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No. 70766-3

THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ERICKA M. RICKMAN,

Plaintiff/Appellant,

v.

PREMERA BLUE CROSS, INC.,

Defendant/Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Respondent Premera Blue Cross ("Premera") hired Appellant Ericka Rickman ("Rickman") to be the Director of one of Premera's subsidiary insurance agencies, Ucentris. 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 Rickman's claim at summary judgment finding that Rickman could not establish the jeopardy and absence of justification elements of her claim. The evidence did not show that discouraging Rickman's risk bucketing concern would jeopardize the public policy in favor of protecting patient confidentiality rights, and also did not show that other means of promoting the public policy are inadequate. The trial court further found that Rickman had failed to establish the absence of justification element of her claim because there was no evidence of any connection between her alleged risk bucketing concern and her discharge. It was undisputed that Premera's investigation of Rickman, and the investigator's recommendation to dismiss her, were made without knowledge of Rickman's risk bucketing concern.

None of Rickman's arguments on appeal warrants reversal because it is undisputed that Premera's investigation was unbiased, as are the underlying facts that led Premera to conclude Rickman exhibited a lack of integrity and poor judgment. Premera respectfully asks this Court to affirm the trial court's summary judgment dismissal of Rickman's claim.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Premera disputes Rickman's assignments of error to the trial

court's decision to dismiss her wrongful discharge in violation of public policy claim at summary judgment.

III. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Rickman failed to establish the jeopardy element of her claim because there is no evidence that discouraging her expression of concern about risk bucketing would jeopardize the public policy established by HIPAA and/or UHCIA?

2. Whether Rickman failed to establish the jeopardy element of her claim because the evidence shows that other means of promoting the public policy under HIPAA and/or the UCHIA are adequate?

3. Whether Rickman failed to establish the causation element of her claim because there is no evidence that her expression of concern about a proposed risk bucketing plan caused her dismissal?

4. Whether Rickman failed to establish the absence of justification element of her claim because there is no evidence that Premera's justification for her dismissal was pretexual?

IV. STATEMENT OF THE CASE

A. Procedural History

Rickman filed this action in Snohomish County Superior Court on December 15, 2010 alleging Premera wrongfully discharged her in

violation of public policy. Clerk's Papers ("CP") at 390-396. Premera moved for summary judgment on April 11, 2013. CP at 363-381. The trial court granted Premera's motion and explained its ruling in a letter opinion, holding that Rickman failed to establish the jeopardy and absence of justification elements of her claim. CP at 4-11. The trial court did not address the causation element of Rickman's claim. *Id.*

B. Factual Statement

1. Shortly After Starting As Director Of Ucentris, Rickman Engaged Her Son As A Captive Agent, Approve His Promotion, and Doubled A Portion Of His Compensation

Rickman served as Director of Ucentris from August 2004 until November 2009. CP at 237, 241-42. Ucentris is a general insurance agency and subsidiary of Premera that sells health, life, and risk management products to individuals and small businesses. CP at 359. Ucentris sells its insurance products using various types of insurance agents who are not employees. CP at 360. During Rickman's employment, some of these agents were "captive agents," which meant they could sell insurance products offered only by Premera and its subsidiaries. *Id.*

As Director of Ucentris, Rickman was responsible for everything that went on with the agency: product development, marketing, sales and

brand strategies, as well as ensuring that operational and financial business objectives were met. CP at 244-45. She was also responsible for the daily operations of the agency, which included coaching and mentoring staff and providing professional development opportunities, and at times directly overseeing Ucentris' agents, including captive agents. CP at 252-53, 291.

Among Rickman's direct reports were Laura Stryker, Ucentris' Sales Manager, and Ann Farrison, the Sales Operations Manager. CP at 247-48. Stryker was generally responsible for the production of Ucentris' agents; tracking their production and sales activities; arranging for training and education opportunities; and supporting Ucentris' operations. CP at 357. Rickman's supervisor when she first started at Ucentris was Steve Melton, who is now deceased, followed by three others. 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. CP at 259-60. At some point, Rickman asked Stryker and Farrison to recommend captive agents to serve as subject matter experts ("SMEs") for particular lines of business. CP at 261, 357. SMEs mentored captive agents, participated in production meetings with captive agents, and sometimes participated in management

meetings. CP at 248-49, 284-85. The SME designation was considered a promotion for which they received additional compensation—a portion of the combined commissions earned within the line of business for which they were responsible, called an "override." CP at 249.

Rickman approved Stryker's and Farrison's SME recommendations, including the selection of her son, Vidor, securing him an elevated status and pay among the captive agents. CP at 261. When Vidor's co-SME for the medical coverage line of business stepped down as SME, Rickman approved an increase in Vidor's override from five to ten percent, twice what the other SMEs received. CP at 250-51, 357.

2. Rickman Repeatedly Failed To Disclose The Relationship With Her Son, Despite Premera's Processes For Identifying Actual And Perceived Conflicts Of Interest

The fact that Rickman's son was engaged by her agency as a captive agent, promoted to SME status, and given increased pay is significant because Premera and its subsidiaries operate in the highly regulated insurance industry. CP at 300-01. As such, Premera is particularly focused on preventing any actual, potential, or perceived conflicts of interest involving its employees. *Id.* at 301. To that end, Premera 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, such as a Code of Conduct, Conflict of Interest Questionnaire Policy, and a Conflict of Interest and Disclosure Questionnaire. *Id.* These documents make clear that Premera expects its employees to think broadly about their relationships and individual situations and disclose not only actual conflicts, but any situations that may raise even a perception of a conflict of interest:

- "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.... To manage potential conflicts Premera relies on you to fully disclose any relationships that may have the potential of being misinterpreted by others." CP 316-17.

- Conflict of interest may include "a situation in which activities [or] interactions...influence, or may appear to influence, an [employee's]...decisions that he/she makes in the course of his/her job responsibilities." CP 329.

- Conflicts of interest may arise in many forms, but most commonly in situations when an employee might be able to use his or her position "to influence Premera business decisions in ways that give an improper advantage to...a family member." CP 333.

In addition, the Conflict of Interest Disclosure Questionnaire, which employees complete upon hire and annually thereafter (CP at 300-01), asks specific questions of employees designed to flag possible conflict situations, including:

- "During the past 12 months, have you or has a 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]?" (CP at 336); and

- "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]?" CP 337.

These questions and policy statements apply directly to Rickman and her relationship to her son. And she knew that Premera relied on her to disclose relationships she might have with a variety of non-employees. CP at 264. But despite this, and despite that Vidor received commissions from the agency Rickman was in charge of for his insurance sales services, Rickman did not disclose Vidor on the Conflict of Interest Disclosure Questionnaire. CP at 256-57, 301-02. Nor did she disclose Vidor in response to the final catch-all question on the Questionnaire asking employees whether they have any additional disclosures to make. CP at 301-02, 342.

According to Rickman, she discussed engaging Vidor as a captive agent with her first supervisor, Melton (now deceased). CP at 259-60. Rickman had no specific discussions with her subsequent supervisors or anyone in Premera's Compliance and Ethics department about the fact that her son was a captive agent, even when she approved his promotion to SME and the increase of his override. CP at 258-59, 263, 265-66.

Rickman's final supervisor, Grover, had no knowledge her son was a Ucentris captive agent. CP at 360.

3. A Ucentris Captive Agent Complains That The Relationship Between Rickman And Vidor Is A Conflict Of Interest

On September 11, 2009, Premera's Compliance department received an anonymous email 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. CP at 345. As reported by Lopez, 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.

4. Premera's Investigation Revealed Facts That Led To Rickman's Dismissal

a. Rickman Underrepresented Her Involvement In The Day-To-Day Dealings With Captive Agents During The Investigation.

Premera's Human Resources and Compliance departments launched an investigation of Lopez's complaint, conducted by Nancy Ferrara, Premera's former Associate Relations Consultant. *Id.* During her interviews with Ferrara, Rickman generally denied that her relationship with her son created any conflict of interest, contended that their relationship was widely known throughout Ucentris, and claimed she had not tried to keep it a secret. CP at 286-87, 303. However, Lopez and another captive agent, Mark Stryzewski, reported that Rickman had told them she was concerned about Premera finding out about her relationship with Vidor and not to tell anyone outside of Ucentris. CP at 294-95, 352-53.

Rickman tried to distance herself from any oversight role with the captive agents in her interviews with Ferrara, claiming that she did not have direct contact with the captive agents, including her son; she did not participate in meetings with captive agents regarding their production goals or performance; and that Stryker handled all oversight of the captive agents. CP at 303. But Stryzewski reported it was his perception that

Stryker lacked authority to make important decisions (these were made by Rickman), and he had discussions with Rickman, not Stryker, about matters that were significant to him. CP at 303-04, 353. Other captive agents shared the same or similar perceptions of Stryker's and Rickman's roles. CP at 296-97, 304, 354-55. Lopez, in particular, referred to Rickman as "Boss" (CP at 277), and he and other captive agents perceived that Vidor received favorable treatment. CP at 302-04, 345, 354-55.

While Stryker was ostensibly tasked with overseeing the captive agents, she did not make and would not have made unilateral decisions relating to matters of significance such as the selection of SMEs, SMEs' performance, termination of captive agent contracts, engaging captive agents, and captive agent marketing campaigns, without Rickman's final approval. CP at 357.

b. Rickman Exhibited Poor Judgment During The Investigation.

Not only was Rickman's description of her role with captive agents at odds with what captive agents reported to Ferrara, but Rickman displayed a lack of judgment and integrity in other ways during the investigation. Rickman discussed her interview with Stryker despite Ferrara's instruction that it be kept confidential. CP at 281, 303, 358. She also was not forthcoming during the investigation. For example, when

Ferrara asked how much the SMEs' override was, Rickman told Ferrara five percent, but did not disclose that her son received a ten percent override. CP at 303. Rickman speculated during her interview with Ferrara and later with Stryker, that Lopez probably made the anonymous ethics complaint. CP at 303, 282.

Not long after, Rickman approved Stryker's recommendation to terminate Ucentris' captive agent contract with Lopez's wife, Vanessa Lopez, because she was purportedly a "low producer." CP at 254-55, 358. This decision seemed suspicious and possibly retaliatory to Lopez and Ferrara for various reasons, including the fact that the decision was made while the investigation was pending, and Rickman had earlier speculated that Lopez might have made the ethics complaint. CP at 304, 298. Indeed, even Rickman discussed with Stryker the possibility of a perception of retaliation associated with the decision to terminate Vanessa Lopez's contract; she nonetheless proceeded with the plan without involving human resources. CP at 254-55.

5. Premera Dismissed Rickman For Exhibiting Poor Judgment And A Lack Of Integrity

Premera's investigation showed that Rickman exhibited poor judgment and a lack of integrity by, among other incidents described above, 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' contract with Lopez's under the circumstances. CP at 304, 360. Grover discharged Rickman on November 3, 2009 based on Ferrara's findings and recommendation. CP at 360.

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

In this lawsuit, Rickman alleges she was dismissed in retaliation for allegedly raising concerns to Grover that the underwriting department's proposal 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. Premera's goal was to retain some of that business by identifying, using risk bucketing, the preferred employer groups of the departing association that Premera wanted to retain, which Ucentris agents could then contact and steer toward membership in other Premera-insured associations. CP at 361. 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.*

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

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

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.

V. ARGUMENT

A. Standard Of Review

"Summary judgment rulings are reviewed de novo." *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008). Summary judgment is proper if the record shows that there are no genuine issues of any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Summary judgment should be granted where the plaintiff cannot make a showing sufficient to establish an essential element of the case. *Does v. Dep't of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196 (1997). A party opposing summary judgment may not rest on mere

allegations in the pleadings, but must set forth specific facts showing there is a genuine issue of material fact. CR 56(e); *see Dicomes v. State*, 113 Wn.2d 612, 631, 782 P.2d 1002 (1989). Where reasonable minds could reach but one conclusion from the admissible facts in the record, summary judgment should be granted. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996).

B. Rickman Has Not Produced Evidence To Establish The Jeopardy, Causation, and Absence of Justification Elements Of Her Wrongful Discharge In Violation Of Public Policy Claim

Rickman contends that she was wrongfully discharged in violation of the public policies of HIPAA and UHCIA after she reported concerns about risk bucketing to Grover. Rickman must prove four elements to establish her claim: (1) a clear public policy (the *clarity* element); (2) existing means of promoting the public policy are inadequate such that discouraging Rickman's conduct would jeopardize the public policy (the *jeopardy* element); (3) her public policy-linked conduct caused her dismissal (the *causation* element); and (4) Premera's justification for Rickman's dismissal was pretexual (the *absence of justification* element). *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 178, 181-82, 125 P.3d 119 (2005); *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 529, 259 P.3d 244 (2011). A plaintiff must prove all four elements of the wrongful

discharge claim. *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000).

The trial court found that a clear public policy exists under HIPAA and UHCIA in favor of protecting and maintaining patient privacy interests, but held that Rickman had failed to establish the jeopardy and absence of justification elements and therefore dismissed her claim at summary judgment. CP at 18-19. Premera respectfully requests that this Court affirm the trial court's dismissal of Rickman's claim.

1. *Jeopardy* Element: Rickman Has Failed To Establish That Discouraging Her Conduct Would Jeopardize The Public Policy And That The Existing Means For Protecting The Alleged Public Policy Are Inadequate

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 v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 181-82, 125 P.3d 119 (2005). She has failed this burden.

a. Discouraging Rickman's Conduct Would Not Jeopardize the Public Policy.

The trial court concluded that discouraging Rickman's conduct would not jeopardize the public policy because her purported comment to Grover that the proposed risk bucketing plan "had HIPAA written all over

it," was "fleeting" and akin to issue spotting that was part of her job. CP at 18. The trial court noted that Rickman made no effort to explain why her "gut reaction" was that the risk bucketing plan would violate HIPAA, nor did she take any steps to verify whether her gut feeling was valid or to address her concern. *Id.* Particularly relevant was the fact that Grover rejected the risk bucketing plan for various business reasons and that Premera never implemented the plan. *Id.*; CP at 361-62. The trial court's rationale is sound and should be affirmed.

i. It Does Not Matter That Rickman Purportedly Raised Her Risk Bucketing Concern Preemptively.

Through a mechanistic and myopic interpretation of *Dicomes*, Rickman asserts that the trial court erroneously relied on that case because it does not apply where a plaintiff, like Rickman, allegedly raises a concern before wrongdoing has occurred. Appellant's Opening Brief ("AOB") at 14. The trial court relied on *Dicomes*' guidance that "courts generally examine the degree of alleged employee wrongdoing, together with the reasonableness of the manner in which the employee reported, or attempted to remedy the alleged misconduct." *Dicomes*, 113 Wn.2d at 619; CP at 18. That allegedly wrongful activity has not yet occurred does not foreclose a court from considering relevant in the total context, as was

done here, the way in which the employee raised concerns or the fact that the employer decided not to pursue the conduct that the employee thought would be illegal.[2] And there is nothing in *Dicomes* suggesting that this guidance is inapplicable where a plaintiff raises concerns of threatened wrongdoing rather than actual wrongdoing.

In assessing the context here, the trial court appears to have concluded that Rickman did not act reasonably in the casual, almost off-hand way in which she allegedly raised her concerns to Grover, or at least that she did not act in a way one would expect an employee to behave if they had a serious concern about threatened illegal activity, particularly in light of the numerous ways in which employees can raise privacy concerns at Premera and its culture of privacy compliance. CP at 18; *see also,* CP at 18, 305, 313, 321. Also relevant was the fact that Rickman did not take any steps to verify whether her misgivings were valid or address them further, and that Premera ultimately did not implement the risk bucketing plan. CP at 18. This analysis is sound and should be affirmed.

Rickman also disputes the trial court's characterization of her alleged complaint as "fleeting" because she asserts she reported concerns

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[2] Latitude to consider the broader context is particularly important because the tort of wrongful discharge in violation of public policy should be recognized only in limited circumstances. *See Cudney*, 172 Wn.2d at 530 (the wrongful discharge tort is narrow and should be applied cautiously). Unsubstantiated claims, such as Rickman's, should be dismissed.

to Grover on other occasions. AOB at 12. The only other time Rickman allegedly addressed her HIPAA concern was arguably even more casual and nebulous than the first—at a fundraiser car wash at which she purportedly thanked Grover for rejecting the risk bucketing plan and reiterated she thought it was "inappropriate and possibly illegal." CP at 189. Setting aside that there is no evidence that Rickman expressed any concerns to Grover (only Rickman's bare assertion),[3] neither of Rickman's alleged reports carried any indicia that she was raising a serious concern about privacy issues. And given Premera's robust processes for reporting privacy concerns, no reasonable juror could conclude that discouraging Rickman's conduct, if it occurred at all, would stifle or jeopardize the protection of privacy rights at Premera.

Similar to her argument relating to *Dicomes*, Rickman appears to contend that *Cudney*'s analysis of *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602 (2002) 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 preemptively. AOB at 12-13. This is an expansive and incorrect interpretation of *Cudney* and *Hubbard*.

In both cases, the court focused on whether the existing protections

[3] Grover does not recall Rickman ever raising any concerns about risk bucketing or HIPAA. CP at 362.

were adequate to protect the public policy. *Hubbard*, 146 Wn.2d at 717; *Cudney*, 172 Wn.2d at 537. *Hubbard* does not hold that plaintiffs who raise concerns before wrongful activity occurs are categorically afforded some super-protection against summary judgment. The timing of the complaint was considered in *Hubbard* only for the limited purpose of assessing whether the specific zoning code enforcement protections at issue provided adequate protection of the public policy of ensuring enforcement of code violations. The *Hubbard* court held the existing protections inadequately protected the public policy because they allowed only aggrieved citizens to seek enforcement of the zoning code and under exceedingly tight deadlines such that it would have been "left up to chance whether the public policy was enforced." *Hubbard*, 146 Wn.2d 717.

The public policy and existing protections here are different than those in *Hubbard*. Each case must satisfy the elements of the claim on its own merits. As is discussed in more detail below, the existing protections *were* available to Rickman regardless that she allegedly raised concerns before purported wrongdoing, and adequately protected the public policy of maintaining the confidentiality of patient health information.

ii. There Is No Conflicting Evidence Relating to the Legality of the Risk Bucketing Proposal.

Rickman appears to suggest that the jeopardy analysis is impacted by purportedly conflicting testimony and evidence Premera presented about whether the risk bucketing plan was legal. AOB at 12. This argument mischaracterizes Grover's testimony relating to a clumsily worded interrogatory propounded by Rickman, and is unavailing to Rickman now for the same reasons set forth in Premera's Reply In Support of Its Motion for Summary Judgment. *See* CP at 53. In any case, whether the risk bucketing plan was legal or not does not determine the outcome here or require reversal of summary judgment.

b. Rickman Failed To Show That Existing Protections of the Public Policy Are Inadequate.

The trial court also properly found that Rickman failed to show the jeopardy element of her claim because the alleged public policy of protecting and maintaining patient privacy interests is adequately protected through other means, and the actions she took were not the only available adequate means to promote the public policy. CP at 18; *Cudney*, 172 Wn.2d at 530; *see Korslund*, 156 Wn.2d at 181-82 ("The plaintiff has to prove that discouraging the conduct that he or she engaged in would jeopardize the public policy…[a]nd…that other means of promoting the

public policy are inadequate."). Whether adequate alternative means for promoting the public policy exist is a question of law where the inquiry requires, as here, examining laws to determine whether they adequately protect the public policy. *Korslund*, 156 Wn.2d at 182.

i. The Statutory Protections Are Adequate.

As a matter of law, both UHCIA and HIPAA provide adequate protections relating maintaining the privacy of patient health care information. UHCIA provides a private right of action against health care providers or facilities that have not complied with the statute. RCW 70.02.170(1). As remedies, Courts may order compliance with the law and award actual damages. RCW 70.02.170(2). And attorney's fees and costs are provided to the prevailing party. *Id.*

HIPAA provides an extensive administrative process for fielding, investigating, and adjudicating complaints. The Department of Health and Human Services, Office for Civil Rights ("OCR") is responsible for administering and enforcing HIPAA's privacy standards and may conduct complaint investigations and compliance reviews.[4] Concerned individuals may make complaints directly to OCR. 45 C.F.R. § 160.306. Robust civil penalties and criminal penalties may be imposed in appropriate cases. *See*

[4] *See* Health Information Privacy: How to File a Complaint, http://www.hhs.gov/ocr/privacy/hipaa/complaints/index.html.

45 C.F.R. § 160.400-160.424; 42 U.S.C. § 1320d-6. And HIPAA provides retaliation protection for those who report suspected violations. *See* 45 C.F.R. §§ 160.316, 164.530(g).

Rickman contends these comprehensive statutory protections are inadequate because they purportedly provide complaint processes only for actual rather than potential noncompliance concerns. Because there was no actual violation here, Rickman contends she could not have invoked HIPAA's protections and complaint processes. AOB at 16-17. But HIPAA allows *any* person who believes there has been a HIPAA violation to file a complaint with OCR. 45 C.F.R. § 160.306(a). 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).

In addition, a page on OCR's website entitled, "What OCR Considers During Intake & Review of a Complaint," states that "[a] complaint must allege an activity that, if proven true, *would* violate the Privacy or Security Rule." *See* http://www.hhs.gov/ocr/privacy/hipaa/enforcement/process/whatocrconsiders.html (emphasis added). This further suggests that Rickman could avail

herself of the existing protections regardless of whether her purported concern about risk bucketing had already occurred, or might in the future. Nothing on OCR's website indicates (and it would be implausible to believe) that OCR would categorically not consider complaints of threatened or potential violations of HIPAA. This is particularly true given OCR's effusive invitation to the public to bring *any* concerns about alleged violations forward. The existing protections adequately protect the public policy.[5]

Rickman cites *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013), contending that the fact that existing laws address the public policy does not necessarily establish those laws adequately protect or promote the public policy. AOB at 10. *Piel* involved an analysis of the regulatory structure for the Public Employment Relations Commission

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[5] Rickman disputed below, but appears to have conceded on appeal, that UHCIA's or HIPAA's protections are not inadequate merely because they do not provide *her* with a private right of action for retaliation or otherwise. This Court recently squarely rejected that argument in *Weiss v. Lonnquist*, observing that "[t]he [Washington] 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." 173 Wn. App. 344, 359, 293 P.3d 1264 (2013); *see also 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."). In any event, HIPAA *does* protect complainants from retaliation. 45 C.F.R. §§ 160.316, 164.530(g); *see also* http://www.hhs.gov/ocr/privacy/hipaa/complaints/ (informing visitors that "HIPAA PROHIBITS RETALIATION" and encouraging individuals to notify OCR in the event of retaliatory action).

("PERC") and is distinguishable because there, the court had *already* held in another case that the regulatory structure did not adequately promote the public policy at issue. *Piel*, 177 Wn.2d at 616-17. That is not the situation here. Further, the PERC statutory scheme specifically stated that its administrative remedies were intended to be in addition to other remedies. *Id.* at 617. No comparable language appears in HIPAA or UHCIA. *See* 42 U.S.C. §1320d et seq., 45 C.F.R. §160 et seq., RCW 70.02 et seq.

ii. Premera's Protections Contributed To The Adequacy Of The Total Protections.

The trial court correctly found that Premera's internal processes, in conjunction with current statutory protections, contributed to the adequacy of the overall structure for protecting the privacy of patients' health information. CP at 18. Particularly relevant to the trial court was Premera's various avenues for raising privacy compliance concerns that are clearly and repeatedly communicated to employees, including in Premera's Code of Conduct, which identifies the departments to which privacy concerns can be raised, as well as a web portal and hotline for lodging complaints. *Id.*; CP at 314-15.

Rickman contends the trial court improperly considered the adequacy of Premera's internal processes and that raising her concerns directly to her supervisor was more effective in promoting the public

policy than making an anonymous complaint online or via the hotline that, she contends, might not be answered in a timely way. AOB at 16. First, Rickman's suggestion that Premera might (or does) drag its feet in addressing concerns placed online or through the hotline is entirely speculative and baseless. Premera's undisputedly strong culture of privacy compliance would be thwarted by lackadaisical responses to privacy concerns. If Lopez's complaint is any indication, Premera responds swiftly to, and takes seriously, concerns made even online. Second, the trial court did not intend Premera's internal processes to be considered in a vacuum as the sole evidence of the adequacy of the existing protections. Rather, they were properly considered in conjunction with the statutory protections, the combination of which amply protect the public's interest in maintaining the confidentiality of patient health information. This Court should affirm the trial court's holding that Rickman failed to establish the jeopardy element.

2. *Causation* Element: Lopez's Complaint And Ferrara's Independent Investigation Cut Off Any Causal Connection Between Rickman's Dismissal And Her Alleged Risk Bucketing Concern

Neither the trial court nor Rickman addressed the causation element in the letter opinion or Appellant's Opening Brief, respectively, yet this is another basis for dismissal of Rickman's claim. Rickman has

failed to present any evidence that her dismissal bore any relationship to her alleged risk bucketing complaint. The evidence of Rickman's poor judgment and lack of integrity that led to her dismissal is clear and undisputed. For example:

- Although Rickman told Ferrara that she was removed from any oversight and day-to-day involvement with the captive agents (including Vidor), and that Stryker was responsible for all such oversight and decisions, captive agents reported that Stryker had no real authority to make decisions, they had conversations relating to significant matters with Rickman, not Stryker, and at least one captive agent referred to Rickman as "boss." CP at 277, 353-55. In light of these and other reports by those who were interviewed, it appeared that Rickman had not been forthcoming about her relationship and involvement with captive agents. CP at 304.

- Rickman denied that she tried to keep her relationship with Vidor quiet, yet two captive agents reported that she had asked them not to talk about it outside of Ucentris. CP at 294-95, 352-53.

- Rickman claimed that she had no obligation to disclose the relationship with her son because he was not a Ucentris employee. CP at 260. 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); the 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). Against this backdrop, Rickman's attempt to justify her non-disclosure based on the fact that Vidor was not a Ucentris or Premera employee underscores her lack of judgment. She should have known that Premera would want to know that her son was a captive agent for the company she oversaw.

- Although Rickman denied she gave her son any favorable treatment, she gave final approval of Vidor's selection as a SME, an assignment that she admits was a promotion, and later authorized doubling his override when his co-SME stepped down. CP at 250-51, 261, 357. While Rickman may contend that Vidor was an appropriate choice for the SME position on his own merits or that she had a reason for doubling his override, this is irrelevant. It was her failure to understand that others might *perceive* those choices to be favoritism toward Vidor that was a

basis for her discharge.[6] Indeed, others in fact perceived favoritism. CP at 303-4, 345, 354-55.

- During the investigation, and contrary to Ferrara's instructions, Rickman failed to maintain the confidentiality of the investigation and openly speculated to both Ferrara and Stryker that Lopez might have been the one to make the complaint against her. CP at 281-83. This is not conduct befitting any employee, much less a Director-level employee. Rickman subsequently approved the termination of Lopez's wife's contract with Ucentris under arguably spurious circumstances, which, even at the time, Rickman herself thought could give the impression of retaliation. CP at 254-55.

It was these circumstances and others, not Rickman's alleged risk bucketing complaint, that led Ferrara to recommend Rickman's dismissal to Grover.[7] Not only is it undisputed that Ferrara had no knowledge of

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[6] Even now Rickman admits that it did not occur to her that anyone in Ucentris might view her playing a role in promoting Vidor as a conflict of interest. CP at 262. Nor would she have appreciated the potential for a conflict of interest even if she had been in Stryker's position as Sales Manager, the position that Rickman claims had *direct* oversight over the captive agents and authority to recommend termination of captive agent contracts. CP at 267-68.

[7] Rickman again appears to have conceded on appeal that the fact that she may have had underlying rationales for her various decisions that ultimately led to her dismissal, such as the decisions to double Vidor's SME override and terminate Vanessa Lopez's captive agent contract, does not establish an issue of material fact as to causation or even pretext. As Premera explained at summary judgment, regardless of whether Rickman had good or even compelling business

Rickman's complaint until well after her discharge, it is also undisputed that: (1) Lopez's complaint triggered Ferrara's investigation,[8] (2) Ferrara did not take direction from Grover in conducting the investigation, (3) Ferrara (not Grover) first recommended Rickman's dismissal based on the findings of the investigation, and (4) Grover based his decision to discharge Rickman on Ferrara's findings and recommendation. CP at 26, 34-35, 302, 305. In short, it is undisputed that Ferrara's investigation and recommendation to discharge Rickman were entirely uninfluenced by Grover or by knowledge of Rickman's alleged risk bucketing complaint. Ferrara's investigation therefore severs any causal link between Rickman's complaint and her dismissal. The trial court agreed in its discussion of the absence of justification element. CP at 19.

Rickman contends it is irrelevant that Ferrara had no knowledge of Rickman's complaint because it was Grover who made the final decision to discharge her. AOB at 18. While true that Grover was the ultimate decision-maker, there simply is no credible evidence suggesting that

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reasons for her decisions, it remains undisputed that these decisions and others could, and did, create impressions that Vidor received favorable treatment and of retaliation. CP at 13-14, 303-04, 345, 354-55. Failing to see this was poor judgment on Rickman's part.

[8] There is no evidence indicating Grover encouraged Lopez to make a complaint against Rickman or linking Lopez's complaint to Rickman's alleged risk bucketing concern. In fact, Lopez's complaint appears to have pre-dated Rickman's discovery of the risk bucketing proposal. CP at 269-70, 345.

Grover had a motivation to discharge Rickman because of her alleged complaint. *See Korslund*, 156 Wn.2d at 178 (claim of wrongful discharge in violation of public policy is an intentional tort such that plaintiff must establish wrongful intent to discharge in violation of public policy). It is undisputed that he dismissed Rickman based on Ferrara's unbiased findings and her recommendation. CP at 360. It is also undisputed that Grover never did or said anything that indicated he thought Rickman had inappropriately raised her concerns to him. CP at 276. And, since the proposed risk bucketing plan was permissible and would not have involved disclosure to Ucentris of *any* information protected by UHCIA or HIPAA, and Grover rejected the plan in any case for legitimate business reasons, there would have been no reason for Grover to have been irritated or threatened by Rickman's concern and to try to cover it up by dismissing her.[9] No reasonable trier of fact could find any causal link between

[9] It should be reiterated that Rickman's contention that she thought the plan would involve disclosure of HIPAA-protected information is sheer speculation. Rickman admits she had *no* detailed information about the plan from which she could reasonably ascertain whether HIPAA-protected information was even at issue. *See* CP at 27 ("I didn't know the details other than it had a potential utilization of our agents to move membership and it had HIPAA written all over it."); CP at 28 ("I did not know actually what [was] going to happen," but had a "gut feeling it wasn't appropriate."). In reality, the proposed risk bucketing plan *was* permitted under the insurance regulations for the particular groups at issue and would not have involved disclosure of *any* patient data to Ucentris, much less identifiable patient health data protected by UHCIA and HIPAA. CP at 361-62. The only information Ucentris would have received would have been at the

Rickman's discharge and her complaint.

3. *Absence of Justification* Element: Rickman Failed To Establish That Premera's Justification For Her Termination Is Pretextual

The trial court properly determined that Rickman failed to establish that Premera's justification for Rickman's dismissal was a pretext for retaliation because there was no genuine dispute of fact that Ferrara recommended Rickman's discharge without knowledge of her alleged risk bucketing complaint. CP at 19. The court also correctly held that the temporal proximity between Rickman's complaint and her discharge was not circumstantial evidence of pretext (or causation, for that matter), noting that only "mere allegations" supported such an assertion. *Id.*

a. It Is Undisputed Rickman Exhibited Poor Judgment In Repeatedly Failing To Disclose Her Son In Conflict Of Interest Questionnaires.

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,[10] and she kept a picture of

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group level—for example, companies Ucentris agents might market Premera products to. *Id.*

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

Vidor on her desk. AOB 19.

As already discussed with respect to the causation element, 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. Rickman was discharged for her poor judgment in failing to realize that. This was especially true after Rickman participated in the decision to promote Vidor and double his override.

b. Grover's Testimony Shows He Had No Plans To Discharge Rickman Before Learning Of The Results Of The Investigation And Ferrara's Recommendation.

Rickman tries to suggest her discharge was a foregone conclusion, alluding to an out-of-context excerpt from Grover's testimony. AOB at 18. In answer to counsel's question as to whether he relied on Ferrara's recommendations in making the decision to discharge Rickman, Grover responded that Ferrara's findings and recommendation "reinforced the decision [he] would have made, on [his] own." CP at 34. What Rickman does not address in her Opening Brief, is that moments later in Grover's deposition, counsel asked if he would have made the decision to discharge

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passed away.

Rickman on his own, regardless of whether or not Lopez's complaint had been made. CP at 83. Grover responded, "No,...based upon the results of the investigation, I made the decision to terminate Ericka, and that was consistent with the recommendation I received from [Ferrara]." *Id.* Grover went on to clarify: "I already had concerns, as we discussed before, about Ericka's business capabilities to run Ucentris, so those were concerns that I had that were continuing to be consistent that was then further [exacerbated]...by her lack of disclosure." *Id.* But Grover testified that he would not have discharged Rickman based on his performance concerns in November 2009 absent Lopez's complaint. CP at 84.

Far from indicating he had already decided to discharge Rickman prior to Ferrara's investigation, Grover's testimony reinforces that, despite the fact he had developed ongoing concerns about Rickman's performance in the six months he had supervised her, his decision to discharge her when he did was, in fact, based on Ferrara's findings and recommendation, not Rickman's alleged risk bucketing concern. That Grover believed he might have eventually terminated Rickman's employment based on the performance concerns at some later date if they continued uncorrected, does not show pretext.

c. Premera Has Not Given Inconsistent Reasons For Rickman's Dismissal.

In another unsuccessful attempt to show pretext, Rickman contends Ferrara's and Grover's testimony is inconsistent about whether her failure to disclose her relationship with her son was the reason for her discharge. AOB at 20-21. Ferrara testified that Rickman's discharge was due not to a specific finding that a conflict of interest existed, but to her poor judgment and lack of integrity. CP at 115. As already discussed, Rickman's conduct led to, at a minimum, a *perceived* a conflict of interest. Grover's deposition testimony, mischaracterized by Rickman (cited at AOB at 18-19), reflects only that "the conflict of interest issue" (not necessarily a finding that a conflict of interest in fact existed) precipitated Rickman's dismissal in November 2009. CP at 83-84. Ferrara's investigation uncovered other examples of Rickman's poor judgment that contributed to her discharge. *Id.*; CP at 360. There is no inconsistency between Grover's and Ferrara's testimony relating to the basis for Rickman's dismissal.

d. Rickman's Remaining Contentions Are Unsupported By Argument And Do Not Show Pretext.

Rickman contends that Premera's reasons for her dismissal are pretextual because Lopez's motives in lodging his complaint against her were purportedly "suspect." AOB at 21. Rickman advances no argument

in support of this contention, but should the Court nonetheless consider it, whether Lopez was biased against Rickman or her son is irrelevant. Premera independently investigated Lopez's allegations, interviewing various Ucentris employees and captive agents. Far from simply accepting each of Lopez's allegations as true, Ferrara concluded that several of them could not be substantiated.[11] Those allegations were disregarded. Lopez's alleged bias—even if he had one—would not be evidence that Premera's reasons for Rickman's dismissal were pretexual.

Rickman further contends (again without argument) that she has established pretext based on her speculation that Grover disliked her for raising her concern about the risk bucketing plan. AOB at 21. As already discussed, however, there is no evidence Grover had any negative feelings toward Rickman relating to her complaint, assuming she made it at all. Rickman's final empty suggestion that Ferrara's investigation was flawed (AOB at 21) is likewise unsupported by any argument or evidence in the

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[11] For example, Lopez alleged that Vidor had direct input into which captive agents received sales leads. Ferrara found no indication that Vidor dictated who received leads. CP at 302. Lopez also alleged that Vidor participated in Ucentris management meetings and had a "direct say" into "how Ucentris spends marketing dollars, what future projects look like, and which agents should be a part of future projects." CP at 345. Ferrara's investigation showed, however, that while Vidor attended some performance meetings with captive agents, some agents understood why he was there, and there was another SME who was involved in various performance meetings as well. CP at 302. Ferrara also found no indication that Vidor was involved in management meetings. *Id.*

record and should be disregarded. There is ample evidence that Ferrara's investigation was thorough and unbiased, and her conclusions were based on undisputed reports by witnesses upon which Premera was entitled to reasonably rely in deciding to terminate Rickman's employment.[12]

In sum, Rickman presents only her own conclusory statements of ultimate fact in contending she was discharged because of her alleged risk bucketing complaint—not evidence. This does not defeat summary judgment. *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

VI. CONCLUSION

There is no credible evidence that Rickman's supervisor, Grover, had any animus toward Rickman, even assuming she did raise a concern about the risk bucketing proposal, or that her alleged concern had anything to do with her discharge. Indeed, Premera's unbiased investigation of Rickman revealed evidence of Rickman's poor judgment and lack of integrity. Both the investigator, who recommended Rickman's dismissal, and Grover, who made the decision to dismiss Rickman based on the results of the investigation, were entitled to reasonably rely on the

[12] Premera has already addressed Rickman's additional contention that Ferrara's lack of knowledge about her alleged risk bucketing complaint is immaterial because Grover was the decision-maker with respect to her discharge. Grover's status as the decision-maker does not establish pretext for the same reasons discussed with regard to the causation element.

information obtained during that investigation, none of which is disputed. For these reasons, and others, Rickman has failed to prove the causation and absence of justification elements of her wrongful discharge in violation of public policy claim.

She also has failed to prove the jeopardy element because discouraging her alleged conduct would not jeopardize the protection of the public policy at Premera and the existing protections under HIPAA and UHCIA adequately protect the public policy of maintaining the confidentiality of patient health information.

In light of the undisputed evidence, no reasonable jury could find that Premera retaliated against Rickman for her alleged risk bucketing concern. The trial court's dismissal of Rickman's wrongful discharge in violation of public policy claim should be affirmed.

DATED this 9th day of January, 2014.

RIDDELL WILLIAMS P.S.

By 

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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 January 9, 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:

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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 9th day of January, 2014.

Jazmine Matautia