THE HONORABLE RICHARD MCDERMOTT
Notice for Hearing: August 21, 2015 at 9:30 a.m.
Moving Party

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

RAMON ANEL,

Plaintiff,

v.

FRANCISCAN MEDICAL GROUP, a Washington Corporation; FRANCISCAN HEALTH SYSTEM, a Washington Corporation; and CATHOLIC HEALTH INITIATIVES, a Colorado Corporation,

Defendants.

No. 14-2-10378-6 KNT

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Defendants' Opposition repeats the same legally and factually unsupported arguments they made in their Summary Judgment Motions. For efficiency, Plaintiff replies to these erroneous arguments by incorporating his Combined Opposition to Defendants' Summary Judgment Motions, *Dkt. 88*, and responds to Defendants' newly-raised arguments below.

A. Defendants provided no admissible evidence that they fired Anel for any reason other than his demands for unpaid wages owed; under controlling law, Defendants are thus liable for the tort of wrongful discharge as a matter of law

VP Field walked into Dr. Anel's office and fired him because he couldn't "let go" of a dispute over unpaid wages. *Dkt. 89* at 8-9. Anel declared this under oath. *Id.* Field does not deny this. *Exh. N* (182:16-185:6). Defendants' rely only on argument claiming they fired Anel for submitting "late" and "unverified" timesheets, which supposedly violates the Stark Law and Anti-Kickback Statute. Argument is not evidence. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198 (1992). Courts can only consider admissible evidence at summary judgment. *Id.* Conclusory allegations or argument of counsel cannot be considered. *Id.* Here, Defendants failed to dispute liability with admissible evidence, and cite to no testimony or other evidence. On this basis alone their opposition fails; judgment should be entered in favor of Plaintiff. *Id.*

The only testimony Defendants cite relates to why Defendants supposedly withheld wages, not why they terminated Anel. This testimony claims they cut Anel's time because his timesheets were supposedly late and included "unverified" entries. But none of this supports the argument that Anel was *fired* for this reason. Moreover, Plaintiff's Combined Opposition proves with admissible evidence that Defendants' supposed examples of late or "unverified" timesheet entries lack any merit whatsoever. *Dkt. 88* at 9-11. Anel only turned in Directorship Timesheets late once, in 2012, as a protest for the nonpayment of wages. *Id.* at 7-8. Defendants did not then fire Anel over this protected activity; rather, they instead admitted that they owed him the wages (but ultimately failed to pay them). *Id.* Plus, other Medical Directors turned in late timesheets with unverified billing yet received no discipline at all—a fact that Defendants also fail to dispute. *Id.* at 13. The timesheet excuse is thus a red herring. But ultimately,

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Defendants Opposition must fail because they have provided *no admissible evidence* that even suggests timesheets had anything to do with the reason Defendants fired Anel. The admissible evidence reveals a single reason for the termination: Anel fought for unpaid wages.

1. Anel prevails on all four wrongful discharge elements as a matter of law

The Clarity element is a pure question of law: does the plaintiff identify a legitimate public policy. *Danny v. Laidlaw Transit Services*, 165 Wn.2d 200, 219 (2008). Defendants do not dispute that the Washington Supreme Court holds that seeking unpaid wages is a legitimate "public policy." *Hume v. Am. Disposal Co.*, 124 Wn.2d 656 (1994). This is the same policy at issue in this case. Thus, Clarity is established as a matter of law under *Hume*.

The Jeopardy element contains two prongs. The first is a fact question: did Anel engage in behavior related to the public policy. *Danny*, 165 Wn.2d at 222. Defendants do not dispute that this prong is established if Anel had "an objectively reasonable belief the law may be violated in the absence of his…action." *Ellis v. City of Seattle*, 142 Wn.2d 450, 461 (2008).[1] Though Defendants might deny they owed Anel wages, under *Ellis*, this is not the issue. They do not dispute Anel fought for unpaid wages, and do not dispute that he had a reasonable belief the wages were owed, which satisfies the first Jeopardy prong under *Ellis*. The second prong is a question of law: do existing rules sufficiently protect the public policy at issue. *Danny*, 165 Wn.2d at 222. Defendants do not dispute that the Supreme Court answered this question in *Hume*, holding that wrongful discharge claims based on wage disputes are viable and fulfill the second prong as a matter of law. *Hume*, 124 Wn.2d at 662. Thus, there is no legal or factual dispute. Both Jeopardy prongs are established as a matter of law under *Ellis* and *Hume*.

Causation merely requires that Anel prove his complaints about unpaid wages were a "substantial factor" in Defendants' decision to fire him. *Scrivener v. Clark College*, 181 Wn.2d 439, 447 (2014). Thus, if Defendants were motivated by multiple purposes and even one was illegal, they are liable. *Id.* Again, Defendants provided no admissible evidence that they fired

[1] Defendants cite an unpublished Ninth Circuit case from 2002, which is inadmissible under GR 14(b) and Ninth Circuit Rule 36-3. This inadmissible case cannot overrule the Washington Supreme Court's holding in *Ellis*.

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Anel for any reason other than his request for unpaid wages. Anel's admissible evidence proves they fired him for complaining about unpaid wages. *Dkt. 88* at 43-44. Defendants attempt to confuse the issue by wrongly claiming Plaintiff "misstates" admissions by Dean Field and Kurt Schley. But this claim is completely misplaced. For example, contrary to Defendants' claim, Schley did in fact say they decided to fire Anel because he demanded pay for hours listed on his timesheets. *Exh. O* (138:22-140:2). In response to a *later* question, Schley said there was "other friction" when Defendants accused Anel of billing for canceled meetings. *Id.* Defendants' own documents, however, prove Anel never did this. *Dkt. 88* at 13. Based on Defendants' own documents, no reasonable jury could find that Anel billed for nonexistent meetings. And again, it is dispositive that no one—not Field, Schley, or anyone—disputes that Defendants fired Anel for seeking unpaid wages. Field does not dispute saying this to Anel. Thus, Defendants do not dispute that Anel's policy-related conduct was at least a substantial factor in his termination, proving Causation as a matter of law under *Scrivener*.

Finally, Defendants fail to meet their burden of proving an overriding justification. Defendants rely solely on argument to falsely claim that Anel violated the Stark Law and Anti-Kickback Statute by requesting wages. As explained in detail in Plaintiff's Combined Opposition, these laws have nothing to do with the wages paid to Medical Directors. Additionally, Dr. Anel could never violate these laws because they do not apply to "bona fide employees." *Dkt. 88* at 44-53. And again, it is fatal to Defendants' opposition that they provided no admissible evidence that they fired Anel because of these laws. *Id.* Not one speck of admissible evidence supports it. Thus, the undisputed admissible evidence and controlling law prove that a reasonable jury *must* find in favor of Anel for his wrongful discharge claim.

B. Defendants had no bona fide dispute as a basis to withhold Dr. Anel's pay

Defendants admit they did not pay Dr. Anel all the time listed on his timesheets. They also admit they are liable for withholding pay under RCW 49.52 unless they can prove they had a bona fide dispute. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160 (1998).

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Incorrect legal interpretations do not create a bona fide dispute. *Dep't of Labor & Indus. v. Overnite Transp.*, 67 Wn. App. 24, 35-36 (1992).

Defendants failed to create a bona fide dispute, and instead repeated the same legally and factually unsupported excuses they made in their Summary Judgment Motions. Plaintiff responds by incorporating his arguments from his Combined Opposition. *Dkt. 88* at 57-61. In short, Defendants claim the Stark Law prohibited them from paying for "unverified" time on Anel's timesheets, but this law has nothing to do with paying employees. It only prohibits billing Medicare/Medicaid in situations that do not apply to this case. *Id.* This false legal argument does not create a bona fide dispute. *Overnite*, 67 Wn. App. at 35-36. And Dr. Anel never submitted false timesheets anyway. He could prove he worked all the time on his timesheets. *Id.* at 9-11. Defendants' arguments about "integration clauses" and statutes of limitations are likewise false and disproven in Plaintiff's Combined Opposition. *Id.* at 57-61.

Now, Defendants claim for the first time ever that Anel committed "timesheet fraud," but provide no admissible evidence to support this eleventh-hour claim and shifting pretext. They cite testimony from only two witnesses, Schley and Field, but Schley did *not* testify that Anel lied on timesheets and Field said he had no personal knowledge of the time Anel billed. *Exh. O* (60:11-20); *Exh. N* (95:6-96:22). Field relied on hearsay statements from other people, *id.*, making his testimony inadmissible under ER 602 and ER 802. *Las*, 66 Wn. App. at 198. Thus, Defendants have no admissible evidence or legal authority to create a bona fide dispute.

C. Defendants failed to provide legal or factual support for any affirmative defenses

To establish a "failure to mitigate" defense, Defendants must prove (1) "substantially equivalent" jobs were available near Anel's residence, and (2) Anel failed to use reasonable diligence in seeking such jobs. *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 529 (1978); *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840-41 (2004).[2] If a defendant fails to prove

[2] Contrary to Defendants' claim, *Labriola* is directly on point. In *Labriola*, a non-compete agreement prohibited the plaintiff from seeking work within 75 miles of her residence. The defendant claimed she failed to mitigate damages because she also did not seek work outside that 75 mile radius, but *Labriola* held that plaintiffs never

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substantially equivalent jobs were available, then the "mitigation" defense fails as a matter of law—even if the plaintiff did not look for work. *Burnside*, 66 Wn. App. at 529-30. Defendants failed to identify *any* available jobs, let alone "substantially equivalent" jobs near Anel's residence. On this basis alone their defense fails. *Id.* Plus, they provided no evidence that Anel failed to seek work. Instead they cite evidence that Anel *asked for work* at numerous hospitals and opened his own practice, which is a valid form of mitigation. *Id.* Thus, they provided no evidence supporting *either* element of their mitigation defense, which fails as a matter of law.

Defendants also failed to support their defense that third parties are liable for Anel's damages. Notably, they did not claim third parties are liable for damages related to the wrongful discharge, withholding of wages, defamation, or tortious interference claims. Rather, they only claimed that malicious prosecution damages could have been caused by the police and/or prosecutor, but provided absolutely no factual or legal support for this claim. Unsupported arguments are inadmissible to oppose summary judgment. *Las*, 66 Wn. App. at 198. Thus, this defense fails as a matter of law and must be dismissed. *Id.*

Likewise, they provide no support for their waiver, estoppel, or unclean hands defenses. They did not claim these defenses apply to wrongful discharge, malicious prosecution, tortious interference, or defamation claims. They only argue Anel "waived" his claim for unpaid wages related to the FHS Quality Directorship because two contracts he signed years later with a different company (FMG) had integration clauses. But integration clauses do not retroactively nullify past contracts, and are thus irrelevant. *Dkt. 88* at 60. Plus, they cite no law suggesting integration clauses constitute waiver or estoppel. Meanwhile, they base their "unclean hands" defense solely on the unsupported "timecard fraud" argument, yet cite no evidence supporting this argument and cite no law suggesting it constitutes "unclean hands." These defenses have no legal or factual support, and thus fail as a matter of law. *Las*, 66 Wn. App. at 198.

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have a duty to seek work or accept job offers farther than 75 miles from their residences. 152 Wn.2d at 840-41. Also, federal law on the mitigation defense is relevant, because it was adopted in *Burnside*, 66 Wn. App. at 529.

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DATED this 17th day of August, 2015.

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DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date listed below I caused to be served a copy of the attached document to the following attorneys for Defendants in the manner indicated below at the following addresses:

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DATED this 17th day of August, 2015, at Seattle, Washington.

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