues are those for which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

In determining whether factual issues exist, we take the evidence together with all reasonable inferences from it in the light most favorable to the nonmoving party. *Renz*, 114 Wn. App. at 617. Summary judgment should be granted only if reasonable persons could reach but one conclusion after reviewing the evidence. *Renz*, 114 Wn. App. at 617.

B. Burden of Proof

Bienick and Shipman-Thompson sued the State under both chapter 49.60 RCW (the Washington Law Against Discrimination) and chapter 42.40 RCW (the State Employee Whistleblower Protection Act). RCW 49.60.210(1) provides that it is unlawful for a government agency to discriminate against any person because he or she has opposed any practices forbidden by chapter 49.60 RCW. It also provides that it is an unfair practice for a government agency, manager, or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW. RCW 49.60.210(2); *see also* RCW 42.40.050(1) (whistleblower who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW).

To establish a prima facie case of whistleblower retaliation or discrimination, an employee

must show that (1) she engaged in a statutorily protected activity, (2) her employer took an adverse employment action, and (3) the employee's activity caused the employer's adverse action. *See Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). Once the employee establishes a prima facie case, the burden shifts to the employer to produce evidence of legitimate, nonretaliatory reasons for the employment action. *Keenan v. Allan*, 889 F. Supp. 1320, 1367 (E.D. Wash. 1995), *aff'd*, 91 F.3d 1275 (9th Cir. 1996); *Estevez v. Faculty Club*, 129 Wn. App. 774, 797-98, 120 P.3d 579 (2005). If the employer sets forth such reasons, the presumption of retaliation is rebutted. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 182, 23 P.3d 440 (2001), *rev'd on other grounds by McClarty v. Totem Elec*., 157 Wn.2d 214, 137 P.3d 844 (2006). The burden then shifts back to the employee to show that the proffered reasons are pretextual or that the whistleblowing activity was a substantial motivating factor for the employer's action. *Keenan*, 889 F. Supp. at 1367; *Estevez*, 129 Wn. App. at 798. When the employee's evidence of pretext is weak or the employer's nonretaliatory evidence is strong, the employer is entitled to summary judgment. *Milligan*, 110 Wn. App. at 638-39.

II. Statutorily Protected Activity

The State contends that neither plaintiff fits within the statutory definition of whistleblower and that the trial court properly dismissed their complaint on this basis alone. Former RCW 42.40.020(8) (2007) defines "whistleblower" as follows:

> "Whistleblower" means an employee who in good faith reports alleged improper governmental action to the auditor, initiating an investigation under RCW 42.40.040. For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term "whistleblower" also means: (a) An employee who in good faith provides information to the auditor in connection with an investigation under RCW 42.40.040 and an employee who is believed to have reported asserted improper governmental action to the auditor or

> to have provided information to the auditor in connection with an investigation under RCW 42.40.040 but who, in fact, has not reported such action or provided such information.[2]

The only complaint to the auditor that led to a whistleblower investigation was Bienick's complaint of August 1, 2005. All the allegedly retaliatory actions that she and Shipman-Thompson described took place well before that date. Moreover, the interim director of the mental health division had removed Pelkey's authority to supervise Bienick before she filed the August 1 complaint. Thus, it was impossible for Pelkey to use his supervisor's position to retaliate against Bienick after she filed her whistleblower complaint. In fact, Bienick produced no evidence that Pelkey retaliated against her, either as her supervisor or otherwise, after August 1.

Bienick and Shipman-Thompson argue that their oral contacts with employees in the auditor's office in 2004 were sufficient to qualify them as whistleblowers who were then subjected to retaliation. Aside from the fact that these 2004 complaints did not initiate an investigation, this argument contradicts Bienick's deposition testimony that she decided not to file a complaint until Pelkey no longer supervised her, as well as interrogatory answers from both plaintiffs stating that they did not file a whistleblower complaint until August 2005. *See Dep't of Labor & Indus. v. Kaiser Aluminum & Chem. Corp.*, 111 Wn. App. 771, 778, 48 P.3d 324 (2002) (when answers to unambiguous interrogatories clearly eliminate any genuine issue of fact, a party cannot thereafter create such an issue merely by contradicting previous admissions).

[2] There was some discussion below, as there is in the appellate briefs, about whether this or the current statutory definition applied. As amended in 2008, the statute extends the definition to cover those who complain to the auditor or a designated public official, but it still requires the complaint to initiate an investigation by the auditor. RCW 42.40.020(10). Bienick and Shipman-Thompson do not argue on appeal that the new definition applies to their 2007 complaint, nor do they cite any authority that would support such an application. Accordingly, we do not further consider the retroactivity issue.

Bienick also argues that there was sufficient evidence to allow a jury to believe that Pelkey thought that she had made a report to the auditor, thus triggering whistleblower protection for her as an employee "who is believed to have reported asserted improper governmental action to the auditor." Former RCW 42.40.020(8). She points to the conversation she had with him in late October 2004. Again, this argument contradicts her assertion that she did not initiate a whistleblower complaint in 2004 with her oral complaints to various state employees. Although we accept Bienick's deposition testimony that she told Pelkey she would go to the governor and the auditor if he did not rescind the second contract, she has produced no evidence that Pelkey by word or conduct made any decision with this threat in mind. And when Pelkey was questioned about the Fairfax contract during the whistleblower investigation, he said he did not want Bienick to suffer any adverse consequences because of her participation with the contract. This is consistent with Pelkey's own stated reservations about the Fairfax contract, which he shared with his supervisor who directed him to execute the contract. The notion that Pelkey retaliated because he thought Bienick had reported the questionable contracts is further rebutted by Pelkey's September e-mail to Bienick and Bushnell that they would be protected if they signed the Fairfax contract. Finally, Pelkey testified that he did not hear until 2006 that Bienick had discussed a whistleblower complaint with another employee in 2004. Under these circumstances, Bienick's statement alone is insufficient to make a prima facie case that Pelkey believed she had reported her perceptions of department misconduct.

Shipman-Thompson did not join in Bienick's August 2005 whistleblower complaint, and the State argues that her claim of whistleblower retaliation must be dismissed as a result.

Shipman-Thompson responds that she has a cause of action under RCW 49.60.210(1), which prohibits discrimination against any person because she has opposed any practices forbidden by the chapter. To qualify for such a cause of action, an employee must oppose practices forbidden by the statute; i.e., the laws prohibiting workplace discrimination. 16A David K. DeWolf and Keller W. Allen, Washington Practice: Tort Law and Practice § 24.16, at 146 (3d ed. 2006). An employee who opposes employment practices reasonably believed to be discriminatory is protected whether or not the practice is actually discriminatory. 16A DeWolf and Allen, Washington Practice § 24.16, at 146. Here, Shipman-Thompson allegedly opposed the whistleblower retaliation directed against Bienick and claims she was retaliated against as a result. But given the facts cited above, we conclude that Shipman-Thompson's belief that Bienick was subjected to whistleblower retaliation was not reasonable. Thus, she is not entitled to recover for workplace discrimination under RCW 49.60.210(1). The same facts dispose of Bienick's workplace discrimination claim based on whistleblower retaliation.

Because the plaintiffs do not satisfy the statutory definition of "whistleblower" or establish an independent claim of workplace discrimination, we affirm the trial court's summary dismissal of their complaint.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.