No. 91040-5

SUPREME COURT OF THE STATE OF WASHINGTON

ERICKA M. RICKMAN,

Petitioner,

v.

PREMERA BLUE CROSS, INC.,

Respondent.

ANSWER TO PETITION FOR REVIEW

RIDDELL WILLIAMS P.S.

Robert M. Howie, WSBA #23092
Skylar A. Sherwood, WSBA #31896
Attorneys for Respondent Premera Blue Cross, Inc.
1001 Fourth Avenue
Suite 4500
Seattle, WA 98154-1192
(206) 624-3600
Facsimile: (206) 389-1708

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATE COURT CASES

STATUTES AND REGULATIONS

OTHER

I. INTRODUCTION

Petitioner Ericka Rickman ("Rickman") is the former Director of Ucentris, one of the subsidiary insurance agencies of Respondent Premera Blue Cross ("Premera"). Premera dismissed Rickman after an ethics investigation revealed she had exhibited poor judgment and a lack of integrity by, among other things, repeatedly failing to disclose that she had engaged her son as an insurance agent for the organization she oversaw; approving her son's promotion to a role as a "subject matter expert" and a corollary increase in his pay to double what other subject matter experts received; misrepresenting her involvement in the day-to-day management of the insurance agents, like her son; approving the dismissal of the wife of the agent who had made the ethics complaint against Rickman, who was also a Ucentris insurance agent, a decision that seemed suspicious and possibly retaliatory; and generally engaging in conduct that led to at least a perceived conflict of interest.

Rickman subsequently filed this lawsuit in which she claimed that Premera wrongfully terminated her employment in violation of public policy for purportedly raising a concern to her supervisor about a proposed business plan that she believed would be a violation of the Health Insurance Portability and Accountability Act ("HIPAA") and

Washington's Uniform Health Care Information Act ("UHCIA"). The trial court dismissed her claim at summary judgment, which the Court of Appeals, Division I, affirmed on appeal.

Premera respectfully asks that this Court deny Rickman's Petition for Review ("Petition") because (1) there is no conflict between the Court of Appeals' decision affirming the trial court's denial of Rickman's claim on summary judgment and *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013), *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602 (2002), or a Division III case, *Becker v. Cmty. Health Sys., Inc.*, __ Wn. App. __, 332 P.3d 1085 (2014); and (2) Rickman's Petition does not present an issue of substantial public interest. *See* RAP 13.4(b)(1), (2), and (4).

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether this Court should deny Rickman's Petition because the Court of Appeals' decision does not conflict with the decisions of this Court or with decisions of Division III of the Court of Appeals?

2. Whether this Court should deny Rickman's Petition because it does not present an issue of substantial public interest?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Statement

1. An Ethics Complaint Against Rickman Leads to an Investigation of Her Conduct, and Ultimately to Her Dismissal

Rickman served as Director of Ucentris, a general insurance agency and subsidiary of Premera, from August 2004 until November 2009. Clerk's Papers ("CP") at 237, 241-42. As Director of Ucentris, Rickman was responsible for the daily operations of the agency, which included overseeing Ucentris' "captive agents" who sold insurance products offered only by Premera and its subsidiaries. CP at 244-45, 252-53, 291. For the six months leading up to her dismissal, Rick Grover was Rickman's supervisor. CP at 243-44, 359.

After being hired as Director, Rickman brought on her son, Taylor Vidor, as a Ucentris captive agent and approved the selection of her son as a subject matter expert ("SME"), which secured him elevated status and pay. CP at 249, 259-61. Rickman later approved an increase in Vidor's "override"[1] from five to ten percent, twice what the other SMEs received. CP at 250-51, 357.

[1] An override was a portion of the combined commissions earned within the lines of business for which the SMEs were responsible. CP at 249.

Rickman knew that Premera has in place a number of policies and guidelines relating to conflicts of interest that it expects all employees to follow, and knew that it relied on her to disclose relationships she might have with a variety of non-employees. CP at 264. Despite this, Rickman did not disclose Vidor on her annual Conflict of Interest Disclosure Questionnaire. CP at 256-57, 301-02, 342.

On September 11, 2009, Premera's Compliance department received an anonymous complaint from an individual who later identified himself as Steven Lopez, a Ucentris captive agent at the time. CP at 302. Lopez's complaint reported his concern of an actual (or at least perceived) conflict of interest with Rickman's son working with her company, including his concerns that Rickman had placed Vidor in an elevated position as a SME; Vidor reported on the daily activities of other captive agents directly to Rickman; Vidor sat in on productivity reviews of captive agents; Vidor had input on which captive agents received leads and which did not; and the general feeling in the office was that being friends with Vidor would curry favor with Rickman. *Id.* Lopez requested that the matter be investigated and initially requested anonymity because he was concerned about retaliation by Rickman. CP at 302, 305.

Premera's Human Resources and Compliance departments launched an investigation of Lopez's complaint, which was conducted by Nancy Ferrara, Premera's former Associate Relations Consultant. *Id.* Ferrara's investigation showed that Rickman exhibited poor judgment and a lack of integrity by, among other things, not reporting her relationship with her son to Compliance and Ethics or Human Resources at any point during her employment, especially when she approved of his SME designation and the doubling of his override, making decisions that fostered at least a perception of favoritism toward her son, and failing to be forthcoming with Ferrara during the investigation. CP at 304-05, 360-01. Also concerning was Rickman's approval of the decision to terminate Ucentris' captive agent contract with Lopez's wife while the investigation against her was pending and when Rickman had earlier speculated that Lopez might have made the ethics complaint. CP at 298, 304, 360. Grover discharged Rickman on November 3, 2009 based on Ferrara's findings and recommendation. CP at 360.

2. Rickman Contends Her Alleged Complaint About "Risk Bucketing" Caused Her Dismissal

Rickman alleges she was dismissed in retaliation for allegedly raising concerns to Grover that a proposal by the underwriting department to use a practice called "risk bucketing" with regard to a particular

business initiative, could be in violation of HIPAA or UHCIA. CP at 392. Risk bucketing is an underwriting process that may be used within certain segments of the insurance business that, in general terms, correlates the insurance premium charged to a particular group of insureds to the underwriting-assessed risk of that group. CP at 361.

Rickman's concern purportedly centered on communications on or around September 28, 2009 between Premera's underwriting department and Grover relating to Underwriting's proposal to use risk bucketing with respect to an association of Premera-insured groups that was merging with another association that was not insured by Premera. CP at 269-70.[2] Rickman contends she spoke with Grover after she learned of this plan and explained to him that "[she] didn't know the details other than it had a potential utilization of [Ucentris'] agents to move membership and it had HIPAA written all over it." CP at 271.[3] At the same time, Rickman admits that "[she did not] know actually what [was] going to happen [with the plan]" and had only a "gut feeling it wasn't appropriate." CP at 271-72. Grover ultimately rejected the risk bucketing plan Underwriting

[2] Risk bucketing in this context and for these groups was entirely lawful under the relevant insurance regulations and, in any case, would not have involved disclosing HIPAA- or UHCIA-protected information. *Id.* CP at 361.

[3] Grover does not recall Rickman raising concerns about this plan, risk bucketing in general, or potential HIPAA or UHCIA violations. CP at 263.

proposed based on his concerns about the plan's favoritism toward Ucentris over Premera's other distribution channels. CP at 361-62.

Rickman has no recollection of anything Grover did or said that indicated he thought she had inappropriately raised her concerns with him. CP at 276. She did not speak with anyone else at Premera or Ucentris about her concerns, nor did she lodge a complaint with Premera's Ethics and Compliance department. CP at 273-74.

Ferrara, who conducted the investigation into Lopez's complaint and subsequently recommended Rickman's dismissal, had no knowledge of Rickman's alleged concern or complaint to Grover until after Rickman's dismissal, when Rickman filed a charge with the Equal Employment Opportunity Commission. CP at 305.

B. Procedural Statement

The trial court denied Rickman's claim at summary judgment, finding that Rickman could not establish the "jeopardy" and "absence of justification" elements of her claim. CP at 19. It concluded that the evidence did not show that discouraging Rickman's "fleeting" comment to her boss would jeopardize the public policy of protecting patient confidentiality, and also did not show that other means of promoting that public policy are inadequate. CP at 18-19. It further concluded that there

was no evidence of any connection between Rickman's alleged risk bucketing concern and her discharge when it was undisputed that Premera's investigation of Rickman, and the investigator's recommendation to dismiss her, were made without knowledge of her risk bucketing concerns. CP at 19.

The Court of Appeals affirmed, holding that Rickman failed to establish the jeopardy element of her claim. Appx.-15. The court agreed that Rickman's "guesswork and intuition" could not satisfy the high bar set by the jeopardy element when Premera's internal reporting system provided an available adequate alternative means of reporting her concerns. Finding that summary judgment could be affirmed based on the jeopardy element alone, the court declined to address the other elements of Rickman's claim, including the absence of justification element. Appx.-13-15. Rickman moved for reconsideration, which the court denied.

IV. ARGUMENT FOR DENIAL OF PETITION FOR REVIEW

A. The Court Of Appeals' Decision Does Not Conflict With The Supreme Court's Decisions In *Piel* And *Hubbard.*

1. The Court Of Appeals' Decision Is Based On The Analysis Set Forth In *Dicomes v. State.*

There is no conflict between the Court of Appeals' opinion and *Piel* or *Hubbard* warranting granting Rickman's Petition under RAP

13.2(b)(1) because the court's decision (and the trial court's decision) was premised on *Dicomes v. State*, 113 Wn.2d 612, 619, 782 P.2d 1002 (1989). Rickman does not articulate in her Petition any basis for rejecting the application of *Dicomes,*[4] which requires courts to examine "the degree of alleged employer wrongdoing, together with the reasonableness of the manner in which the employee reported, or attempted to remedy, the alleged misconduct" to determine whether an employee has stated a claim for wrongful discharge in violation of public policy. *Id.*; *see* Appx.-11-15.

Under *Dicomes*, the undisputed facts establish that Rickman did not reasonably report her alleged concerns: She admits she was ill-informed about the plan and took no steps to educate herself about its details to ascertain the viability of her purported concerns (CP at 271-74). There also is no evidence that Premera engaged in any wrongdoing: It is undisputed that Premera did not implement the risk bucketing plan (CP at 361-62) and there is no evidence that the plan would have been unlawful; Rickman offers only her speculative, "gut feeling" in that regard (CP at 271-72).

Based on the record and *Dicomes*' instruction, the Court of Appeals correctly held that there is no genuine issue of material fact about

[4] Rickman does not dispute (or even address) the court's application of *Dicomes* in her Petition.

whether discouraging Rickman's conduct would jeopardize the public policy of maintaining and protecting patient privacy interests. As the court noted, Rickman's "[g]uesswork and intuition" do not meet the high standard set by the jeopardy element of the wrongful discharge in violation of public policy claim. Appx.-12.

In terms of *Dicomes*' relationship to *Piel* and *Hubbard*, *Dicomes* is still alive and well. This Court issued its decision in *Dicomes* before the Court adopted the current four-part test used for the wrongful discharge in violation of public policy tort, but the standards set forth in *Dicomes* are applied under what are now the clarity and jeopardy elements of that claim.[5] *See Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996) and *Piel*, 177 Wn.2d at 610 (both citing *Dicomes* for proposition that decisions before adoption of four-part test tended to "lump[ ] the clarity and jeopardy elements together...."). In adopting the current four-part test, however, this Court made clear that doing so "[did] not change the existing common law in this state." *Gardner*, 128 Wn.2d at 941. *Dicomes* therefore is still valid law that provides a method of

[5] To establish a claim for wrongful discharge in violation of public policy, a plaintiff must prove: (1) the existence of a clear public policy (the *clarity* element); (2) that discouraging the conduct in which she engaged would jeopardize the public policy (the *jeopardy* element); (3) that the public-policy-linked conduct caused the dismissal (the *causation* element); and (4) that the defendant has not offered an overriding justification for the dismissal (the *absence of justification* element). *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119 (2005); *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 529, 259 P.3d 244 (2011).

analysis of the public policy claim that coexists, but does not conflict, with *Piel* or *Hubbard*. Indeed, both *Piel* and *Hubbard* cite to *Dicomes*, but neither criticizes the analysis therein.

As the Court of Appeals noted, where an employee raises a concern about potential employer misconduct, as was the case here, the court may, under *Dicomes*, assess the record as to the degree of wrongdoing, if any, that the employer would have engaged in, and assess the reasonableness of the way in which the employee raised the concerns or attempted to remedy the alleged wrongdoing. Appx.-12. The Court of Appeals did not err in concluding, under *Dicomes*, that Rickman has failed to establish the jeopardy element of her claim.[6]

2. Rickman Is Not Immune From Summary Judgment Because She Raised Concerns Preemptively.

Rickman's assertions in this matter appear to be premised on a misperception that this Court's analysis of *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602 (2002) in *Cudney*, 172 Wn.2d at 537 stands for the proposition that wrongful discharge in violation of public policy claims are protected from summary judgment if brought by plaintiffs who raised concerns before a violation occurs. Petition at 7-8. As the Court of Appeals noted, "[a]lthough *Cudney* and *Hubbard* empower courts to

[6] Further, the Court of Appeals' application of *Dicomes* here in an unpublished opinion does not present an issue of substantial public interest.

protect a plaintiff who raises concerns before wrongful activity occurs, they do not immunize that plaintiff from an adverse grant of summary judgment. Instead, courts must apply the standard in *Dicomes* to determine whether summary judgment should be granted." Appx.-12 n.6. Under that standard, as already discussed, Rickman cannot establish the jeopardy element of her claim and her Petition should be denied.

In any event, as discussed further below, the existing protections *were* available to Rickman regardless that she allegedly raised concerns before purported wrongdoing, and they adequately protect the public policy of maintaining the confidentiality of patient health information.

3. Adequate Alternative Means Of Promoting The Public Policy Exist.

To establish the jeopardy element, Rickman must show that discouraging her alleged report of her risk bucketing concern would jeopardize the public policy, and that other means of promoting the public policy are inadequate. *Korslund*, 156 Wn.2d at 181-82. The Court of Appeals correctly held that Premera's "robust internal reporting system"—shown by the undisputed evidence, including the prompt investigation of Lopez's ethics concern against Rickman—adequately promoted the public policy of protecting the privacy of health information. Appx.-14-15.

Rickman contends that this holding conflicts with *Piel* and *Hubbard*, which assessed the adequacy of the pertinent statutory and administrative schemes at issue in those cases. She goes on to contend that, under *Piel* and *Hubbard*, the protections under UHCIA and HIPAA are inadequate because: she allegedly raised concerns before an alleged violation such that neither statute applies; she could not recover consequential or emotional distress damages under UHCIA; UHCIA has a prevailing party attorney fee provision; and monetary sanctions under HIPAA are available only for actual violations of the law. First, as the Court of Appeals correctly noted, although *Piel* and *Hubbard* analyzed statutory schemes, neither case nor any other existing Washington case law, mandates that the available alternative means of protecting the public policy must "carry the force of law" and subject the employer to liability to be adequate, especially where the protective scheme functions as well as Premera's. Appx.-13.

Second, Rickman's assertions about the ways in which UHCIA's and HIPAA's protections are purportedly inadequate amount to disappointment over the fact that they do not afford *her* a private right of action for retaliation or damages, a proposition this Court has rejected as determinative of the adequacy of alternative protections. *See Hubbard*,

146 Wn.2d at 717 ("The other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy.").[7]

Rickman contends that Premera's reporting process is inadequate because she believes that reporting her concerns directly to her supervisor was superior to reporting her concerns anonymously through the ethics hotline or any other mechanism provided at Premera.[8] Rickman's suggestion that Premera might place less importance on or is dilatory in addressing concerns placed online or through the hotline or any other available means, is speculative and baseless. Premera's undisputedly strong culture of privacy compliance would not be served by lackadaisical responses to privacy concerns. If Lopez's complaint is any indication, Premera responds swiftly to, and takes seriously, even anonymous

---

[7] HIPAA does provide protection for retaliation. 45 C.F.R. §§ 160.316, 164.530(g); *see also* http://www.hhs.gov/ocr/privacy/hipaa/complaints/(stating "HIPAA PROHIBITS RETALIATION" and encouraging individuals to notify the Office for Civil Rights ("OCR") in the event of retaliatory action). And, as Rickman acknowledges, OCR considers all concerns, whether raised before a potential violation or after a violation has occurred. 45 C.F.R. § 160.306(a); Petition at 11. Indeed, OCR's website proclaims, "**ANYONE CAN FILE!** – Anyone can file a complaint alleging a violation of the Privacy or Security rule." *See* Health Information Privacy: How to File a Complaint, http://www.hhs.gov/ocr/privacy/hipaa/complaints/(emphasis in original). Rickman's fear that OCR might not take up her concern (Petition at 11-12) is speculative and does not establish the existing statutory and administrative protections are inadequate.

[8] Although Premera provides employees with various ways to make complaints, some of which enable anonymous submission, none*requires* anonymous submission of concerns. CP at 314-15. Indeed, Lopez later identified himself to Premera's investigators. CP at 302-303.

concerns made online. Rickman has failed her burden to produce any evidence undermining Premera's robust reporting process.

B. The Court Of Appeals Decision Does Not Conflict With Division III's Decision In *Becker.*

Rickman also contends that the Court of Appeals' Opinion conflicts with a Division III case, *Becker v. Cmty. Health Sys., Inc.*, __ Wn. App. __, 332 P.3d 1085 (2014). *Becker* is distinguishable on the facts and therefore does not conflict with the Court of Appeals' Opinion and warrant granting Rickman's Petition under RAP 13.4(b)(2).

Becker involved a CFO who was instructed by his employer to submit a false and misleading financial statement of the company's finances, or lose his job. *Id.* at 1087. In his role as CFO, the employee was responsible for ensuring the accuracy of the employer's financial statements. Capitulating to the employer's ultimatum would have exposed him to personal liability under a myriad of criminal statutes and regulations governing corporate financial reporting. *See id.* at 1087. Thus, the employee refused, and submitted a report to his employer detailing his concerns that their proposed plan would fraudulently mislead investors. *Id.* at 1087. He was then discharged.

Under the unique circumstances presented in *Becker*, and even though the underlying statutory scheme provided comprehensive and

rigorous protections, Division III recognized a "narrow exception" to the doctrine of at-will employment (*see Cudney*, 172 Wn.2d at 529) and allowed the employee a private right of action under the public policy tort, because the employer's instructions had placed the employee in the untenable position of being forced to choose between committing a crime for which he would be personally liable, and disobeying his employer. *Becker*, 332 P.3d at 1093. In addition, the employee was **directly responsible** for making sure the employer complied with laws regulating corporate financial reporting and for upholding the public policy of honesty in corporate financial reporting. Effective protection of that public policy in large part depended on the CFO's efforts, in particular, to comply with the law, in addition to his special responsibilities and expertise. *Id.* at 1094. None of those circumstances are present here.

Premera did not give Rickman an ultimatum that she violate criminal law (and thereby face prosecution) or be fired. Particularly compelling to Division III, the CFO in *Becker* was uniquely situated and qualified in that role to identify financial reporting errors and issues and it was his job to ensure that the employer's financial records and statements were truthful and accurate. Rickman, in contrast, was not uniquely situated or qualified as Director of Ucentris to identify HIPAA and

UHCIA issues and had no direct responsibilities related to monitoring Ucentris' or Premera's programs and business plans to ensure they complied with health care privacy laws. Indeed, Rickman admitted "[she did not] know actually what [was] going to happen [with the risk bucketing plan]" and had just a "gut feeling it wasn't appropriate." Clerk's Papers ("CP") at 271-72. Rickman's casual and undisputedly ill-informed alleged expression of concern to Grover was not directly related to the protection of the public policy that she purports to champion, nor necessary to enforce it, in the way the CFO's conduct was in *Becker*. The facts here are distinguishable from *Becker* and do not warrant carving out an exception to the underlying doctrine of at-will employment or granting Rickman's Petition.

C. The Court Of Appeals Properly Declined To Rule On The "Absence Of Justification" Element Of Rickman's Claim And Its Decision To Do So Does Not Create An Issue Of Substantial Public Interest.

Because Rickman failed to prove the jeopardy element of her claim, the Court of Appeals abstained from ruling on the other elements of her claim, including the absence of justification (or pretext) element. Rickman characterizes this abstention as error, but an appellate court is not required to rule on every facet of a claim and should exercise judicial restraint if a case can be decided on other grounds. *Hayden v. Mutual of*

Enumclaw Ins. Co., 141 Wn.2d 55, 68, 1 P.3d 1167 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 894, 948 P.2d 381 (1997)) ("Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, [the court] should resolve the case on that basis without reaching any other issues that might be presented."). Doing so is not error. The Court of Appeals' Opinion is unpublished and Rickman fails to advance any argument establishing that a substantial issue of public interest is presented by the absence of justification element of her claim that would warrant review by this Court. Her Petition should be denied.

Instead, Rickman rehashes her summary judgment contentions, which include a false assertion that Grover and Ferrara's testimony regarding the reasons for her discharge are somehow in conflict. But the record shows that Grover and Ferrara gave consistent reasons for Rickman's discharge: Rickman's "judgment" and "lack of integrity" in handling, among other things, the perceived conflict of interest with her son, according to Ferrara, and the "conflict of interest issue" pertaining to her son, according to Grover. CP 23, 83:11 – 84:13, 115:2-5, 117:4-11.

Rickman contends Premera's reliance on her repeated failure to disclose the relationship with her son is pretexual because Vidor was an independent contractor, not a Premera or Ucentris employee; she did not

keep her relationship with Vidor secret; she purportedly disclosed it to her first (and now deceased) supervisor, Melton;[9] and she kept a picture of Vidor on her desk. Petition at 17. But she knew Premera was relying on her to disclose relationships she might have with any number of non-employees. CP at 264. Questions in Premera's Conflict of Interest Disclosure Questionnaire directly apply to the situation with Rickman and Vidor. CP at 336-37. Premera's Code of Conduct emphasizes that even situations leading to the *appearance* of a conflict of interest must be disclosed. CP at 317. And the Conflict of Interest Disclosure Questionnaire explains that conflicts may arise in situations, such as the one here, in which the employee could use her position to influence decisions in ways that give an advantage to a family member. CP at 333. Premera's conflict of interest process and the associated documents undisputedly envisioned disclosure of the relationship irrespective of Vidor's status as an independent contractor or whether Rickman was open about their relationship around the office and to Melton.

Further, there is no credible evidence suggesting that Grover, as the decision-maker, had a motivation to discharge Rickman because of her alleged complaint. *See Korslund*, 156 Wn.2d at 178 (claim of wrongful

[9] Rickman's contentions about what she allegedly told Melton should be disregarded because they are self-serving and unverifiable given that Melton has passed away.

discharge in violation of public policy is an intentional tort such that plaintiff must establish wrongful intent to discharge in violation of public policy). And the temporal proximity between Rickman's complaint and her discharge is not circumstantial evidence of pretext because Rickman offers only her own allegations to support such an assertion, as noted by the trial court. CP at 19. Indeed, Rickman admits that Grover never did or said anything that indicated he thought Rickman had inappropriately raised her concerns to him (CP at 276) and it is similarly undisputed that Grover dismissed Rickman based on Ferrara's unbiased findings and her recommendation (CP at 360).

These and other undisputed facts establish that Rickman failed to prove the absence of justification element of her claim and further review of this element by this Court would not serve a substantial public interest.

V. CONCLUSION

For the reasons set forth above, Premera respectfully requests that this Court deny Rickman's Petition.

DATED this 17th day of December, 2014.

RIDDELL WILLIAMS P.S.

By _____
Robert M. Howie, WSBA #23092
Skylar A. Sherwood, WSBA #31896
Attorneys for Respondent Premera Blue Cross, Inc.

CERTIFICATE OF SERVICE

I, Jazmine Matautia, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Respondent Premera Blue Cross, Inc. in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On December 17, 2014, I served a true and correct copy of the foregoing document on the following party, attorney for Appellant, via email (with permission) as follows:

Joel P. Nichols, WSBA #23353
3411 Colby Avenue
Everett, WA 98201
425-259-2222 (phone)
joelnichols@denomillikan.com
kallen@denomillikan.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 17th day of December, 2014.

Jazmine Matautia

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ERICKA M. RICKMAN Appellant, v. PREMERA BLUE CROSS, Respondent.	)	DIVISION ONE No. 70766-3-I UNPUBLISHED OPINION FILED: September 2, 2014

DWYER, J. — Ericka Rickman was terminated from her position as director of Ucentris Insured Solutions—a subsidiary of Premera Blue Cross—in the wake of two events, both of which occurred around six weeks prior to her termination. One event was triggered by an anonymous e-mail complaint, wherein an independent contractor for Ucentris reported a conflict of interest involving Rickman and her son, who also worked as an independent contractor for Ucentris. The other event occurred when Rickman expressed concern to her supervisor that a Premera business proposal could violate HIPAA.[1] Following an internal investigation of Rickman in response to the anonymous complaint, Rickman was terminated from her position. She then filed suit against Premera, alleging that she had been unlawfully discharged in violation of public policy.

[1] Health Insurance Portability and Accountability Act of 1996. Pub. L. No. 104-191, 110 Stat. 1936.

She now appeals from an adverse grant of summary judgment, contending that the trial court erred in concluding that she failed to satisfy her burden as to the "jeopardy" and "absence of justification" elements of her cause of action. Because the trial court correctly ruled as to the "jeopardy" element, we affirm without considering its treatment of the "absence of justification" element.

I

Rickman served as director of Ucentris from August 2004 until November 2009, when her employment was terminated. Ucentris—a subsidiary of Premera—sells health, life, and risk management products to individuals and small businesses. As an organization, Premera is focused on identifying and preventing any actual, potential, or perceived conflicts of interest involving its employees. It has in place a number of policies and guidelines relating to conflicts of interest that it expects all of its employees—including those of its subsidiaries—to follow. These include a code of conduct, a conflict of interest questionnaire policy, and a conflict of interest and disclosure questionnaire. Pertinent language contained within these policies and guidelines is reproduced below:

- Conflict of interest may occur if your outside activities or personal interests influence *or appear to influence* your job performance or the decisions you make in the course of your job responsibilities.
- It is each individual's responsibility to not only avoid obvious conflicts, but to also avoid *the appearance of a conflict of interest*. . . . To manage potential conflicts Premera relies on you to fully disclose any relationships that may have the potential of being misinterpreted by others.
- "Conflict of Interest" refers to a situation in which activities,

> interactions, or offers of grants or other monetary compensation from outside entities influence, or may appear to influence, an associate's job performance or the decisions that he/she makes in the course of his/her job responsibilities.
> - A conflict of interest may take many forms, but usually arises when an associate might be able to use his or her position: to influence Premera business decisions in ways that give an improper advantage to themselves, a family member, or another person; or to obtain for themselves, a family member, or other person a financial benefit unrelated to the compensation they receive for the work they perform at Premera.

(Emphasis added.)

When employees are hired, and annually thereafter, they complete the conflict of interest disclosure questionnaire, which poses questions relating to potential conflicts, including the following:

> - During the past 12 months, have you or has any family member received any fee, commission, gift, or other compensation due to the sale of a health care service agreement or insurance policy by or on behalf of [Premera or any of its subsidiaries]?
> - During the past 12 months, have you or has any family member received any fee, commission, gift, or other compensation arising from [a] . . . purchase . . . [or] sale . . . made by or for . . . [Premera or any of its subsidiaries]?

Ucentris hires independent contractors to sell its insurance products. Some of these agents are called "captive agents," meaning that they can sell insurance products offered only by Premera and its subsidiaries. Rickman's son, Taylor Vidor, worked as a "captive agent." Rickman stated that she told her first supervisor at Ucentris—Steve Melton, now deceased—about Vidor and was told that she did not need to disclose the potential conflict of interest because Vidor was not an employee. Rickman also stated that she disclosed her relationship with Vidor to Jessica Johnson, an employee in the human resources department

at Premera. Rickman had no specific discussions with anyone in Premera's compliance and ethics department about her relationship with Vidor. Her final supervisor, Rick Grover, was unaware that her son was a Ucentris "captive agent."

In 2008, Vidor was promoted from a "captive agent" to a "subject matter expert" (SME). Although subordinates of Rickman recommended that Vidor be promoted, Rickman approved their recommendation. When Vidor's co-SME stepped down, Rickman approved an increase in Vidor's "override"—his commission—from five to ten percent, which was twice the percentage "override" of other SMEs. Vidor did, however, take over the workload of his former co-SME.

On September 11, 2009, Premera's compliance department received an anonymous e-mail complaint from an individual who later identified himself as Steven Lopez—a Ucentris "captive agent" at the time. Lopez reported his concern that a conflict of interest existed given that Rickman's son worked with Ucentris. Among other complaints, Lopez reported that Rickman had placed Vidor in an elevated position as a SME; that Vidor reported on the daily activities of other "captive agents" directly to Rickman; that Vidor sat in on productivity reviews of "captive agents"; that Vidor had input on which "captive agents" received leads and which did not; and that the general feeling in the office was that being friends with Vidor would curry favor with Rickman. Lopez requested that the matter be investigated and initially requested anonymity, claiming that he feared retaliation by Rickman.

Following Lopez's anonymous complaint, Premera launched an investigation, which was conducted by Nancy Ferrara. When Rickman was interviewed by Ferrara, Rickman denied that her relationship with Vidor created a conflict of interest and stated that their relationship was known throughout Ucentris. She indicated that her first supervisor, Melton, had known about the relationship and she stated that she had told a former Premera human resources representative named Jessica Johnson about her relationship with Vidor, but that Johnson "never got back to her and eventually left Premera." According to Ferrara, "Human resources did not have any record that Ms. Rickman had contacted Ms. Johnson."

Lopez and another "captive agent," Mark Stryzewski, reported that Rickman had told them that she was concerned about Premera finding out about her relationship with Vidor and had instructed them not to tell anyone outside of Ucentris about their relationship. Although Rickman claimed that she did not have any oversight role with the "captive agents," Stryzewski stated that it was his perception that Rickman did, in fact, have the ultimate authority to make important decisions regarding "captive agents." Other "captive agents" shared the same or similar perceptions of Rickman's authority.

In late October 2009, Ferrara shared the results of her investigation with Grover, including her recommendation that Rickman be dismissed. Among other things, Ferrara concluded that Rickman

> exhibited poor judgment and a lack of integrity by, among other things, not reporting her relationship with Mr. Vidor to Compliance or Human Resources at any point during her employment

> (especially when she approved of his SME designation and the doubling of his override); making decisions that allowed at least a perception of favoritism toward her son; seemingly condoning familial relationships within Ucentris without Compliance's involvement, which created an environment of at least perceived favoritism; failing to be forthcoming with me during the investigation; speculating about who the complainant was; and authorizing the termination of Ms. Lopez's captive agent contract under the circumstances.[2]

Grover agreed with Ferrara's recommendation and terminated Rickman's employment on November 3, 2009.

Prior to the termination, and around the time that Lopez lodged his anonymous complaint, Rickman had expressed concern to Grover that a potential change in Premera's business practice could violate health insurance privacy laws. Rickman learned that Pacific Benefits Trust, a large association underwritten by Premera, was likely merging with Washington Grocers Trust, which was underwritten by a different company. Rickman confirmed this information with the director of Premera's "Small Business Group," Robin Hilleary. When Rickman told Hilleary that a Ucentris "captive agent" had a client who, in light of the merger, wanted the agent to look for other non-Premera insurance for his business, Hilleary told Rickman that Premera did not want agents to look outside Premera for insurance for their clients. Hilleary also told Rickman that Premera planned to use Ucentris agents to transfer the membership of preferred groups of the merged associations into associations that were underwritten by Premera. Rickman believed that this approach would

[2] Following Lopez's anonymous complaint, Rickman approved the recommendation to terminate Ucentris's contract with Lopez's wife who was also a "captive agent."

constitute an illegal form of "risk bucketing"—that is, separating riskier policy holders from less risky ones and putting them into separate "buckets" for underwriting—because doing so would require disclosure of private policyholder information.

Although Rickman admittedly did not know the details of the plan and although she was unable to say that it was, in fact, illegal, Rickman nevertheless relayed her concerns to Grover, telling him that the plan "had HIPAA written all over it." She then urged him to "take it up the chain of command to make sure everything was legal." However, Grover demurred, stating, "Ericka, we don't always tell everything to [Senior Executive Vice President of Sales and Marketing] Heyward Donnigan because she's like a dog on a bone when she finds something out." Rickman responded, "But that's the way I have always done my business," to which Grover replied, "Well, there's a new Sheriff in town."

Subsequently, Grover forwarded a string of e-mail messages to Rickman. In Rickman's opinion, these e-mail messages confirmed her concern that Premera leadership planned on engaging in a form of "risk bucketing" that could potentially violate health insurance privacy laws. Rickman reiterated her concern to Grover that the plan was inappropriate and possibly illegal.

Ferrara had no knowledge of Rickman's alleged concern or complaint to Grover until after Rickman's dismissal when Rickman filed a complaint with the Equal Employment Opportunity Commission. Additionally, Grover stated that the type of "risk bucketing" that caused Rickman concern would not have involved

disclosing information protected by HIPAA or UHCIA.[3] Nonetheless, Grover ultimately did not adopt the proposed plan based upon his concerns about the plan's favoritism toward Ucentris over Premera's other distribution channels.

On December 15, 2010, Rickman filed suit in Snohomish County Superior Court, alleging that Primera had wrongfully discharged her in violation of public policy. On April 11, 2013, Primera moved for summary judgment. Thereafter, in a letter opinion, the trial court granted Premera's motion, ruling that Rickman did not establish a prima facie case of wrongful discharge in violation of public policy—a decision which was based on her failure to produce evidence as to the "jeopardy" and "absence of justification" elements of her claim.

Rickman appeals.

II

Rickman contends that the trial court erred by granting summary judgment for Premera. This is so, she asserts, because genuine issues of material fact exist as to the "jeopardy" and the "absence of justification" elements. We disagree.

"A motion for summary judgment presents a question of law reviewed de novo." Nat'l Sur. Corp. v. Immunex Corp., 162 Wn. App. 762, 770, 256 P.3d 439 (2011), aff'd, 176 Wn.2d 872, 297 P.3d 688 (2013). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

[3] Washington's Uniform Health Care Information Act, ch. 70.02 RCW.

judgment as a matter of law." CR 56(c). The nonmoving party on summary judgment "must set forth specific facts showing that there is a genuine issue of material fact." Dicomes v. State, 113 Wn.2d 612, 631, 782 P.2d 1002 (1989). "Summary judgment is appropriate if in view of all of the evidence, reasonable persons could reach only one conclusion." Yankee v. APV N. Am., Inc., 164 Wn. App. 1, 8, 262 P.3d 515 (2011).

In her complaint, Rickman claimed that she was wrongfully discharged in violation of public policy. Thus, in order to survive Premera's summary judgment motion, Rickman was required to produce evidence that, if proved, would establish the following four elements: (1) the existence of a clear public policy ("clarity" element);[4] (2) that existing means of promoting the public policy were inadequate such that discouraging Rickman's conduct would jeopardize the public policy ("jeopardy" element); (3) that her public policy-linked conduct caused her dismissal ("causation" element);[5] and (4) that Premera's justification for her dismissal was prextexual ("absence of justification" element). See, e.g., Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 178, 181-82, 125 P.3d 119 (2005). "These elements are conjunctive, meaning that all four elements must be proved." Cudney v. ALSCO, Inc., 172 Wn.2d 524, 529, 259 P.3d 244 (2011). Our Supreme Court has indicated that "the wrongful discharge

[4] The trial court ruled that a clear public policy existed in favor of maintaining and protecting patient privacy interests. Neither party challenges this ruling on appeal.

[5] Although the trial court did not address the "causation" element in its ruling, on appeal Premera avers that we may also affirm the trial court's grant of summary judgment based on Rickman's failure to produce evidence necessary to create genuine issues of material fact as to the "causation" element. Because we affirm the trial court's ruling based on the "jeopardy" element, we need not address Premera's averment.

tort is narrow and should be 'applied cautiously.'" Danny v. Laidlaw Transit Servs., Inc., 165 Wn.2d 200, 208, 193 P.3d 128 (2008) (quoting Sedlacek v. Hillis, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001)); accord Weiss v. Lonnquist, 173 Wn. App. 344, 352, 293 P.3d 1264, review denied, 178 Wn.2d 1025 (2013).

Rickman makes two arguments in support of her contention that the trial court erred with respect to the "jeopardy" element. First, that it erred by concluding that no issues of material fact existed as to whether discouraging her conduct would jeopardize the public policy in favor of maintaining and protecting patient privacy interests. Second, that it erred by concluding that adequate alternative means of promoting this policy existed. Neither argument is persuasive.

"The jeopardy element sets up a relatively high bar." Weiss, 173 Wn. App. at 352. Not only is the plaintiff required to "show that she engaged in particular conduct and the conduct directly relates to the public policy or was necessary for the effective enforcement of the public policy," she "must prove that discouraging the conduct that she engaged in would jeopardize the public policy." Weiss, 173 Wn. App. at 352. "'This burden requires a plaintiff to argue that other means for promoting the policy . . . are inadequate.'" Piel v. City of Federal Way, 177 Wn.2d 604, 611, 306 P.3d 879 (2013) (alteration in original) (internal quotation marks omitted) (quoting Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 945, 913 P.2d 377 (1996)). "If there are other adequate means available, the public policy is not in jeopardy and a private cause of action need not be recognized." Weiss, 173 Wn. App. at 352; see also Cudney, 172 Wn.2d at 530 (explaining that

application of a "strict adequacy standard" produces "only a narrow exception to the underlying doctrine of at-will employment"). Although inquiry as to the "jeopardy" element is generally factual in nature, "the question whether adequate alternative means for promoting the public policy exist may present a question of law." Korslund, 156 Wn.2d at 182.

Rickman argues first that the trial court erred by concluding that no issues of material fact existed as to whether discouraging her conduct would jeopardize the public policy in favor of maintaining and protecting patient privacy interests. This is so, she asserts, because it improperly relied on the Supreme Court's decision in Dicomes to reach its conclusion. However, Rickman's efforts to distinguish Dicomes are unavailing.

The particular language from Dicomes that the trial court relied upon and with which Rickman takes issue is as follows:

> In determining whether retaliatory discharge for employee whistleblowing activity states a tort claim for wrongful discharge under the public policy exception, courts generally examine the degree of alleged employer wrongdoing, together with the reasonableness of the manner in which the employee reported, or attempted to remedy, the alleged misconduct.

113 Wn.2d at 619.

The whistleblowing activity in Dicomes occurred after a violation of the law; however, nothing in that decision limits its application to instances in which whistleblowing postdates a violation. Moreover, Rickman offers no persuasive reason for cabining the application of Dicomes to its facts. Indeed, where an employee reports concern with potential employer activity—as Rickman did

here—a trial court may examine the record to approximate the degree of wrongdoing, if any, that would have taken place in the event that the employer had engaged in the activity. Similarly, a trial court may examine the reasonableness of the manner in which the employee reported the potential misconduct or attempted to remedy it. It was proper for the trial court to apply the standard in Dicomes to the facts in this case.[6]

Turning to the trial court's application of Dicomes, there was no error. The trial court was persuaded by the fact that Premera did not implement the "risk bucketing" plan and by Rickman's failure to apprise herself of the details of the plan in order to determine whether it was, in fact, illegal. After examining the trial court record and the parties' briefs, we cannot conclude that the manner in which Rickman reported her concerns was reasonable, or that Premera—had it actually implemented the "risk bucketing" plan—would have engaged in any degree of wrongdoing. Rickman's ignorance of the plan's details and legality, coupled with her failure to make meaningful inquiries, gainsays her position that she reported her concerns in a reasonable manner. Moreover, she adduced no evidence that the abandoned "risk bucketing" plan would have been illegal, relying only on her statement to Grover that the plan "had HIPAA written all over it." Guesswork and intuition do not meet the high bar set by the "jeopardy" element. No genuine

[6] Contrary to Rickman's intimation, our Supreme Court's decision in Cudney, wherein it analyzes Hubbard v. Spokane County, 146 Wn.2d 699, 50 P.3d 602 (2002), does not categorically bar a grant of summary judgment against a plaintiff who raises concerns before a violation of the law occurs. Although Cudney and Hubbard empower courts to protect a plaintiff who raises concerns before wrongful activity occurs, they do not immunize that plaintiff from an adverse grant of summary judgment. Instead, courts must apply the standard in Dicomes to determine whether summary judgment should be granted.

issues of material fact exist as to whether discouraging Rickman's conduct would jeopardize the public policy of maintaining and protecting patient privacy interests.

Rickman next argues that the trial court erred by concluding that adequate alternative means of promoting the public policy existed. This is so, she asserts, because (1) no Washington authority holds that an internal reporting system can constitute an adequate means of promoting a public policy; (2) her method of reporting was more effective than Premera's internal reporting system; and (3) the complaint mechanisms within HIPAA and UHCIA are only available for actual rather than potential noncompliance. We disagree.

The "strict adequacy" standard requires available adequate alternative means of promoting the public policy; however, contrary to Rickman's first assertion, there is no indication that available alternative means must carry the force of law in order to be adequate. Nevertheless, Rickman argues that a private internal reporting system cannot be adequate, reasoning that if it were otherwise, then "an employer could simply escape liability by creating a complaint mechanism, regardless of whether it subsequently terminated an employee for taking action that promoted the public policy by preventing a law violation." Rickman reasons that were we to determine that Premera's internal reporting system constituted an adequate alternative means of promoting the public policy, she would be left without a private remedy against Premera, despite the fact that she was responsible for preventing a law violation. It follows from this, she urges, that an alternative means is only adequate if it exposes the

employer to liability. However, even assuming—without deciding—that Rickman did, in fact, prevent a law violation, "[t]he Supreme Court has repeatedly emphasized that *it does not matter* whether or not the alternative means of enforcing the public policy grants a particular aggrieved employee any private remedy." Weiss, 173 Wn. App. at 359. The effect of the Supreme Court's unswerving approach is that the question of whether an alternative means is adequate is answered not by reference to the terminated employee's potential recourse against the employer, but by determining whether the alternative means promotes the public policy at issue. Focusing on whether the public policy is promoted ensures that the wrongful discharge in violation of public policy cause of action exists as "only a narrow exception to the underlying doctrine of at-will employment." Cudney, 172 Wn.2d at 530. Were we to embrace Rickman's reasoning, we would impermissibly broaden the narrow exception drawn by the Supreme Court.

Nevertheless, Rickman asserts that direct reporting was a superior method to utilizing Premera's internal reporting system. Not only is her assertion speculative, it fails to address the applicable standard, which is concerned not with winnowing down the available alternatives until only the best one remains but, rather, with establishing a baseline above which any available alternative is considered adequate. Rickman had to present evidence tending to show that anonymous electronic or telephonic reporting was an inadequate alternative means of promoting the public policy at issue. Yet, she failed to offer any evidence impugning the evidence in the record of Premera's robust internal

reporting system. Given the existence of Premera's internal reporting system, which—as evidenced, in part, by the prompt investigation following Lopez's complaint against Rickman—appears, on this record, to be functioning effectively, we conclude that the system provided an available adequate alternative means by which Rickman could have reported her concerns, thereby promoting the public policy in favor of maintaining and protecting patient privacy interests. Therefore, without deciding whether HIPAA or UHCIA provided available adequate alternative means, we conclude that the trial court did not err in its ruling with respect to the "jeopardy" element.

We affirm the superior court's grant of summary judgment in favor of Premera.

We concur:

OFFICE RECEPTIONIST, CLERK

To: Matautia, Jazmine
Cc: joelnichols@denomillikan.com; kallen@denomillikan.com; Howie, Robert; Sherwood, Skylar A.
Subject: RE: Rickman v. Premera Blue Cross, Inc. - Supreme Court Case No. 91040-5

Received 12/17/14

From: Matautia, Jazmine [mailto:jmatautia@Riddellwilliams.com]
Sent: Wednesday, December 17, 2014 4:20 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: joelnichols@denomillikan.com; kallen@denomillikan.com; Howie, Robert; Sherwood, Skylar A.
Subject: Rickman v. Premera Blue Cross, Inc. - Supreme Court Case No. 91040-5

Erika Rickman v. Premera Blue Cross, Inc.
Supreme Court Case No. 91040-5

Filed by:
Skylar A. Sherwood, WSBA #31896
ssherwood@riddellwilliams.com

Dear Clerk:

Attached for filing is the Answer to Petition for Review. Petitioner's Attorney is also copied on this email.

Ms. Sherwood may be reached at the email above or (206) 624-3600.

Thank you,

Jazmine Matautia | Riddell Williams P.S.
Executive Assistant to Skylar A. Sherwood
jmatautia@riddellwilliams.com

T 206.624.3600 1001 Fourth Avenue, Suite 4500
F 206.389.1708 Seattle, Washington 98154-1192