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

JAMES P. WOODBURY, individually,

Plaintiff,

vs.

CITY OF SEATTLE, a municipality,

Defendant.

Case No.: 09-2-22704-7SEA
Hon. Michael C. Hayden
Trial Date: December 6, 2010

**PLAINTIFF’S OPPOSITION TO
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

NOTED: October 29, 2010
With Oral Argument

I. INTRODUCTION AND RELIEF REQUESTED¹

The City has filed a motion for summary judgment asking the Court to dismiss this case before a jury can hear the facts in a public forum showing corruption and cover-up at the Seattle Fire Department by Fire Chief Dean and his direct reports. Thankfully, Supreme Court case law requires that this case proceed to trial because there are significant issues of material fact in dispute, and only a jury can decide which facts to believe. This is a classic example of local government waste, misconduct, corruption, and cover up where the individual who

¹ The inferences, which accompany specific facts set forth herein, are identified in the section headings as (Inference 1, 2, etc.). The inferences may be found by number in Appendix 1.

1 brings the charges to light is retaliated against for doing so. Plaintiff Chief James Woodbury
2 acted in good faith and within the public interest when he reported what was later determined
3 to be a “gross waste of public funds” and “misuse of official position” by a fellow firefighter
4 totaling nearly \$200,000 in lost revenue to the City. Motion for Summary Judgment (the
5 “Motion”), Barnett Dec., Ex. D (SEEC Investigative Report at 10-12).

6 As the nonmoving party at summary judgment, Chief Woodbury is entitled to all facts
7 and inferences drawn in his favor. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693,
8 169 P.3d 14 (2007). The facts in this case show that prior to Chief Woodbury’s whistleblower
9 complaint, the plan to abrogate a deputy chief position was based on seniority until the
10 Woodbury whistleblower complaint was filed. Then Dean changed plans and targeted and
11 demoted Woodbury.² The Defendant’s Motion for Summary Judgment should be denied.

12
13 **II. STATEMENT OF FACTS AND INFERENCES**

14 **A. The Seattle Fire Department (“SFD”) Is Organized As A Paramilitary**
15 **Organization Under Fire Chief Dean Who Has The Authority To Demote His**
16 **Assistants And Can Exert His Will Through Indirect Orders (Inferences 1-4)**

17 The SFD is a paramilitary organization. Sheridan Dec., Ex. 1 (Hepburn Dep. at 25:5-
18 8). It has ranks and deference is given to senior personnel by junior personnel. Woodbury
19 Dec. at ¶1. Frequently, senior officers call subordinates by their first names, but junior
20 personnel call their superiors by their rank. Woodbury Dec. at ¶2. The SFD may utilize both
21 implied and direct orders. Sheridan Dec., Ex. 1 (Hepburn Dep. at 24:16-25:16), Woodbury
22 Dec. at ¶3. Receiving a direct order is “being told very specifically what to do and to do it.”
23

24 _____
25 ² Although the City prefers the term “reduction in rank” to “demotion,” the two are used interchangeably in the
Seattle Fire Department. Sheridan Dec., Ex. 1 (Hepburn Dep. at 10:11-18), Ex. 2 (Bracilano Dep. at 18:7-11).

1 Sheridan Dec., Ex. 1 (Hepburn Dep. at 24:19-25). An implied order from a superior is “a
2 more veiled suggestion type of comment.” *Id.* For example, a direct order from a superior
3 might be, “get me a glass of water.” An indirect order from a superior might be, “I’m thirsty. I
4 sure could use a glass of water.” Sheridan Dec., Ex. 1 (Hepburn Dep. at 25:1-4). The result is
5 the same. The subordinate complies and provides the superior with a glass of water.

6 Chief Dean is the head of the SFD. Dean supervises approximately eight direct reports
7 who make up his leadership team, which meets weekly, and in 2008, was composed of
8 Assistant Chief Hepburn, Assistant Chief Vickery, Assistant Chief Nelsen, Assistant Chief
9 Tipler, SFD Human Resources Director Linda Czeisler, Finance Director Chris Santos, IT
10 Director Lenny Roberts, and Communications Director Helen Fitzpatrick. Sheridan Dec., Ex.
11 1 (Hepburn Dep. at 7:19-8:24). At the weekly meetings, the leadership team discusses issues
12 of a department-wide nature. *Id.*

14 In 2008, there were eleven deputy chiefs who reported to the assistants. Below them in
15 the chain of command were battalion chiefs and firefighters. Woodbury Dec. at ¶4. Assistant
16 chiefs and deputy chiefs are exempt employees and serve at Chief Dean’s pleasure and may
17 be demoted for any reason so long as it is not for a retaliatory or discriminatory reason.

18 Sheridan Dec., Ex. 3 (Dean Dep. at 331:1-7, 331:21-332:3, 94:20-96:2, Ex. 2 to Dean Dep.).
19 Dean relies on his assistant chiefs to keep him informed of what is happening in the
20 suborganizations they supervise. *Id.* (Dean Dep. at 23:8-12).

21
22 **B. All The Chiefs Are Subject To The City’s Progressive Discipline Policy**
23 **(Inferences 5-6)**
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1 “Progressive discipline is the use of increasingly more severe forms of discipline in an
2 attempt to correct behavior performance problems in the workplace. Under progressive
3 discipline, the severity of the penalty should be appropriate to effectively change the
4 undesirable behavior or performance.” Sheridan Dec., Ex. 4 (Czeisler Dep. at 54:24-55:7, Ex.
5 6 to Czeisler Dep.). The SFD utilizes a progressive discipline policy, which is applicable to all
6 ranks below Chief Dean. *Id.* (Czeisler Dep. at 54:24-55:7). Progressive discipline ranges
7 from, at the low level of informal and formal counseling, which could result in the use of a
8 performance improvement plan, to higher level discipline from an official reprimand, to
9 suspension, demotion, and finally, to termination. *Id.* (Ex. 6 to Czeisler Dep.). Chief
10 Woodbury has no documented record of progressive discipline in his personnel file. May Dec.
11 at ¶ 1.

13 **C. Chief Dean Has Worked For The SFD For Many Years And Is Well Versed In**
14 **Union Contracts (Inference 7)**

15 Chief Dean has been employed by the City of Seattle for forty years. Sheridan Dec.,
16 Ex. 3 (Dean Dep. at 5:18-20). Before entering management at the SFD, Dean was a member
17 of both firefighter unions—Local 27 and Local 2898. Sheridan Dec., Ex. 3 (Dean Dep. at
18 12:25-13:15). During a three-year period, while Dean was Assistant Chief of Administration,
19 he interacted with union representatives on union issues, and oversaw contract negotiations
20 between the City and both fire department union locals, which included reading union
21 contracts. Sheridan Dec., Ex. 3 (Dean Dep. at 15:8-16:4).

23 **D. Since 2002, Lieutenant Footer Has Engaged In Gross Misconduct Under The**
24 **Supervision Of Three Fire Marshals Including Dean, Nelsen, And Tipler**
25 **(Inferences 8-9)**

1 The following facts are taken from the SEEC Report, which was admitted into
2 evidence by the City as a part of their summary judgment motion, and which is attached as
3 Exhibit D to the Barnett Declaration submitted on the City's behalf.

4 In 2002, Lt. Footer was assigned to be the dedicated Special Events Fire
5 Prevention Inspector working with Qwest Field under the terms of a 2001
6 contract between SFD and F&G. In this position he became responsible for the
day-to-day management of all SFD activities at Qwest Stadium.

7 The Seattle Seahawks began to play home games at Qwest Field in September
8 2002. During the football games, F&G would disengage the stadium's fire
9 alarm system from the automatic alarm reporting program - a procedure known
10 as putting the stadium in "event mode"- bypassing the automatic emergency
11 reporting system. In "event mode" the stadium's fire alarm system routes all
12 alarms to a central fire control panel located within the stadium and onsite
personnel have a short period of time to investigate and verify whether an
emergency in fact exists. During professional and college football games this
process avoids disruption of the event or evacuation of the stadium due to a
false alarm.

13 When SFD was informed by F&G that the stadium would be placed in "event
14 mode" for football games, SFD required F&G to staff all games with a
15 contingent of firefighters, known as "fireguards," all of whom were trained fire
16 personnel. Fireguards were stationed in the central fire alarm control room and
17 in various parts of the stadium. The fireguards were to investigate the source of
any alarm and determine if an emergency existed. F&G accepted this condition
and fireguards have attended both college and professional football games
since 2002.

18 Fireguard duty is overtime duty. Fireguards have been used at various venues
19 throughout the City of Seattle, including Bumbershoot, raves, and pyrotechnic
20 displays. SFD treats fireguard overtime costs as reimbursable expenses, and
21 bills them to the organization individual using the service. Payments are made
to the City of Seattle general fund.

22 It is common knowledge within the FMO that all fireguard activities are billed
23 to the requesting party. The procedure for billing fireguard services has been
24 the same for over a decade and is well known to members of the FMO Special
25 Events section where the majority of fireguard activity take place. Lt. Footer
told us that he understood that fireguard services were to be billed.

1 On Qwest Field game days, usually six firefighters and a supervising lieutenant
2 work as fireguards....Lt. Footer is responsible for completing the form and
3 ensuring that it is routed to SFD's fiscal administration unit. Ideally, he obtains
4 the signature of someone at F&G before submitting it. Since 2002, Ms. Sue
5 Skaggs has been the person responsible for billing fireguard services.

6 From 2002 until the end of the 2007 season, F&G used fireguards for football
7 games on 76 occasions. The total amount of the services provided at football
8 games to F&G for these services was \$189,811. Of this amount only \$26,798
9 was billed by SFD to F&G. Lt. Footer was the supervising officer in charge of
10 submitting the fireguard activity sheets during this period with the exception of
11 October 2005 when he was on medical leave.

12 In 2002 - 2007 there were 39 other occasions when reimbursable SFD services
13 were provided to F&G and not billed. These "other services" totaled \$16,353.
14 Lt. Footer was the supervising officer in charge of submitting the fireguard
15 activity sheets for these additional events.

16 Motion, Barnett Dec., Ex. D (Report at 2-3). "Lt. Footer's failure to do his job led to a **gross**
17 **waste of \$195,697 of public funds.**" *Id.* at Ex. D (Report at 1) (emphasis added).

18 Chief Dean was the Fire Marshal from 2002-2004 and was the Fire Marshal at the
19 time Lt. Footer was sent to work at F&G. Sheridan Dec., Ex. 3 (Dean Dep. at 57:22-58:11).
20 Chief Nelsen was Fire Marshal in 2004 when Dean became Fire Chief, and Nelsen held that
21 position until Chief Tipler took over as Fire Marshal in 2007. Sheridan Dec., Ex. 3 (Dean
22 Dep. at 126:9-25, 25:15), Ex. 5 (Woodbury Dep. at 26:21-25), Woodbury Dec. at ¶5.

23 The SEEC investigation found that Chiefs Dean, Tipler, and Nelsen bear responsibility
24 for the failure to collect \$195,697 from F&G:

25 Each of the three SFD Fire Marshals who served between 2002 and 2008,
having the duty and obligation to be effective stewards of public funds, failed,
despite warnings, to ensure that the Lt. Fire Inspector position at F&G was
appropriately supervised, and each bears responsibility for the failure to collect
\$195,697 of reimbursable expenses due from F&G from 2002 through 2007.

1 Motion, Barnett Dec., Ex. D (Report at 2).

2 **E. Since 2004, Chief Dean Ignored Woodbury’s Recommendation That Lt. Footer’s**
3 **Assignment At F&G Be Rotated Owing To A The Possibility Of Improper**
4 **Conduct Over Time—The Mayor Ultimately Agreed With Woodbury**
5 **(Inferences 10-12)**

6 During his career, Chief Woodbury was promoted to battalion chief on a fast track.
7 Sheridan Dec., Ex. 6 (Taylor Dep. at 15:23-16:8). Chief Woodbury was promoted to deputy
8 chief by Chief Dean in 2004. Sheridan Dec., Ex. 5 (Woodbury Dep. at 23:2-28:4). Upon
9 promotion to deputy chief, Woodbury was assigned to be the Assistant Fire Marshal under
10 Assistant Chief Nelsen and he held that position until he was demoted in January 2009.
11 Sheridan Dec., Ex. 5 (Woodbury Dep. at 23:2-28:4).

12 Woodbury never directly supervised Lt. Footer either in or out of the Fire Marshal’s
13 office; in the Fire Marshal’s office, Footer reported through a different chain of command to
14 the Fire Marshal (either Dean, Nelsen, or Tipler). *Id.* (Woodbury Dep. at 45:18-46:4).

15 In 2004, Chief Woodbury became concerned that Lt. Footer was acting more like an
16 F&G employee than a SFD inspector. Woodbury Dec. at ¶6. Chief Woodbury was concerned
17 because Lt. Footer could not produce plans typically used by SFD inspectors for reoccurring
18 events. Woodbury Dec. at ¶7. Chief Woodbury recommended to Chief Nelsen that Lt.
19 Footer’s position be rotated to avoid potential conflicts of interest, as a good business
20 practice. Woodbury Dec. at ¶8. Chief Nelsen brought Woodbury’s concerns to Chief Dean
21 and then reported back to Woodbury the following: “Chief Nelsen stated to me that Chief
22 Dean had emphatically told him that Lieutenant Footer was not to be rotated out of this
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1 position.” Woodbury Dec. at ¶9, Sheridan Dec., Ex. 5 (Woodbury Dep. at 109:17-110:3)
2 (referenced by the City); Motion, Overbey Dec., Ex. A (answers at 2).

3 In 2007, when Chief Tipler became Fire Marshal, Woodbury made this same
4 recommendation to Tipler concerning the need to rotate Footer out of the position as a good
5 business practice, and Tipler agreed, but indicated that he did not think Dean would permit the
6 rotation. Woodbury Dec. at ¶10, Sheridan Dec., Ex. 5 (Woodbury Dep. at 47:21-48:25).

7 The City has admitted into evidence a 2009 letter from the Mayor to Chief Dean in
8 which the Mayor overrides Dean and requires the rotation of assignments in the Fire
9 Marshal’s Office. Motion, Ceis Dec., Ex. C. Thus, the Mayor agreed with Woodbury in result.
10

11 **F. In June 2008, Chief Dean Allegedly Learned For The First Time That Footer**
12 **Had Failed To Invoice F&G At A Potential Cost Of \$200,000 To The City**
13 **(Inferences 13-15)**

14 In June 2008, Captain Greene learned that Footer had apparently failed to invoice
15 F&G for several years and believed that the cost to the City might exceed \$250,000. First,
16 Greene reported his findings to Tipler, who was visibly upset and brought Greene to meet
17 with Dean. Sheridan Dec., Ex. 7 (Greene Dep. at 30:18-33:3). At the meeting, Greene told
18 Dean, “It looks like there’s invoices missing all the way back to 2002, I can’t really find any
19 of them. . . . Milt Footer understands the process.” Sheridan Dec., Ex. 7 (Greene Dep. at
20 33:13-16). At the meeting, Dean did not seem to be upset at all by the news of Footer’s
21 misconduct and suggested that, “we need to figure out how much money is missing, see if we
22 can get 50 cents on the dollar, or whatever we can get.” *Id.* (Greene Dep. at 33:22-34:4).
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1 At his deposition on June 29, 2010, Greene claimed that he had not done the
2 calculation to know how much money was missing as of the time of the meeting with Dean
3 and Tipler. *Id.* (Greene Dep. at 32:4-6). Greene was then impeached with a prior inconsistent
4 statement he made to the SEEC investigator in January 2009 revealing the he had told Dean
5 the dollar range:

6 We told Chief Dean what had happened, that these invoices were missing, that
7 it appears that we haven't been invoicing for these labor hours to the tune at
8 the time of, you know, my raw numbers and this is simply based on what rates
9 were and how many hours people would be there, I had put together some
10 basic numbers and it looked like it could have been as much as \$250,000 to
\$300,000 that I could actually probably track but it would depend on what they
had done in the past. I mean I am speculating.

11 *Id.* (Greene Dep. at 34:17-36:10), Sheridan Dec., Ex. 8 (page SFD002019 and SFD002046-
12 47). After being impeached, Greene admitted his recollection was probably better in January
13 2009, when he gave the interview to the SEEC investigator, than at the time of his deposition.

14 *Id.* (Greene Dep. at 35:16-36:10).

15 Tipler verified that at the June 2008 meeting, Greene told Dean a large amount of
16 money may not have been invoiced: "something up there" near \$250,000 or \$300,000.

17 Sheridan Dec., Ex. 9 (Tipler Dep. at 19:1-21:11).

18 In contrast, at his deposition, Dean failed to state that Greene had told him that as
19 much as \$250,000 to \$300,000 may not have been invoiced to F&G. Instead, Dean, who was
20 deposed in May 2010, before Greene or Tipler, claimed that Tipler was the first to tell him
21 that "they thought they had a problem with invoicing." Sheridan Dec., Ex. 3 (Dean Dep. at
22 26:6-15). But Dean denied knowing until December 2008 that six figures worth of revenue
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1 was not invoiced, again claiming that Tipler did not tell him, and not revealing that Greene
2 had told him that the loss could be hundreds of thousands of dollars. *Id.* (Dean Dep. at
3 215:10-216:5, 221:13-21).

4 **G. In June 2008, After Diane Hansen Suggests An Outside Investigator For Footer's**
5 **Misconduct Regarding The F&G Invoicing, Dean Accuses Hansen, Woodbury**
6 **and Tipler of Going After Footer (Inferences 16-17)**

7 Diane Hansen worked for the SFD for 29 years. Sheridan Dec., Ex. 10 (Hansen Dep.
8 at 4:21-24). In 2008, Hansen was a Fire Prevention Administrator and Strategic Advisor
9 with civil service protection. *Id.* (Hansen Dep. at 4:25-5:14). In 2008, she worked in the Fire
10 Marshal's Office and reported to Tipler, and before that, she reported to Nelsen and Dean
11 when they were Fire Marshal. *Id.* (Hansen Dep. at 5:21-6:13). Hansen was an advisor and
12 assistant to the Fire Marshals. *Id.* (Hansen Dep. at 6:15-7:3).

13 Hansen first heard of the Footer invoicing issue from Captain Greene the week of June
14 3, 2008, when he told her that Footer had failed to invoice for seven years of revenue, which
15 she understood to be a large amount of money. *Id.* (Hansen Dep. at 7:4-8:23). After hearing
16 Greene's report, she immediately notified Chief Woodbury, and then she and Woodbury met
17 with Tipler on June 6, 2008. *Id.* (Hansen Dep. at 8:24-9:4). At the meeting with Woodbury
18 and Tipler, Hansen told Tipler that this was "a very serious transgression against the public
19 trust and undermined the integrity of the fire marshal's office and the fire department and that
20 it required action." *Id.* (Hansen Dep. at 10:22-25). She also expressed her concern to Tipler
21 that positions at the Fire Marshal's Office should be rotated. *Id.* (Hansen Dep. at 11:4-18).

1 Later on June 6th, Chief Tipler went to see Chief Dean to discuss the failure to
2 invoice. *Id.* (Hansen Dep. at 11:4-12:18). Tipler told Hansen that he had just met with Dean
3 for two hours about the invoicing issues and that **Dean accused Tipler, Woodbury, and**
4 **Hansen of being “out to hang Footer.”** *Id.* (Hansen Dep. at 11:13-12:4). Dean also told
5 Tipler that they would need a business reason to rotate Footer, and Tipler recommended that
6 Hansen talk to Dean, so she made an appointment to see Dean the following Monday. *Id.*
7 (Hansen Dep. at 12:7-23).

8
9 Hansen met with Dean on June 9, 2008. *Id.* (Hansen Dep. at 13:2-15:18). At the
10 meeting, Hansen suggested that Dean hire an outside investigator.

11 I said I did not want to end my career with the fire marshal’s office, my name,
12 Chief Dean’s name, or the fire marshal’s office or the fire department having
13 our reputation tainted by this occurrence, and that as he was to be ultimately
14 the final arbitrator of any disciplinary action, he should distance himself from
15 the investigation. And I suggested that he possibly contact a Mel McDonald,
16 who worked in another city department, to conduct an investigation regarding
17 the missing revenues.

18 *Id.* Dean insisted on keeping the matter internal claiming he would “have the fire department
19 finance director Chris Santos conduct an investigation and that he would have Travis Taylor,
20 the EEO officer, conduct an investigation.” *Id.* There is no evidence in the record that Taylor
21 was asked to conduct any investigation.

22 Hansen was disappointed with Dean’s position and shared her disappointment with
23 Woodbury and later with Tipler. *Id.* (Hansen Dep. at 15:24-16:3).

24 In his second day of deposition, on June 28, 2010, Dean claimed not to remember a
25 conversation with Hansen in which she expressed concerns over Footer’s activities. Sheridan

1 Dec., Ex. 3 (Dean Dep. at 333:3-335:16). He also denied ever hearing the name Mel
2 McDonald before the deposition, and claimed not to recall any conversations with Hansen as
3 set forth above. *Id.*

4 **H. From June – September 2008, Dean Stops Any Investigation, And Woodbury**
5 **Threatens to Report the Conduct to Ethics—Tipler Tells Dean That Woodbury**
6 **and Others May File Complaint (Inference 18)**

7 Through the summer of 2008, Hansen had no sense that active investigations were
8 going forward. Sheridan Dec., Ex. 10 (Hansen Dep. at 16:20-19:3). In meetings with F&G,
9 they were instructed not to discuss the monies owed but not invoiced. *Id.* In discussions with
10 Santos, Tipler, Woodbury, and Hansen, Tipler instructed them to “focus on going forward.”
11 *Id.* Hansen understood amount of unbilled revenue to be between \$230,000 and \$250,000. *Id.*

12 Chief Woodbury was also an outspoken member of the FMO during the summer and
13 fall of 2008 regarding Lt. Footer’s failure to invoice F&G. Woodbury Dec. at ¶11. Chief
14 Woodbury participated in numerous meetings with Hansen, Tipler, English, and Greene over
15 the issue. Woodbury Dec. at ¶12. He strongly advocated to Chief Tipler that there be some
16 type of investigation and discipline of Lt. Footer. Woodbury Dec. at *Id.* In describing his
17 relationship with Chief Dean in 2008, Chief Woodbury testified:
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19 22 A..... once the Milt Footer issue started to
20 23 come to light about late May, early June, and the four of
21 24 us, Chief English, Diane Hansen, Captain Greene and myself,
22 25 in conjunction with Chief Tipler, started looking into the
23 1 issues. Chief Dean stopped the investigation in June 2008,
24 2 and from that period forward Chief Dean very much
25 3 interjected himself into the investigation and the issues
4 surrounding Lieutenant Footer.
5 The four of us, not speaking for Chief Tipler, but the
6 four of us were very concerned on the scope and content of

1 7 the issues. We were very alarmed. We had been told that
2 8 the financial investigation was over.

3 Sheridan Dec., Ex. 5 (Woodbury Dep. at 155:22-156:8). Once Hansen and Woodbury were
4 told that the financial investigation was over, and the Hannah Montana ticket issue came to
5 light around the same time, Hansen and Woodbury began to speak to Chief Tipler about filing
6 a whistleblower complaint or talking with the FBI. Sheridan Dec., Ex. 9 (Tipler Dep. at 51:5-
7 52:24); Woodbury Dec. at ¶13. Chief Woodbury placed copies of the Seattle Municipal Code
8 whistleblower provisions on Chief Tipler's desk in September 2008. Sheridan Dec., Ex. 9
9 (Tipler Dep. at 51:5-52:24); Woodbury Dec. at ¶14.

10 Chief Tipler told Chief Dean that Chief Woodbury, Captain Greene, and Hansen were
11 threatening to file an ethics complaint regarding Lt. Footer's misconduct. Sheridan Dec., Ex.
12 9 (Tipler Dep. at 51:5-52:24).

13
14 **I. Chief Dean Works To Cover-Up Footer's Misconduct And Never Tells The
15 Mayor's Office That Footer Has Failed To Invoice F&G (Inference 19)**

16 Although by the summer of 2008, Hansen, Tipler, Woodbury, and Greene were
17 convinced of the implausibility of almost six years of invoices being lost in interoffice mail,
18 Chief Dean maintains that he believed Lt. Footer was telling the truth until early 2009.
19 Sheridan Dec., Ex. 3 (Dean Dep. at 29:12-39:20, 123:1-20). Chief Dean instead blamed the
20 missing invoices, at least in part, on Chief Woodbury and Harry Laban's inability to
21 renegotiate the contract with F&G in 2004, even though the contract renegotiation was not
22 intended to cover fireguard services. *Id.*, Sheridan Dec., Ex. 11 (emails from F&G).
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1 Chief Dean testified that as of the point when Chief Tipler offered his resignation in
2 September 2008, Dean was still “working from that assumption” that Footer had submitted
3 the invoices. Sheridan Dec., Ex. 3 (Dean Dep. at 33:3-22). In contrast, Chief Tipler stated the
4 following in his deposition:

5 12 Q. Did Chief Dean ever say to you, look, let’s face
6 13 it, he sent the invoices, someone else messed up, or words
7 14 to that effect?

8 15 A. No, I think he pretty much without saying it
9 16 conceded that Footer was lying.

10 17 Q. And this is from the, those early meetings that
11 18 we’ve been talking about today?

12 19 A. Yes.

13 20 Q. So were you ever told by Chief Dean that basically,
14 21 look, we don’t know enough about Footer, about whether
15 22 Footer made a mistake in order to discipline him?

16 23 A. No, I don’t think we were told that, that I was
17 24 told that.

18 Sheridan Dec., Ex. 9 (Tipler Dep. at 33:12-24).

19 9 Q. During this time when you’re trying to get Footer
20 10 disciplined and transferred, did Chief Dean express to you a
21 11 believe that Footer, that there wasn’t -- that there wasn’t
22 12 enough evidence to say that Footer had not improperly
23 13 invoiced F&G?

24 14 A. No, I don’t think there was any doubt in his mind
25 15 that Footer had not properly invoiced them. I think he was
16 16 more concerned that it had gone on so long without being
17 17 detected and that it would involve people who were either
18 18 retired or no longer in the marshal’s office.

19 Sheridan Dec., Ex. 9 (Tipler Dep. at 40:9-18). Chief Tipler also testified that Chief Dean “was
20 21 concerned about the public perception if this thing got out.” *Id.* (Tipler Dep. at 26:20-21).

22 Dean is a direct report to the mayor. Sheridan Dec., Ex. 12 (Ceis Dep. at 4:23-5:8).

23 This is consistent with former Deputy Mayor Ceis’s testimony that until Woodbury filed the
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1 January 2009 whistleblower retaliation complaint with the Mayor's Office, Ceis had no idea
2 of Footer's misconduct because Dean had not told the Mayor. *Id.* (Ceis Dep. at 5:9-6:21).
3 Dean's efforts to keep the information from the Mayor was also a part of the Mayor's
4 admonition of Chief Dean in a May 2009 letter:

5 Secondly, when issues such as billing problems, serious ethics lapses or other
6 major issues occur, you must tell me. We meet regularly. You also meet with
7 the Deputy Mayor and the Chief of Department Operations. It is important that
8 your Department conduct itself in a transparent manner rather than trying to
9 handle these issues internally.

10 Motion, Ceis Dec., Ex. D.

11 **J. On October 17, 2008, Chief Woodbury Files A Whistleblower Complaint With
12 The SEEC After Dean And Tipler Refuse To Act (Inference 20)**

13 Chief Woodbury drafted his whistleblower complaint in September 2008 and showed
14 it to Chief English, Hansen, and Captain Greene for their review. Woodbury Dec. at ¶15. The
15 whistleblower complaint is dated September 30, 2008, and concerns two allegations of
16 misconduct on behalf of Lt. Footer – the failure to invoice F&G and the demand for all access
17 passes to the Hannah Montana concert at Key Arena. Sheridan Dec., Ex. 13 (whistleblower
18 complaint). The whistleblower complaint states that the failure to invoice F&G had not been
19 done since 2001 and that an estimated \$210,000 to \$250,000 had not been recovered by the
20 City. *Id.* Chief Woodbury met with Kate Flack and Wayne Barnett of the SEEC to discuss the
21 complaint, pre-filing, on October 7, 2008. Woodbury Dec. at ¶17. Then, on October 17, 2008,
22 Chief Woodbury filed his whistleblower complaint with the SEEC. Sheridan Dec., Ex. 13
23 (whistleblower complaint). While Woodbury was showing the complaint draft to Hansen on
24 his computer, a message appeared on the computer, which raised concern that the computer
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1 was being accessed by a third party based on an earlier experience when Hansen became
2 aware of management accessing an employee's work computer. Sheridan Dec., Ex. 10
3 (Hansen Dep. at 43:8-44:9, 61:21-63:13). Greene also reported that files on his computer and
4 paper files in his office had disappeared. Sheridan Dec., Ex. 7 (Greene Dep. at 9:2-13:21).

5 **K. On Or Before October 17, 2008, Greene Betrays Woodbury And Tells Chief**
6 **Dean That Woodbury Is Filing An Ethics Complaint With The SEEC**
7 **(Inferences 21-22)**

8 Chief Woodbury drafted his whistleblower complaint in September 2008 and showed
9 it to Chief English, Hansen, and Captain Greene for their review. Chief Dean testified that he
10 called SEEC Executive Director Barnett in late September 2008, after talking with Captain
11 Greene, to tell Barnett that that an SEEC complaint was going to be filed. Sheridan Dec., Ex.
12 3 (Dean Dep. at 18:19-22:14, 103:17-19). However, Chief Tipler testified that Chief Dean
13 told him that Dean had called Barnett in response to Tipler's reporting to Dean that an ethics
14 complaint might be filed. Sheridan Dec., Ex. 9 (Tipler Dep. at 68:8-22). On November 20,
15 2008, before the decision was made to demote Chief Woodbury, Barnett sent an email to
16 Chief Dean confirming that allegations had been received and the SEEC was investigating.
17 Motion, Barnett Dec., Ex. C. The same email string shows that Dean confirmed his earlier
18 contact with Barnett on October 13, 2008. *Id.*

20 Greene and Dean tell conflicting stories. On May 25, 2010, Dean testified that he
21 contacted Barnett in late September 2008, but not about a whistleblower or ethics issue.
22 Sheridan Dec., Ex. 3 (Dean Dep. at 18:19-22:14). Instead, Dean says he "heard there was
23 some concern about discipline that I had issued and people were complaining about it." *Id.*
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1 According to Dean, this was not an ethics issue. He says he got that information from Greene
2 on a street corner about the same day. *Id.* Dean denied that Greene named Woodbury. *Id.*
3 Later in his deposition, Dean said that Greene came to him in November to complain that
4 Woodbury was pressuring him to sign a complaint. *Id.* (Dean Dep. at 86:5-91:21). Greene
5 says that Woodbury showed him a complaint letter, which he did not read, and did not know
6 to whom it was going to be sent. Sheridan Dec., Ex. 7 (Greene Dep. at 49:14-57:18). But
7 Greene admits telling Dean that Woodbury was pressuring him to sign a complaint letter. *Id.*
8 After all the contradictory testimony which demonstrates that Dean is dissembling, he comes
9 clean in his summary judgment declaration and admits that he knew Woodbury went to the
10 SEEC in September 2008: “Also in September, Greene called me and told me about some of
11 his frustrations in the Fire Marshal's Office. In the course of describing that, he mentioned he
12 was being pressured by Woodbury, to join in a complaint that would be presented to the
13 SEEC.” Thus, the City now admits that Dean knew in September 2008 that Woodbury
14 intended to file the whistleblower complaint, and then learned from Wayne Barnett at the
15 SEEC, that a complaint had been filed. Woodbury did not pressure Greene. Woodbury Dec.
16 at ¶16.

19 **L. After Learning That Woodbury Filed A Whistleblower Complaint With The**
20 **SEEC, Dean Begins To Plot Retaliation Against Woodbury By Deselecting**
21 **Deputy Chief Walsh For Demotion (Inferences 23-25)**

22 In August 2008, the Mayor’s Office asked the SFD to abrogate an assistant chief
23 position from the 2009 budget, but Chief Dean instead offered to abrogate a deputy chief
24 position and a lieutenant position. Sheridan Dec., Ex. 14 (Dively Dep. at 22:17-23). This
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1 proposal was accepted by the Mayor’s Office. *Id.* Chief Dean claims that he attempted to offer
2 up a battalion chief position initially, but that the Mayor’s Office rejected it because the
3 position was funded by a special levy. Motion, Dean Dec. at ¶13. This statement is not
4 supported by former City Finance Director Dwight Dively. Sheridan Dec., Ex. 14 (Dively
5 Dep. at 17:2-23:1).

6 In October 2008, Michael E. Walsh had been publicly identified by Hepburn as being
7 the person who would be demoted because he was last to be promoted thus first to be
8 demoted. Sheridan Dec., Ex. 1 (Hepburn Dep. at 18:3-21:1). Seniority had been “the primary
9 factor in making moves, when moves were required” within the SFD. Sheridan Dec., Ex. 10
10 (Hansen Dep. at 67:12-16). But at his deposition, Hepburn claimed that he was “speaking out
11 of school” and had no basis for those statements, despite being familiar with contract
12 provision 20.5, which clearly delineates that deputies are not subject to civil service rules.
13 Sheridan Dec., Ex. 1 (Hepburn Dep. at 18:3-21:1). Dean said that he thought civil service
14 rules applied to the deputy demotion, which is why he had believed that Walsh would be the
15 person demoted owing to advice he got from HR, which he seemed to rely on for some
16 time—even talking to Walsh about his likely demotion. Sheridan Dec., Ex. 3 (Dean Dep. at
17 81:23-82:23, 94:14-102:15). But HR Manager Taylor admits that Dean knew within twenty-
18 four hours of inquiring, that the civil service rules did not apply to deputy chiefs. Sheridan
19 Dec., Ex. 6 (Taylor Dep. at 13:1-15:4, 23:5-14). Czeisler confirmed for Dean that he had
20 several options and was not required to use seniority. Sheridan Dec., Ex. 4 (Czeisler Dep. at
21 32:4-36:4), Ex. 6 (Taylor Dep. at 13:1-19, 23:5-14). Furthermore, it was common knowledge
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1 at least among battalion chiefs and above that the deputy chief position serves at the pleasure
2 of the Fire Chief and is exempt from the Civil Service Rules. Sheridan Dec., Ex. 15 (Walsh
3 Dep. at 24:15-25:5). Also, previously in his career with the SFD, Chief Dean was responsible
4 for overseeing contract negotiations with the two SFD unions for three years. Sheridan Dec.,
5 Ex. 3 (Dean Dep. at 15:15-25).

6 **M. Knowing That Woodbury Filed The October Whistleblower Complaint, In**
7 **November, Dean Goes To The City Labor Relations To Ask If He Can Demote**
8 **Woodbury For Alleged Performance Issues Even Though Woodbury Has No**
9 **Performance Issues, And Then Raises Performance Issues in Subsequent**
10 **Meetings With His Assistants—But Denies Having Done So—Which Leads To**
11 **Woodbury’s Demotion (Inferences 26-29)**

12 In mid-November 2008, several weeks after Chief Woodbury filed his whistleblower
13 complaint, Chief Dean spoke with David Bracilano and Julie McCarty of the City’s Labor
14 Relations department to ask if he could demote Chief Woodbury based on performance in the
15 planned abrogation. Sheridan Dec., Ex. 3 (Dean Dep. at 75:8-77:17, 85:3-19). Chief Dean was
16 told by Bracilano and McCarty that he could not use performance as a basis for the demotion.
17 *Id.* Woodbury had not been subjected to any progressive discipline. May Dec. at ¶1.

18 At his deposition, Dean claimed that the only reasons he sought Woodbury’s demotion
19 were based on a 2008 incident involving a firefighter named Richardson who took offense
20 that Woodbury challenged his clothing choices since he could be called to meet with the
21 Mayor at any time, and a May 2008 incident involving an occupant load question and Captain
22 Greene at a nightclub, in which Greene claimed that Woodbury failed to follow orders about
23 how to handle the problem, and three EEO complaints against Woodbury for which
24 Woodbury was exonerated. Sheridan Dec., Ex. 3 (Dean Dep. at 41:23-52:8, 79:20-80:25), Ex.
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1 5 (Woodbury Dep. at 64:25-66:22, 82:13-90:22). Dean admits that for the nightclub issue and
2 Richardson issue, he passed the information along to Tipler and there was no further action.
3 *Id.* (Dean Dep. at 41:23-52:8, 79:20-80:25). As to the EEO complaints, Woodbury was
4 exonerated after investigations by Travis Taylor, although on other occasions, Taylor found
5 that Assistant Chiefs Tipler and Vickery had engaged in improper actions. Sheridan Dec., Ex.
6 6 (Taylor Dep. at 16:14-23:4).

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8 After Chief Dean spoke with McCarty and Bracilano regarding demoting Chief
9 Woodbury, an informal meeting was held on November 18, 2008 between SFD Labor
10 Relations and the chiefs union to discuss the planned abrogation of the deputy chief position.
11 Harvey Dec.; Sheridan Dec., Ex. 16 (McCarty notes). Present at the meeting was Battalion
12 Chief Rick Verlinda, the Local 2898 President, Bracilano, McCarty, and Paul Harvey, a union
13 consultant. Harvey Dec. During the meeting, Verlinda and Harvey expressed their belief that
14 Chief Walsh would be selected for demotion based on his rank as the least senior deputy
15 chief. Harvey Dec. Bracilano and McCarty stated that the name they heard was Chief
16 Woodbury. Harvey Dec.

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18 In contrast to Dean's testimony, Bracilano claims that in the call from Dean before or
19 after the November 18 meeting, Woodbury's name was never mentioned, which may just be
20 an effort to cover for his boss. Sheridan Dec., Ex. 2 (Bracilano Dep. at 28:14-34:10).-Dean
21 wound up asking for volunteers. When no deputy chiefs volunteered to be demoted, Chief
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1 Dean set up meetings with the assistant chiefs³ to decide who to demote. Sheridan Dec., Ex. 3
2 (Dean Dep. at 104:1-11). Chief Dean did not invite HR to attend the meetings and no notes
3 were taken at any of the meetings. *Id.* (Dean Dep. at 105:15-21, 118:12-18). Chief Dean did
4 not consult HR or the legal department regarding the demotion decision at any time. Sheridan
5 Dec., Ex. 4 (Czeisler Dep. at 32:17-22), Ex. 3 (Dean Dep. at 119:8-12).

6 Chief Tipler testified that, at some point, Chief Dean told the assistant chiefs that an
7 ethics complaint had been filed by someone in the Fire Marshal's Office. Sheridan Dec., Ex. 9
8 (Tipler Dep. at 55:6-23). Chief Hepburn testified that he became aware of Lt. Footer's failure
9 to bill F&G from "general conversations amongst the fire chief and the other assistant chiefs"
10 prior to the assistant chief demotion meetings. Sheridan Dec., Ex. 1 (Hepburn Dep. at 7:3-15).

11 Chief Dean testified that he did not criticize Chief Woodbury's performance during
12 the assistant chief meetings. Sheridan Dec., Ex. 3 (Dean Dep. at 106:14-07:7). Chief Dean
13 also did not inform the assistant chiefs of what he had learned from Labor Relations – that the
14 demotion should not be based on performance. *Id.* (Dean Dep. at 106:3-13). Chief Tipler
15 testified that the performance of each deputy chief was discussed during the meetings.
16 Sheridan Dec., Ex. 9 (Tipler Dep. at 92:18-24). Chief Nelsen testified that, out of all of the
17 other deputy chiefs, Chief Dean criticized only Chief Woodbury's performance at the
18 meetings. Sheridan Dec., Ex. 17 (Nelsen Dep. at 58:25-59:8, 65:2-68:8). Chief Hepburn
19 testified that Chief Dean criticized the performance of only two deputy chiefs – Chief
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24 ³ The assistant chiefs at that time were Hepburn, Nelsen, Tipler, and Vickery. Sheridan Dec., Ex. 1 (Hepburn
25 Dep. at 11:17-19). The eleven deputy chiefs at the time of the demotion decision were Duggins, English, Fosse,
Juris, Lomax, Rosenthal, Oleson, Sodeman, Youngs, Walsh, and Woodbury. *Id.* (Hepburn Dep. at 11:24-12:2).

1 Woodbury and Chief Oleson. Sheridan Dec., Ex. 1 (Hepburn Dep. at 12:3-14:25). Hepburn
2 also claimed that Oleson was ruled out because of his age and the fear of an age
3 discrimination claim, as was Rosenthal as the only woman, they claim they feared a lawsuit.
4 *Id.* (Hepburn Dep. at 15:1-17:8, 22:25-24:15). Hepburn also admitted that had he known that
5 Woodbury filed a whistleblower complaint, that would have been “a cause for discussion.” *Id.*

6 Ultimately Chief Woodbury was selected for demotion, with the rationale given that
7 Chief Woodbury was slated to go into the position to be abrogated in January 2009. Sheridan
8 Dec., Ex. 3 (Dean Dep. at 117:13-25). Chief Lomax, who was currently in the position to be
9 abrogated, Special Operations, was not considered for demotion. *Id.* (Dean Dep. at 135:20-
10 136:11). Chief Dean testified that he simply “didn’t bring it up.” *Id.* (Dean Dep. at 136:5).

11 When Chief Dean informed Chief Woodbury that he was selected for demotion, Chief
12 Woodbury asked whether, should a deputy chief vacancy occur in the future, he would be
13 considered for the position. Woodbury Dec. at ¶38; Sheridan Dec., Ex. 3 (Dean Dep. at
14 275:21-276:20). Chief Dean responded: “That’s not the way the rules are written,” or words
15 to that effect. Woodbury Dec. at ¶39; Sheridan Dec., Ex. 3 (Dean Dep. at 276:18-20).

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18 **N. Woodbury Is Locked Out Of His Computer, Causing Safety Issues, And Forced
19 To Retake A Class In Retaliation For His Whistleblower Filing (Inference 30)**

20 Woodbury was locked out of his computer after being identified as a whistleblower,
21 which caused safety issues. Woodbury Dec. at ¶41, Sheridan First Supp. Dec., Ex. 18
22 (Woodbury Dep. at 320:15-337:22). Shortly after his demotion, Chief Woodbury was
23 required by Chief Lomax to retake a Hazardous Materials training class, which resulted in
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1 another member of the SFD being denied the opportunity to take the class. Woodbury Dec. at
2 ¶42, Sheridan First Supp. Dec., Ex. 18 (Woodbury Dep. at 338:6-349:4).

3 **O. Dean Demotes Woodbury To Battalion Chief But Promotes Him Again After**
4 **Woodbury Files This Lawsuit, Despite Dean’s Claims That Woodbury Has**
5 **Performance Problems (Inference 31)**

6 After Chief Woodbury filed this lawsuit, Dean re-promoted him to Deputy Chief of
7 Training, an isolated position under Chief Vickery, who further retaliated against Woodbury.
8 Woodbury Dec. at ¶46; Motion, Overbey Dec., Ex. B, Sheridan First Supp. Dec., Ex. 18
9 (Woodbury Dep. at 284:3-287:23). Dean was unable to explain why he wanted Woodbury
10 demoted before the lawsuit, but thought he would make a good Deputy Chief after the lawsuit
11 was filed. Sheridan Dec., Ex. 3 (Dean Dep. at 193:3-194:8).

12 **P. After Dean And Vickery’s Mendacious Testimony Is Revealed In This Lawsuit,**
13 **Woodbury Is Transferred To A Deputy Chief Of Operations Position (Inference**
14 **32)**

15 After Chief Woodbury filed another administrative claim concerning Chief Vickery’s
16 retaliation, and Chief Dean and other managers testified and their mendacious testimony
17 became apparent, the City transferred Chief Woodbury again.

18 **Q. Dean Also Retaliated Against Diane Hansen (Inference 33)**

19 Diane Hansen testified that, after the June 2008 meeting with Dean, Dean began to
20 treat her differently and she was no longer an insider. Sheridan Dec., Ex. 10 (Hansen Dep. at
21 37:3-39:9, 72:7-74:15).

22 **III. STATEMENT OF ISSUE**

23 Whether this Court should deny the Defendant’s Motion for summary judgment?
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IV. EVIDENCE RELIED UPON

Plaintiff relies on the Declarations of John P. Sheridan, Chief James Woodbury, Chief Paul Harvey, and Ashalee May, and the pleadings filed in this case.

V. ARGUMENT AND AUTHORITY

A. The Summary Judgment Standard Requires that Facts and Inferences Be Viewed in the Light Most Favorable to Chief Woodbury

Summary judgment is only appropriate where “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) (emphasis added). The court is required to view “the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving part.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). If there is a dispute as to any material fact, summary judgment is improper. *Id.* The evidence presented, whether direct or indirect, should be considered cumulatively. *Raad v. Fairbanks North Star Borough*, 323 F.3d 1185, 1194 (9th Cir. 2003). The trial court shall not substitute “its judgment concerning the weight of the evidence for the jury’s.” *Id.*

B. The McDonnell Douglas Burden-Shifting Framework Does Not Apply

In the Motion, the defendant incorrectly applies the burden-shifting framework set out in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), which is utilized at summary judgment in Washington in cases brought under RCW 49.60, the Washington Law Against Discrimination. The City cites to retaliation claims brought under RCW 49.60.210 as applying *McDonnell Douglas*. Motion at 14. In fact, only claims brought under RCW 49.60.210(1),

1 which establishes a cause of action for retaliation stemming from persons opposing RCW
2 49.60 discrimination, may employ *McDonnell Douglas. Renz v. Spokane Eye Clinic*, 114 Wn.
3 App. 611, 617-19, 60 P.3d 106 (2002). RCW 49.60.210(2) creates a cause of action for state
4 employee whistleblower retaliation “as defined in chapter 42.40 RCW.” RCW 42.40, the
5 State Employee Whistleblower Act, establishes a framework for state employee
6 whistleblowers that have experienced retaliation as:

7 (1)(a) Any person who is a whistleblower, as defined in RCW 42.40.020, and
8 who has been subjected to workplace reprisal or retaliatory action *is presumed*
9 *to have established a cause of action* for the remedies provided under chapter
10 49.60 RCW.

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

17 RCW 42.40.050 (emphasis added). RCW 42.40 creates a presumption of retaliation that the
18 employer can rebut using a preponderance of the evidence standard, not the *McDonnell*
19 *Douglas* burden-shifting framework.⁴ Chief Woodbury is neither a state employee, nor did he
20 oppose discrimination under RCW 49.60. Plaintiff asserts claims under RCW 42.41.040, the
21 Local Government Whistleblower Act, and Seattle Municipal Code (“SMC”) 4.20.810, for
22 whistleblower retaliation. *McDonnell Douglas* does not apply to his claims. However, by
23 analogy, there is no reason why the presumption given to 42.40 plaintiffs should not be given
24 to City employees, in which case, the City has not met its burden in the opening brief.

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⁴ In *Rainey v. Washington State Horse Racing Comm.*, 2006 WL 2131741, *4-5 (Wash. App. Div. 2) (not published), Division II found that the *McDonnell Douglas* framework did not apply to claims brought under RCW 42.40.

1 In order to prove a claim for retaliation, Chief Woodbury must show 1) that he
2 engaged in a statutorily protected activity; 2) that an adverse employment action was taken
3 against him; and 3) “that retaliation was a substantial factor behind the adverse action.” *Kahn*
4 *v. Salerno*, 90 Wn. App. 110, 129, 951 P.2d 321 (1998). Often times “the employer’s
5 motivation must be shown by circumstantial evidence because ‘the employer is not apt to
6 announce retaliation as his motive.’” *Id.* at 130 (quoting *Wilmot v. Kaiser Aluminum & Chem*
7 *Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991)). Proximity in time between the protected
8 activity and the adverse employment action is one factor the courts will consider in
9 determining whether or not the employer was motivated by retaliation. *Id.* at 130-31.
10 Furthermore, in *Kahn*, the court stated that “if the employee establishes that he or she
11 participated in an opposition activity, the employer knew of the opposition activity, and he or
12 she was discharged, then a rebuttable presumption is created in favor of the employee that
13 precludes [the court] from dismissing the employee’s case.” *Id.* at 131.

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16 **C. Chief Woodbury Prevails Under the Substantial Factor Test**

17 In the instant case, as stated in *Kahn*, a rebuttable presumption towards retaliation is
18 created that prevents this Court from dismissing Chief Woodbury’s case at summary
19 judgment. In fact, the City concedes each element in favor of the rebuttable presumption.⁵
20 Chief Woodbury’s whistleblower complaint filed with the SEEC was protected activity and
21 he was demoted by Chief Dean just two months after engaging in the protected activity. Chief
22 Dean was the decision maker. He had sole discretion in determining who would be demoted.

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25 ⁵ The City also concedes the first two elements of the “substantial factor test” – the protected activity and the
adverse employment action. Motion at 15.

1 Both Chief Tipler and Captain Greene told Chief Dean of Woodbury’s plan to file a
2 whistleblower complaint prior to its filing. Chief Dean called SEEC Executive Director
3 Barnett to state that a claim was expected to be filed. Barnett confirmed in an email to Chief
4 Dean prior to Chief Woodbury’s demotion that a complaint had been received and it was
5 being investigated. The close proximity in time between the whistleblower complaint and
6 Chief Woodbury’s demotion strongly suggests that the complaint was a substantial factor in
7 his demotion.
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9 The City claims that although Chief Dean had sole discretion in the demotion
10 decision, he allowed the decision to be made by his assistant chiefs and simply acquiesced to
11 their recommendation. But Chief Dean was the decision maker—their analysis fails.

12 **D. Chief Woodbury Prevails Even Under *McDonnell Douglas***

13 Even if this Court were to apply the *McDonnell Douglas* burden-shifting framework to
14 the instant case, Chief Woodbury is able to show that his protected activity was a substantial
15 factor in his demotion and raise a genuine issue of material fact as to the defendant’s
16 pretextual reason. Under the burden-shifting scheme, and viewing all facts and inferences in
17 the light most favorable to the plaintiff, once the plaintiff establishes a *prima facie* case of
18 retaliation, the burden shifts to the defendant to present admissible evidence of a legitimate
19 reason for the adverse employment action. *Davis v. West One Automotive Group*, 140 Wn.
20 App. 449, 460-61, 166 P.3d 807 (2007). If the defendant is able to present such evidence, the
21 burden shifts back to the plaintiff to raise a genuine issue of material fact as to whether the
22 defendant’s proffered reason was a pretext. *Id.* “An employee can demonstrate that the
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1 reasons given by the employer are not worthy of belief with evidence that: (1) the reasons
2 have no basis in fact, or (2) even if based in fact, the employer was not motivated by these
3 reasons, or (3) the reasons are insufficient to motivate an adverse employment decision.” *Renz*
4 *v. Spokane Eye Clinic*, 114 Wn. App. 611, 619, 60 P.3d 106 (2002).

5 The facts viewed in the light most favorable to Chief Woodbury create a number of
6 inferences which show that Chief Woodbury’s whistleblower complaint was a substantial
7 factor in his demotion and that the reason offered by the City for his demotion is pretext. Each
8 inference cited by plaintiff in Appendix 1 gives rise to issues of material fact which defeat
9 summary judgment.
10

11 **E. The City’s “Reverse Cat’s Paw” Theory Ignores the Fact that Chief Dean Is**
12 **Ultimately the Sole Decision maker**

13 In the Motion, the City argues that there is no evidence that Chief Dean made the
14 actual decision to demote Chief Woodbury. Motion at 19. But even Chief Dean admits that he
15 was the final decision maker. As the Fire Chief, in paramilitary, hierarchical organization,
16 Chief Dean is responsible for the demotion decision. He had sole discretion to accept or reject
17 the assistant chief’s recommendation. In this case, the individual with the retaliatory
18 motivation was also the actual decision maker. The City’s reverse cat’s paw analogy leads to
19 only one conclusion--liability.
20

21 Chief Dean, knowing that Chief Woodbury was a member of a protected class,
22 criticized only Chief Woodbury’s performance during the meetings, leaving the assistant
23 chiefs with the impression that Chief Woodbury is who Chief Dean wanted them to select
24 using an implied order by inference. *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476,
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1 486 (2006) (discussing the “cat’s paw” or “rubber stamp” theory and noting that “A biased
2 low-level supervisor with no disciplinary authority might effectuate the termination of an
3 employee from a protected class by recommending discharge or by selectively reporting or
4 even fabricating information in communications with the formal decision maker”).

5 **F. Summary Judgment Is Improper Here Pursuant to CR 56(f)**

6 Plaintiff has been unable to depose Chief Lomax in this case due to his apparent
7 unavailability for the last three weeks for a forty-five minute deposition. Sheridan Dec.,
8 Sheridan First Supp. Dec. at ¶2, Ex. 19 (deposition notices and scheduling emails). Chief
9 Lomax’s testimony is relevant to Chief Woodbury’s claim that he was forced to retake a
10 Hazardous Materials training class, which is part of his retaliation claims. Sheridan Dec.,
11 Sheridan First Supp. Dec., Ex. 18 (Woodbury Dep. at 338:6-349:4). Additionally, plaintiff has
12 a pending motion for reconsideration filed with the court regarding taking additional
13 depositions of witnesses Julie McCarty, Patty Kunitsugu, Doug Carey, Helen Fitzpatrick, and
14 plaintiff’s comparator deputy chiefs who were not demoted. Sheridan Dec. These additional
15 depositions are necessary in order to support Chief Woodbury’s burden at summary judgment.
16 Sheridan Dec. Finally, plaintiff has not yet had the opportunity to review McCarty’s
17 handwritten notes of her November 18, 2008 meeting with the union where Chief Woodbury
18 was mentioned as the individual that Chief Dean wanted to demote. Sheridan Dec. An
19 inspection of the notes is scheduled, but has not yet taken place. Sheridan Dec. Plaintiff also
20 has a motion to compel pending. Plaintiff hereby incorporates by reference the facts and
21 claims in those two pending motions.
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VI. CONCLUSION

Viewing the facts and inferences in the light most favorable to Chief Woodbury, it is clear that significant issues of material fact remain for trial. The Defendant's Motion for Summary Judgment should be denied.

Dated: October 18, 2010, in Seattle, Washington.

THE SHERIDAN LAW FIRM, P.S.

By: s/John P. Sheridan
John P. Sheridan, WSBA # 21473
Attorney for Plaintiff

Appendix 1

Woodbury v. City of Seattle
Plaintiff's Opposition to Defendant's Motion for Summary Judgment

Facts and Inferences in the Light Most Favorable to the Nonmoving Party

A. The Seattle Fire Department ("SFD") Is Organized As A Paramilitary Organization Under Fire Chief Dean Who Has The Authority To Demote His Assistants And Can Exert His Will Through Indirect Orders	
Inference 1:	The inference may be drawn that Chief Dean is a competent and knowledgeable manager by virtue of his experience and tenure as Fire Chief.
Inference 2:	The inference may be drawn that Chief Dean can influence his assistant chiefs and deputy chiefs to do his bidding using direct or indirect orders because failure to do so could result in demotion.
Inference 3:	The inference may be drawn that Chief Dean consults the leadership team regarding issues of a department-wide nature.
Inference 4:	The inference may be drawn that the assistant chiefs keep Chief Dean informed of what is happening in the suborganizations they supervise.
B. All The Chiefs Are Subject To The City's Progressive Discipline Policy	
Inference 5:	The inference may be drawn that Chief Dean is aware of the progressive discipline policy and uses progressive discipline to correct the performance deficiencies of his subordinates when they engage in undesirable behavior or performance.
Inference 6:	The inference may be drawn that since Chief Woodbury has no record of progressive discipline, he has not had behavior or performance issues.
C. Chief Dean Has Worked For The SFD For Many Years And Is Well Versed In Union Contracts	
Inference 7:	The inference may be drawn that Chief Dean is familiar with union contracts and aware of the various terms contained in union contracts.
D. Since 2002, Lieutenant Footer Has Engaged In Gross Misconduct Under The Supervision Of Three Fire Marshals Including Dean, Nelsen, And Tipler	
Inference 8:	The inference may be drawn that Chiefs Dean, Nelsen, and Tipler were responsible for the failure to collect \$195,697 of reimbursable expenses due from F&G from 2002 through 2007 because they either failed to properly supervise Lt. Footer or they knew Footer was

<p>engaging in misconduct and took no action to stop him.</p> <p>Inference 9: The inference may be drawn that Chiefs Dean, Nelsen, and Tipler were in no position to investigate Lt. Footer’s alleged misconduct because they supervised Footer through the period of his misconduct and their oversight of any investigation would be a conflict of interest.</p>
<p>E. Since 2004, Chief Dean Ignored Woodbury’s Recommendation That Lt. Footer’s Assignment At F&G Be Rotated Owing To A The Possibility Of Improper Conduct Over Time—The Mayor Ultimately Agreed With Woodbury</p>
<p>Inference 10: The inference may be drawn that Chief Woodbury was a top performer or he would not have been “fast-tracked” and would not have been promoted to Deputy Chief by Dean.</p> <p>Inference 11: The inference may be drawn that Chief Dean’s resistance to rotating Lt. Footer was based on an improper purpose because competent and experienced managers like Woodbury and the Mayor understood the potential for conflict in having Footer in that position without rotation and either advocated or directed the rotation, whereas Chief Dean is a competent and experienced manager who did not.</p> <p>Inference 12: The inference may be drawn that Chief Woodbury played no role in Footer’s misconduct; he never supervised Footer and consistently advocated for his rotation.</p>
<p>F. In June 2008, Chief Dean Allegedly Learned For The First Time That Footer Had Failed To Invoice F&G At A Potential Cost Of \$200,000 To The City</p>
<p>Inference 13: The inference may be drawn that Greene was dissembling to cover-up that he told Dean that hundreds of thousands of dollars may be missing from City revenue owing to Footer’s misconduct since 2002.</p> <p>Inference 14: The inference may be drawn that Dean was dissembling in an effort to hide that he knew that Greene believed hundreds of thousands of dollars may be missing from City revenue owing to Footer’s misconduct since 2002.</p> <p>Inference 15: The inference may be drawn that Dean knew in June 2008 that Greene thought hundreds of thousands of dollars may be missing from City revenue owing to Footer’s misconduct since 2002.</p>
<p>G. In June 2008, After Diane Hansen Suggests An Outside Investigator For Footer’s Misconduct Regarding The F&G Invoicing, Dean Accuses Hansen, Woodbury and Tipler of Going After Footer</p>
<p>Inference 16: The inference may be drawn that Dean was dissembling in claiming not to recall Hansen’s meeting in an effort to cover-up that he was</p>

<p>informed of her concerns over Footer’s misconduct in June 2008.</p> <p>Inference 17: The inference may be drawn that Dean’s accusing Tipler, Woodbury, and Hansen of being “out to hang Footer” was an effort to justify taking no action to investigate or rotate Footer since there was no evidence that anyone was against Footer.</p>
<p>H. From June – September 2008, Dean Stops Any Investigation, And Woodbury Threatens to Report the Conduct to Ethics—Tipler Tells Dean That Woodbury and Others May File Complaint</p>
<p>Inference 18: The inference may be drawn that by the summer of 2008, Dean had identified Woodbury as a target for retaliation since unlike Hansen, Woodbury had no civil service protections and served at the pleasure of Chief Dean.</p>
<p>I. Chief Dean Works To Cover-Up Footer’s Misconduct And Never Tells The Mayor’s Office That Footer Has Failed To Invoice F&G</p>
<p>Inference 19: The inference may be drawn that Chief Dean wanted to keep the magnitude of Footer’s failure to invoice F&G a secret from outside parties, including the Mayor’s Office, and that he was concerned about the public perception if Footer’s misconduct regarding F&G got out.</p>
<p>J. On October 17, 2008, Chief Woodbury Files A Whistleblower Complaint With The SEEC After Dean And Tipler Refuse To Act</p>
<p>Inference 20: The inference may be drawn that management may have accessed the Woodbury complaint and knew its content.</p>
<p>K. On Or Before October 17, 2008, Greene Betrays Woodbury And Tells Chief Dean That Woodbury Is Filing An Ethics Complaint With The SEEC</p>
<p>Inference 21: The inference may be drawn that Greene did read the Woodbury whistleblower complaint before it was filed and that he told Dean about the complaint before October 17, 2008.</p> <p>Inference 22: The inference may be drawn that Dean sought to head off an investigation about Footer and F&G by claiming this was simply a disagreement about discipline, and to give himself deniability if the case got publicized.</p>
<p>L. After Learning That Woodbury Filed A Whistleblower Complaint With The SEEC, Dean Begins To Plot Retaliation Against Woodbury By Deselecting Deputy Chief Walsh For Demotion</p>
<p>Inference 23: The inference may be drawn that Dean is dissembling about his “fighting” for the deputy position because he was targeting Woodbury, and had been doing so since accusing Woodbury, Hansen, and Tipler</p>

of being out to hang Footer in June 2008.

Inference 24: The inference may be drawn that Dean intended to demote Walsh until Dean learned that Woodbury was a whistleblower, then changed the rules to target Woodbury.

Inference 25: The inference may be drawn that Dean had no basis to demote Woodbury since Woodbury had not engaged in any misconduct implicating the progressive discipline policy.

M. Knowing That Woodbury Filed The October Whistleblower Complaint, In November, Dean Goes To The City Labor Relations To Ask If He Can Demote Woodbury For Alleged Performance Issues Even Though Woodbury Has No Performance Issues, And Then Raises Performance Issues in Subsequent Meetings With His Assistants—But Denies Having Done So—Which Leads To Woodbury’s Demotion

Inference 26: The inference may be drawn that Dean was seeking to punish Woodbury for having filed the whistleblower complaint.

Inference 27: The inference may be drawn that since there was no documented progressive discipline in Woodbury’s record that could lead to the progressive discipline step of demotion, Chief Dean’s motive in seeking demotion in November 2008 was in retaliation for Chief Woodbury’s whistleblowing activities in October 2008.

Inference 28: The inference may be drawn that Dean gave his assistants an implied order by only identifying Woodbury as a person with performance problems, an order that was followed.

Inference 29: The inference may be drawn that the assistants were informed that Woodbury was the whistleblower and were ordered to demote him.

N. Woodbury Is Locked Out Of His Computer, Causing Safety Issues, And Forced To Retake A Class In Retaliation For His Whistleblower Filing

Inference 30: The inference may be drawn that Woodbury was being harassed for his whistleblower activities.

O. Dean Demotes Woodbury To Battalion Chief But Promotes Him Again After Woodbury Files This Lawsuit, Despite Dean’s Claims That Woodbury Has Performance Problems

Inference 31: The inference may be drawn that there was nothing deficient in Woodbury’s performance in 2008.

P. After Dean And Vickery’s Mendacious Testimony Is Revealed In This Lawsuit, Woodbury Is Transferred To A Deputy Chief Of Operations Position

Inference 32: The inference may be drawn that Woodbury is a top performer who can fill any vacancy.

Q. Dean Also Retaliated Against Diane Hansen

Inference 33: The inference may be drawn that Hansen was being retaliated against for her ethical stand on Lt. Footer and F&G.