NO. 95269-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID MARTIN,

Plaintiff/Appellant,

v.

GONZAGA UNIVERSITY,

Defendant/Respondent

AMICUS CURIAE MEMORANDUM BY WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION AND INTEREST OF AMICUS

In *Martin v. University of Gonzaga*, a former employee alleged that he was terminated from the University because he complained about the lack of safety padding in the University gymnasium. The University claimed that it did not fire Martin because of his complaints about safety, but because of his lack of professionalism and insubordination unrelated to his safety complaints.

Martin filed suit alleging wrongful discharge in violation of public policy and that the University failed, pursuant to RCW 29.12.250, to produce a complete copy of his personnel file. The trial court granted the University's motion for summary judgment on both claims and Martin appealed. The court of appeals affirmed summary judgment on the wrongful discharge claim but reversed and remanded on the personnel file claim.

The court of appeals filed three separate opinions. No judge joined the opinion of any other judge. Judge Fearing wrote the lead opinion, 200 Wn. App. at 333-375, and applied Henry Perritt's four-part test for wrongful discharge. Judge Fearing found that Plaintiff satisfied the first three elements of the Perritt test but that Plaintiff failed to satisfy the fourth element: the absence of an "overriding justification," *Id*. at 352-73. Judge Fearing determined there existed questions of fact precluding summary judgment on the claim under RCW 49.12.250. *Id*. at 373-74.

Judge Pennell agreed that there existed questions of fact concerning the personnel file claim and concurred that the wrongful discharge claim should be dismissed but solely on the ground that Plaintiff failed to prove that retaliation was a substantial factor in the University's decision. *Id.* at 375-77. Judge Korsmo concurred that the University was entitled to summary judgment on the wrongful discharge claim but dissented on the disposition of the personnel file claim. *Id.* at 377-79.

Mr. Martin filed a Petition for Review regarding the appellate court's disposition of the wrongful discharge claim, and the University filed a Cross-Petition on the issue of the personnel file. The Washington Employment Lawyers Association ("WELA") urges this Court to grant the Petition for Review.

WELA is a chapter of the National Employment Lawyers Association. WELA consists of more than 190 attorneys admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. The claim of wrongful discharge in violation of public policy is fundamental to the enforcement of employee rights and respect for the rule of law.

II. SUMMARY OF ARGUMENT

In 2015 this Court decided a trilogy of cases that significantly clarified the public policy tort and ruled that strict adequacy was not

required to satisfy the jeopardy element of the *Perritt* formulation. *See Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d at 268, 358 P.3d 1139 (2015); *Rickman v. Premera Blue Cross,* 184 Wn.2d 300, 358 P. 3d 1153 (2015); *Becker v. Community Health Systems,* 184 Wn.2d 252, 359 P. 3d 746 (2015). No longer does the existence of other nonexclusive statutory remedies preclude a plaintiff from recovery. *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d at 274. The Court rejected the application of the *Perritt* formulation except in those rare cases which don't fit neatly into one of the four traditional categories of wrongful discharge cases and returned to the tort's roots in *Thompson v. St. Regis Paper Co*., 102 Wn.2d 219, 685 P.2d 1081 (1984). *Id.*

Notwithstanding the clear direction from this Court in *Rose*, confusion about the elements of proof for the wrongful discharge tort continue to plague the lower courts and legal community. This confusion is reflected in Judge Fearing's lead opinion in *Martin,* the Court of Appeals' recent decisions in *Karstetter v. King County Correction Guild*, ___ Wn. App. ___, 407 P.3d 384 (2017), and *Billings v. Town of Steilacoom,* ___ Wn. App. ___, ___ P.3d ___, 2017 WL 6987827 (2017), and the recent adoption of a Washington Pattern Instruction on a claim for wrongful discharge. WPI 330.51. Appendix A.

Judge Fearing's lead opinion in *Martin* applies the Perritt formulation even though Plaintiff brings a whistleblower claim, which is

one of the four traditional categories for wrongful discharge. Having erroneously applied the Perritt formulation, Judge Fearing misapplied the "overriding justification" element and defeated the substantial factor standard.

The substantial factor standard recognizes that an employee can prevail if an illegal reason was a substantial factor even if a legitimate business reason also motivated the decision. *See Scrivener v. Clark College*, 181 Wn.2d 439, 446-47, 334 P.3d 541 (2014). Yet, Judge Fearing ruled, as a matter of law, that a legitimate business reason, *i.e.*, insubordination, is an overriding justification despite his finding that Plaintiff's *unrelated* protected conduct was a "substantial factor" in the decision to discharge. 200 Wn. App. at 367. If followed by other courts, the lead opinion would eviscerate the wrongful discharge claim. No prior Washington case has ruled that an employer's overriding justification outweighed an employee's conduct that directly related to public policy. Judge Fearing literally invites this Court to accept review to clarify the application of the overriding justification element. 200 Wn. App. at 360.

The Court of Appeals' decision is in conflict with a decision of the Supreme Court. RAP 13.4(b)(1).

In December 2017, the Washington Pattern Instruction Committee adopted a pattern instruction addressing wrongful termination in violation of public policy. WPI 330.51. The Pattern Instruction incorrectly recognizes

"overriding justification" as an element and defeats the substantial factor standard by allowing a jury to decide that an employer's "legitimate, overriding consideration" is sufficient to defeat liability even though the employee's protected conduct is a "substantial factor" in the decision to discharge. Unless the Court clarifies the application of the "overriding justification' element of the Perritt formulation, prejudicial instructional error will infect every jury trial adjudicating a wrongful discharge claim.

The conflict between this Court's decision in *Rose* and Pattern Instruction creates an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

III. ARGUMENT

A. Contrary to What *Martin* Decides, the *Perritt* Formulation Does Not Apply When the Facts Fall Into One of the Four Traditional Categories of Wrongful Discharge Cases.

The Court in *Rose v. Anderson Hay & Grain* recognized the four traditional categories of claims to which the public policy tort might apply: (1) when employees are fired for refusing to commit an illegal act, (2) when employees are fired for performing a public duty or obligation, such as serving jury duty, (3) when employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims, and (4) when employees are fired in retaliation for reporting employer misconduct, *i.e.*, whistle-blowing. 184 Wn.2d at 276 (citing *Gardner v. Loomis Armored Inc.,* 128 Wn.2d 931, 936, 913 P.2d 377 (1996)). This Court then held that

"[w]hen the plaintiff's case does *not* fit neatly within one of these scenarios, a more refined analysis may be necessary and the four-factor Perritt analysis may provide helpful guidance." *Becker*, 184 Wn.2d at 259 (Emphasis added). On the other hand, when the plaintiff's case does fall within one of the four traditional wrongful discharge scenarios "such detailed analysis is unnecessary" and courts should not employ the four *Perritt* factors when evaluating the legal sufficiency of the plaintiff's claim. *Id*; *Rose*, 184 Wn.2d at 287.

Here, it is clear that Martin alleged a safety violation at the University's gymnasium, which is one of the four traditional categories of wrongful discharge, *i.e*., whistleblowing. The Court of Appeals incorrectly applied the *Perritt* formulation instead of the *Thompson* formulation.[1] Contrary to the lead opinion in *Martin*, after the *Rose* trilogy Washington cases do not "evince[] a devotion to Perritt's formulation of the tort." 200 Wn. App at 366.

Like *Martin*, the Pattern Instruction adopts the overriding justification element of the Perritt formulation for cases falling within the four traditional categories of wrongful discharge cases. WPI 330.51.

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[1] *Martin* is not the only recent court of appeals decision to make this error. *See also Karstetter v. King County Correction Guild*, 407 P.3d at 390 (Perritt formulation applied despite recognition of the four traditional categories of wrongful discharge); *Billings v. Town of Steilacoom,* 2017 WL 6987827 *10-11 (Because Plaintiff was terminated for "just cause" "there existed an overriding justification for his dismissal even if he could prove the other elements [of the Perritt formulation]").

B. Contrary to What *Martin* Decides, Overriding Justification Only Applies When the Employer Admits Causation.

In those rare cases when the *Perritt* formulation applies, the overriding justification affirmative defense applies only in cases, unlike this case, where the defendant concedes that the reason for the dismissal was the plaintiff's public-policy-linked conduct which it asserts as an overriding justification for the decision. *Rickman v. Premera Blue Cross*, WL 2869083 *4 (2016) (unpublished) ("[u]nlike the employer in *Gardner,* Premera does not concede that it terminated Rickman for any public policy linked-conduct" so the overriding justification doesn't apply); Henry H. Perritt. Jr., *Employee Dismissal Law & Practice*, §7.08 at p. 7-100.1 (overriding justification applies *only* where "employer does not deny that the determining factor or dominant reason for the dismissal was the employee's public-policy-linked conduct"). *See* Appendix B.

In *Gardner v. Loomis*, for example, the employer admitted that it terminated the driver because he left the truck, which is the same conduct plaintiff claimed as protected activity - causation was admitted. 128 Wn.2d at 940. In these circumstances, the burden shifts to the defendant to make out an "overriding justification" defense. *Id.* at 941.

The overriding justification defense under wrongful discharge law is analogous to the business necessity defense that exists under employment discrimination law. Perritt, *supra*, at 7-100.1, 7-102.2; *cf. Shannon v. Pay*

`N Save Corp., 104 Wn.2d 722, 731, 709 P.2d 799 (1985); *Hegwine v. Longview Fibre Co., Inc.*, 162Wn. 2d 340, 355 n.8, 172 P. 3d 688 (2007). Under both the business necessity and overriding justification doctrines, the employer concedes that it acted because of a legally prohibited reason but asserts that under the circumstances it was justified in doing so. *Id. See also Rickman v. Premera,* 2016 WL 2869083 *3 ("The 'absence of justification' or 'overriding justification' . . . inquiry presupposes that an employee was fired for public policy-linked conduct; in other words, it applies only when the causation element is not in dispute" (internal quotation omitted)).[2]

In this case, Judge Fearing allowed the University to defeat Martin's wrongful termination claim based on alleged overriding justifications that were *unrelated* to Martin's protected conduct. 200 Wn. App. at 364-367. Such an analysis directly conflicts with *Gardner*. It also contradicts the very purpose for the overriding justification defense, which requires the court to balance the public policies that the plaintiff's conduct implicates against the employer's interests in proscribing that conduct.

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[2] The overriding justification defense should not be confused with the mixed motives/same action defense available under federal but not Washington law. See Perritt, *supra*, at p. 7.100.1. The latter defense allows an employer to prove that even though an illegal reason motivated its decision it would have taken the same action even absent the illegal motivation. In other words, the same action defense allows the employer to prove that the illegal reason was not a but-for cause/determining factor of the adverse action at issue.

C. Contrary to What *Martin* Decides, the Overriding Justification Affirmative Defense Does Not Defeat the Substantial Factor Standard.

Under the "substantial factor" "an employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable . . . ." *Scrivener v. Clark College,* 181 Wn.2d 439, 446-47, 334 P.3d 541 (2014). The lead opinion defeats the substantial factor standard by allowing a finding that an illegal motivation is not sufficient if the employer also had an unrelated legitimate reason for discharge, *i.e.*, insubordination.[3] According to Judge Fearing, "the overriding justification element assumes that an unlawful reason for the firing was a substantial factor, but another predominant reason also justified the termination." 200 Wn. App at 363.

Judge Fearing also decided that the overriding justification that employer asserts in court need not have even motivated the employer to terminate the employee. *Id*. at 362-364 ("The university may avoid liability if insubordination constitutes a justifying reason under the law and overrides the advocacy of safety concerns *regardless of whether insubordination motivated the firing*.") (emphasis supplied). There is

[3] The Pattern Instruction also defeats the "substantial factor" standard by allowing an employer's "legitimate, overriding consideration," which was insufficient to defeat causation, as an affirmative defense to liability. This improperly confuses overriding justification with mixed motive/ same action defense. *See* Comment WPI 330.51. The comment's recognition that the term "legitimate, overriding consideration" is not defined emphasizes that any employer legitimate reason, including absenteeism, can defeat liability. Moreover, this instruction erroneously divorces the employer's alleged overriding justification from the plaintiff's protected activity and it improperly commits to the jury the balance of interests that is for the court to weigh. *See Gardner*, 128 Wn.2d at 942-50.

literally no precedent under Washington (or federal) law suggesting that an employer can defeat an unlawful termination claim based on facts the employer was aware of at the time the employee's dismissal but chose not to consider.[4] Under Judge Fearing's analysis, even if an employer discharges an employee *solely* because of her public policy linked conduct, the employer can prevail in court by asserting that its decision was nevertheless justified by some other reason upon which it never relied. If followed by other courts, the lead opinion in *Martin* would eviscerate the tort of wrongful discharge. The Lead Opinion is inconsistent with decisions of the Supreme Court. RAP 13.4(b)(1).

IV. CONCLUSION

The decision in *Martin* conflicts with decisions of the Supreme Court, RAP 13.4(b)(1), and creates an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). The Petition for Review should be granted.

[4] Judge Fearing claimed to find support for his analysis in the "after-acquired evidence defense." 200 Wn. App. at 363. The after-acquired defense allows an employer to cut-off an unlawfully terminated plaintiff's economic damages based on information the employer discovers *following* the employee's dismissal if the employer proves that the new information would have caused the employer to terminate the employee for the newly discovered lawful reasons. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 354 (1995) (This affirmative defense applies when "the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds"). This Court has not endorsed that defense and it cannot be reconciled with the substantial factor causation standard. In any event, the after acquired evidence doctrine does not permit an employer to defend its actions based on information that it knew about at the time of the employee's termination but upon which it did not actually rely. Moreover, the after-acquired evidence defense applies to economic damages only and does not absolve the employer of liability.

RESPECTFULLY SUBMITTED this 29th day of January 2018.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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Michael Subit, WSBA #29189

- Appendix A –

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WESTLAW **Washington Civil Jury Instructions**

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WPI330.51Wrongful Termination in Violation of Public Policy—Burden of Proof

Washington Practice Series TM
Washington Pattern Jury Instructions--Civil

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Washington Practice Series TM
Washington Pattern Jury Instructions--Civil
December 2017 Update

Washington State Supreme Court Committee on Jury Instructions

Part XVI. Employment
Chapter 330. Employment Discrimination

WPI 330.51 Wrongful Termination in Violation of Public Policy—Burden of Proof

To recover on [his] [her] claim of wrongful termination in violation of public policy, (name of plaintiff) has the burden of proving that a substantial factor motivating the employer to terminate [his] [her] employment was [his] [her] [refusing to commit an unlawful act] [performing a public duty] [exercising a legal right or privilege] [reporting what [he] [she] reasonably believed to be employer misconduct].

If you find from your consideration of all of the evidence that (name of plaintiff) has not met this burden, then you must find for the defendant (name of employer) [on this claim].

If you find from your consideration of all of the evidence that (name of plaintiff) has met this burden, then you must find for plaintiff (name of plaintiff) [on this claim].

[If you find from your consideration of all of the evidence that (name of plaintiff) has met this burden, then you must determine whether (name of employer) has met its burden of proving that it had a legitimate, overriding consideration for terminating (name of plaintiff). If you find that (name of employer) has met its burden of proving it had an overriding consideration for its actions, then you must find for (name of employer). If (name of employer) has not met this burden, then you must find for (name of plaintiff) [on this claim].]

NOTE ON USE

Use this instruction when the plaintiff alleges a termination in violation of public policy.

This instruction sets out the elements of a common law wrongful termination in violation of public policy tort. Use bracketed language when the employer asserts an affirmative defense that it had a legitimate overriding justification for terminating its employee. That affirmative defense would not be applicable to a constructive discharge claim when the former employee resigned.

Give the substantial factor instruction, WPI 330.01.01 (Employment Discrimination—Disparate Treatment—Burden of Proof—Substantial Factor), with this instruction.

COMMENT

This instruction is new for this edition.

The employer's affirmative defense if it terminated the employee is that the termination was justified by an overriding consideration. Rickman v. Premera Blue Cross, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015) (citing Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 947–950, 913 P.2d 377 (1996)). Thus, there could be a mixed motive situation if the employer terminates for an allegedly proper reason yet a substantial factor in the decision involved a violation of public policy. The employer must prove not only a proper motive but that this motive was the "overriding consideration" in the termination.

What constitutes an "overriding consideration" is not defined in the case law.

The three decisions in Becker v. Community Health Systems, 184 Wn.2d 252, 359 P.3d 746 (2015), Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 358 P.3d 1159 (2015), and Rickman v. Premera Blue Cross, 184 Wn.2d 300, 358 P.3d 1153 (2015), effectively overruled Cudney v. ALSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011). The three decisions focused on whether there were alternatives to bringing a tort action. The "substantial factor" test applies to wrongful termination in violation of public policy. See RCW Chapter 49.60, WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof), and WPI 330.01.01 (Employment Discrimination—Disparate Treatment—Burden of Proof—Substantial Factor).

To support a claim, the termination may be direct, by an employer, or it may be constructive, when the employee believes it necessary to resign. Korslund v. DynCorp Tri-Cities Services, Inc., 156 Wn.2d 168, 177 n.1, 125 P.3d 119 (2005).
[Current as of October 2016.]

END OF DOCUMENT

- Appendix B –

§ 7.08 PROVING OVERRIDING JUSTIFICATION

Circumstances may arise, especially in the internal public policy category defined in §§ **7.09[C]** through **7.09[D][5]**, in which the employer does not deny that the determining factor or dominant reason for the dismissal was the employee's public-policy-linked conduct but asserts that legitimate business reasons nevertheless outweigh the public policy and justify the dismissal.[482] This is the *overriding justification* or *business necessity defense.* The justification issue presents this fact question: was there a business necessity for discharging the plaintiff, even if protected conduct was the reason for the dismissal.[483] *Protected conduct* is involved only if both the clarity and jeopardy elements of the public policy tort have been resolved in the plaintiff's favor.

This defense differs from the mixed motive problem addressed in **§ 7.07[B]**. In the mixed motive case, the employer asserts that the real motive for the dismissal had nothing to do with public policy. In the business necessity case, the employer admits that the dismissal related to conduct protected by public policy but asserts that the employer's interests in the circumstances should override the jeopardy to public policy. As Judge Easterbrook explained in *Reeder-Baker v. Lincoln National Corp.*,[484] an employee is entitled statutorily to protest discrimination, but not by punching a supervisor.

If circumstances under which the employee was terminated present questions of business necessity, fact issues should be resolved by the jury,

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[482] *See* Rivera v. Woodward Resource Center, 865 N.W.2d 887, 893, 895, 897 (Iowa 2015) (extensively discussing this book's framework for overriding business justification); Brown & Root, Inc. v. Donovan, 747 F.2d 1029, 1035 (5th Cir. 1984) (pointing out the difference in impact on employment policies between protecting whistleblowing to government agencies as opposed to internal quarrels over employer policies); Zoerb v. Chugach Elec. Ass'n, 798 P.2d 1258, 1262 (Alaska 1990) (citing earlier edition of this text for proposition that legitimate interests may justify discharge partially motivated by improper reason; jury adequately informed as to determining true reason for dismissal; affirming jury verdict for employer in breach of contract/just cause case); Alexander v. Kay Finlay Jewelers, Inc., 208 N.J. Super. 503, 506 A.2d 379 (1986) (dismissal of employee for filing suit in salary dispute did not offend public policy; employer had legitimate interest in being free of harassment from employee suits).

[483] Quoted in Gardner v. Loomis Armored, Inc., 913 P.2d 377 (Wash. 1996) (extensively using framework suggested by this book to conclude that armored car driver fired for assisting holdup victim stated public policy tort claim).

[484] 834 F.2d 1373, 1380-81 (7th Cir. 1987) (dissenting from affirmance of judgment in favor of employee).

and the judge should retain control over balancing the interests of employee, employer, and public policy. The employee should retain the burden of persuasion in convincing the jury that her conduct was not unreasonably disruptive to the employer's legitimate business needs.[485]

The comments to § 870 of the Restatement (Second) of Torts, the section that provides the doctrine for the public policy tort, state that it is the plaintiff's burden to plead and prove the elements of the prima facie

[*Next page is 7-101.*]

[485] Restatement (Second) of Torts § 870, cmt. j (1979).

case[486] and the defendant's burden to plead and prove the existence of any privilege that may be applicable.[487] These two propositions potentially conflict respecting proof of justification. Because lack of justification is an element of the prima facie case under § 870, the comments suggest that the plaintiff has the burden of producing evidence to show lack of justification. Yet, conceptually, justification is a privilege, and the comments also say that the defendant has the burden with respect to privileges.[488]

Consideration of the allocation of responsibility between judge and jury helps explicate the order of proof respecting justification, although the public policy tort cases vary somewhat in the faithfulness with which they honor this allocation.[489] Comment k requires the judge to engage in the interest-balancing process to determine whether tort liability exists for a dismissal in the circumstances alleged by the plaintiff and to decide what privileges apply.[490] Justification is a privilege. The jury is limited by comment k to applying the rules and standards articulated by the judge to the facts that it finds to exist. If the impact of the plaintiff's conduct on the defendant's business is a factual issue, the jury decides that as a matter of fact. The judge decides, as a part of her balancing responsibility, whether the employer had legal justification. The approach that limits the jury to factual questions, suggested in this and following sections, is most consistent with the underlying philosophy of Restatement (Second) § 870 and the nature of wrongful dismissal disputes.

It is desirable for the judge to retain control over the balancing process. Only in this way can the appellate courts retain adequate control over the direction in which the public policy balance is struck. If juries are allowed to strike the balance in individual cases, the constraints on an employer's discretion will be unpredictable and the outcomes largely immune from appellate review.

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[486] Restatement (Second) of Torts § 870, cmts. j, n.

[487] Restatement (Second) of Torts § 870, cmts. e, j. *See also* Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989) (reversing intermediate court; defendant has burden to prove justification for interference with contract; acknowledging authority to contrary).

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[489] *See* Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981) (jury decides not only factual reason for dismissal but also question of whether it contravened public policy). *Accord* Cilley v. New Hampshire Ball Bearings, Inc., 514 A.2d 818 (N.H. 1986).

[490] Restatement (Second) of Torts § 870, cmt. k.

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[490] Restatement (Second) of Torts § 870, cmt. k.

In *Becker v. Rosebud Operating Services, Inc.*,[490.1] the Montana Supreme Court affirmed summary judgment for the employer, finding that good cause existed under the Montana Wrongful Discharge Act, based on the plaintiff's insubordination and profanity directed at his supervisor. In relevant part:

> The Act defines "good cause" as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." Section 39-2-903(5), MCA. A legitimate business reason is one that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business. To defeat a motion for summary judgment on the issue of good cause, the employee may either prove that the given reason for the discharge is not "good cause" in and of itself, or that the given reason is a pretext and not the honest reason for the discharge. If the moving party presents no evidence that there is an issue of material fact relating to the wrongful discharge claim, summary judgment is appropriate.[490.2]

The plaintiff's actions were uncontested, the court continued. In addition:

> ROSI's standards of conduct, set forth in the employee handbook, permitted "disciplinary action ranging from reprimand to immediate discharge, depending on the seriousness . . . of the offense." Serious breaches of conduct, including but not limited to "[u]sing profane or abusive language at any time on Company premises," were identified as potentially warranting immediate discharge. Becker was aware of ROSI's standards of conduct. Although Becker argues that foul language is commonplace at ROSI and was not that of "a ladies' tea party," directing profanity at one's supervisors after being told to calm down and leave the premises is much more egregious than simply using foul language throughout the course of an ordinary workday. Moreover, Becker presented no evidence that ROSI applied its employment policy unequally, arbitrarily or capriciously in this context which may give rise to a question concerning good. The preliminary discipline of placing Becker on leave was certainly authorized under ROSI's policy and, in fact, constitutes further evidence that ROSI management was not engaged in a conspiracy to terminate

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[490.1] 191 P.3d 435 (Mont. 2008).

[490.2] 191 P.3d at 442-43 (internal quotations and citations omitted).

> Becker from the workforce altogether. However brief it may have been, Gray gave Becker an opportunity to go home and calm down, with pay. It was only after Becker further escalated the situation by directing profanity at Kerzman and Gray that he was terminated.[490.3]

The court found that "Becker's behavior was disruptive of ROSI's operation, and Becker presented no evidence that ROSI's reason for terminating him was false, whimsical, arbitrary or capricious. Section 39-2-903(5),[490.4] MCA." The court noted that Becker offered only "conclusory and speculative statements to the District Court that he was terminated for his union activities, and that he was terminated because the limestone blower broke."[490.5] This court agreed with the district court that "Becker presented no evidence that the reason given for his termination was a pretext." Accordingly, the court found that the defendant was entitled to judgment as a matter of law.[490.6]

A clear example of the business necessity defense is *Harman v. LaCrosse Tribune*,[491] in which the employer's interests in proper service to clients overrode public policy in the employee's favor. The lower court held that public policy based on a constitutional right of free speech was overridden by the lawyers' Code of Professional Responsibility when a lawyer employee of the law firm attacked a client during a press release. The Michigan intermediate court, however, rejected the argument that the status of an attorney justifies a dismissal even when that status violates contractual entitlements.[492]

Another example of overriding justification is *Geary v. United States Steel Corp.*,[493] in which the employer apparently was willing to admit that it fired Geary for his protests of safety defects in the employer's steel tubing products but asserted that the manner of his protest was sufficiently unreasonable to justify his dismissal. The Supreme Court of Pennsylvania, affirming the dismissal of the plaintiff's

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[490.3] 191 P.3d at 442-43 (internal quotations and citations omitted).

[490.4] 191 P.3d at 442-43 (internal quotations and citations omitted).

[490.5] 191 P.3d at 442-43 (internal quotations and citations omitted).

[490.6] 191 P.3d at 442-43 (internal quotations and citations omitted).

[491] 117 Wis. 2d 448, 344 N.W.2d 536 (1984).

[492] Mourad v. Automobile Club Ins. Ass'n, 465 N.W.2d 395, 398-400 (Mich. Ct. App. 1991) (affirming in part $1 million judgment for attorney dismissed in violation of implied just cause contract; rejecting argument that contract should not be enforced with respect to attorney).

[493] 456 Pa. 171, 319 A.2d 174 (1974).

complaint, concluded that the most natural inference to be drawn from the facts recited by the plaintiff was that he "had made a nuisance of himself" and the company discharged him to preserve administrative order in its own house."[494] According to the court, Geary had expressed his own point of view about the tubing product, bypassing his immediate superiors and going directly to a vice president of the company. The court hinted that the outcome might be different if a plaintiff presented evidence from which it could be inferred that "the company fired Geary for the specific purpose of causing him harm, or coercing him to break [a] law."[495]

Such cases present questions like those in statutory sex, religion, or age discrimination cases in which the employer admits that the defined characteristic (sex, religion, or age) was the reason for the dismissal but defends on the grounds that the defined characteristic was a bona fide occupational qualification (*see* **Chapter 2**) for the position from which the plaintiff employee was excluded. To prevail on this defense, the employer must show that the discharge because of the characteristic was reasonably necessary to its business operation. Another analogy is found in statutory retaliation cases, in which the employer admits that employee's protest of the general type protected by statute was the reason for the dismissal but defends on the ground that the form or nature of the protest was so disruptive to the employer's legitimate business interests that it should not be liable (*see* **Chapters 3, 11**). The courts have held that a protest of this type may interfere with the employee's job performance to such an extent that a dismissal on the basis of the protest is lawful.[496]

In these statutory cases, the employer must establish an affirmative defense, which means that the employer has the burden of persuasion. In retaliation cases under Title VII (*see* **Chapter 3**), the burden of

[*Next page is 7-103.*]

[494] 456 Pa. 171 at 180, 319 A.2d at 178.

[495] 456 Pa. 171 at 180, 319 A.2d at 178.

[496] *See* Hazel v. United States Postmaster Gen., 7 F.3d 1, 4 (1st Cir. 1993) (affirming judgment on partial findings for employer; employee not entitled to refuse transfer or to refuse work as way of protesting perceived race and age discrimination); Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983), *on remand,* 118 L.R.R.M. (BNA) 2779 (W.D. Pa. 1985) (employer argued that it dismissed the plaintiff for pro-union remarks made to nonmanagement personnel, defending itself against a public policy tort claim based on the First Amendment); Rosser v. Laboreres, 616 F.2d 221, 223 (5th Cir. 1980). Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (similar limitation under NLRA).

proof to show that the form of the protest was inappropriate is on the employer.[497]

In public policy tort cases, the burden of persuasion remains with the plaintiff employee on all three elements, including when mixed motive is involved. But if the employer admits protected conduct was the determining factor in the dismissal but defends on business necessity grounds, the employer should have the burden of persuasion on that defense. In effect, the employer is saying that something special about its business gives it an interest strong enough to override public policy, even though the plaintiff met her burden on all three elements of the public policy tort. The evidence of the special circumstances of the employer's business would be within the employer's control. Therefore, it is fair to put the burden of production on the employer. The burden of persuasion also should be placed on the employer because the proposition advanced by the employer is disfavored as contrary to public policy and is counterintuitive.[498]

The types of factual inquiry in a public policy tort business necessity case are similar to those in statutory bona fide occupational qualification or business necessity cases. In both, the strength of the employer's asserted business necessity[499] defense turns on facts such as the disruption to the employer's business that would result from permitting the plaintiff employee's conduct to continue[500] and the availability of measures other than dismissal, such as transferring the employee to another part of the employer's business to reduce the business impact of the employee's conduct. As the Wisconsin intermediate court of appeals put it, "There are good and bad ways to oppose illegal orders. Reilly (the plaintiff) could not have shot Turner (her boss) in order to protest the order."[501]

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[497] Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

[498] C. McCormick, McCormick on Evidence § 336, at 948-49 (E. Cleary ed., 3d ed. 1984) (discussing factors leading to placing burden of proof on one party or the other).

[499] The term "business necessity" is used as a term of art in disparate impact race, sex, and religion cases. *See* **§ 2.03.** It is used here in a more general sense because the term is more evocative than "bona fide occupational qualification."

[500] *See* Novosel v. Nationwide Ins. Co., 721 F.2d 894, 901 (3d Cir. 1983) (trial court should consider effect of public-policy-protected conduct on employer's efficient operations).

[501] Reilly v. Waukesha County, 535 N.W.2d 51, 55 (Wis. Ct. App. 1995) (affirming summary judgment for defendants) (split opinion).

In cases in which the employee refuses to follow orders (*see* **§ 7.09[D][5]**), after a reasonable investigation by the employer of claims of public policy violation, the employee's conduct may become so obstructive as independently to justify a dismissal.[502] In *Nelson Steel Corp. v. McDaniel*,[503] the Kentucky Supreme Court held that an employee who was dismissed for filing workers' compensation claims against prior employers did not fall within Kentucky's public policy tort doctrine. The court based its conclusion on the employer's legitimate interest in reducing its workers' compensation expenses. For this to be overriding justification, of course, negates the public policy tort as applied to workers' compensation retaliation. The employer's economic interest is the same regardless of whether it dismisses for filing claims against prior employers or against itself.

In *Geary*-type facts, the employer would argue that the protest over product design was effected in such a way as to jeopardize managerial authority to make the final decision over product design. In the words of the Pennsylvania Supreme Court, the employer would argue that the employee "made a nuisance of himself" instead of reasonably advocating public policy.[504] If the jury believed that, the employer would face no liability for the dismissal, even though it was established that the employee's conduct was protected by public policy and that the conduct was the determining factor in the dismissal.[505]

In *Cisco v. United Parcel Service, Inc.*,[506] for example, the court affirmed a dismissal of a public policy tort claim. The employee was terminated after being acquitted of theft and trespass involving a UPS customer. The court reasoned that, even though dismissal for an unsubstantiated criminal charge might violate public policy in Pennsylvania, the employer had an overriding interest in protecting its reputation and business activity, which might be jeopardized by the mere arrest of one

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[502] *See* Devlin v. North Shore Door Co., No. 68063, 1995 WL 277110 (Ohio Ct. App. May 11, 1995) (citing this author on analytical framework for public policy tort; affirming summary judgment against disruptive employee based on business justification).

[503] 898 S.W.2d 66 (Ky. 1995).

[504] Geary v. United States Steel Corp., 456 Pa. 171, 180, 319 A.2d 174, 178 (1974).

[505] *See* Galante v. Sandoz, 196 N.J. Super. 568, 570, 483 A.2d 829, 830 (1984) (dismissal under equitably administered absenteeism policy does not give rise to public policy tort even though absence was occasioned by workers' compensation injury); Slover v. Brown, 140 Ill. App. 3d 618, 621, 488 N.E.2d 1103, 1105 (1986) (same).

[506] 328 Pa. Super. 300, 476 A.2d 1340 (1984).

of its employees.[507] Similar overriding justification may exist when drug testing at safety-sensitive facilities is the basis for the dismissal.[508]

The court in *Gardner v. Loomis Armored, Inc.*,[509] quoted the analysis of overriding justification in the earlier edition of this text, noting that the overriding justification element of the public policy tort permits employers to escape liability even when an employee has established clarity, jeopardy, and causation.[510] It also noted that the overriding justification element enables a court to weigh the employer's argument that a workplace rule should trump public policies furthered by actions like Gardner's in protecting the holdup victim. The majority carefully considered the defendant's explanation of the importance of its rule against armored truck drivers' leaving the truck. Indeed, it concluded that the broad Good Samaritan doctrine urged by Gardner was not a policy of sufficient importance to override the employer's work rule:

> If we followed plaintiff's broad reading of the Good Samaritan doctrine, an employer's interest, however legitimate, would be subjugated to a plethora of employee excuses. A delivery person could stop to aid every motorist with car trouble, no matter how severe the consequences to the employer in terms of misdelivery deadlines. Employees could justify tardiness or absence by claiming they drove an ailing friend to the doctor's office. The Good Samaritan doctrine does not embody a public policy important enough to override an employer's legitimate interest in workplace rules.[511]

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[507] 328 Pa. Super. 300 at 307-08, 476 A.2d at 1344. *See also* Kinoshita v. Canadian Pac. Airlines, Ltd., 803 F.2d 471, 475 (9th Cir. 1986) (airline justified in dismissing for suspicion of drug abuse based on company's need for good reputation); Hayworth v. Deborah Heart & Lung Ctr., 638 A.2d 1354, 1356 (N.J. Super. Ct. App. Div. 1994) (New Jersey's whistleblower statute did not protect an employee who destroyed blood samples in order to protest what he perceived to be inadequate procedures). Alexander v. Kay Finlay Jewelers, Inc., 208 N.J. Super. 503, 506 A.2d 379 (1986) (dismissal of employee for filing suit in salary dispute did not offend public policy; employer had legitimate interest in being free of harassment from employee suits).

[508] *See* Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 21 (N.J. 1992) (affirming reversal of judgment for employee in safety-sensitive job at oil refinery who was fired for failing random drug test; public policy based on constitutional acceptance of privacy interests recognized but overriding employer and public safety interests existed).

[509] 913 P.2d 377 (Wash. 1996).

[510] 913 P.2d 377 at 387-88.

[511] 913 P.2d 377 at 386.

Nevertheless, the majority appropriately reasoned that it "must balance the public policies raised by plaintiff against Loomis' legitimate interest in maintaining a safe workplace and determine whether those public policies outweigh Loomis' concerns."[512] Balancing the rescue of a person from a life-threatening situation against the work rule required that the work rule lose. "By focusing on the narrow public policy encouraging citizens to save human lives from life threatening situations, we continue to protect employers from frivolous lawsuits."[513]

Dissenting Justice Madsen argued that the majority's conclusion on overriding justification would open up to the courts a variety of arguments that work rules should be ignored.[514]

The majority is correct, for the reason succinctly summed up by concurring Justice Guy: "our nature would cause any decent person, under these dire circumstances, to break the rule and save the life."[515]

Life-threatening situations are relatively rare, and it is most unlikely that employees who are dismissed for violating employer safety rules would be very often in a position to assert that they were saving another's life. It surely is appropriate for the overriding justification element to put courts in the position of balancing the relative importance of public policy against the employer's asserted justification, and that balancing, when carefully done and explained, should protect the legitimate interests of employee, employer, and society.

For cases in which business necessity is at issue, the jury instructions should be framed so that the jury makes the necessary factual decisions and the judge retains the ultimate responsibility for balancing the interests of employer, employee, and public policy.[516]

In *Pang v. International Document Services*,[516.1] the Utah Supreme Court affirmed summary judgment against an in-house attorney who claimed his termination resulted from his reporting violations of state lending law. **Section 7.05[C]** summarizes the factual background of the case. The court found that the effect on public policy was outweighed by countervailing interests:

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[512] 913 P.2d 377 at 386.

[513] 913 P.2d 377 at 386.

[514] *Id.* at 392 (Madsen, J., dissenting).

[515] *Id.* at 387.

[516] *See* Nees v. Hocks, 272 Or. 210, 218 n.2, 536 P.2d 512, 516 n.2 (1975) (suggesting that evidence that source at a particular time would have created special hardship might have allowed employer to prevail.

[516.1] 356 P.3d 1190 (Utah 2015).

3. Any policy reflected in rule 1.13 is outweighed by other countervailing interests

¶ 42 Mr. Pang's claim fails for one additional reason. Even if an employee raises a policy that is plainly defined by the requisite authoritative sources and of broad importance to the public, the employer's countervailing interest in regulating its workplace environment may nevertheless outweigh the policy at issue and permit the employee's termination. And here, even if an in-house counsel's duty to "report up" was clear and substantial, we are persuaded that other provisions of the ethical rules express countervailing policy interests that outweigh any Mr. Pang has raised in this case.

¶ 43 Two such policies are protecting a client's right to choose representation and deterring illegal conduct. And the rules strike a delicate balance between allowing clients to secure the representation of their choice and guarding against a client's use of an attorney's services to engage in criminal activity. For example, rule 1.2(a) provides that lawyers must "abide by a client's decisions concerning the objectives of representation" but cannot "assist a client[ ] in conduct that the lawyer knows is criminal or fraudulent." Other provisions give these directives some teeth—rule 1.16 requires an attorney to "withdraw from the representation of a client" if "the representation will result in violation of the rules of professional conduct or other law." And the lawyer must also withdraw if "the lawyer is discharged" by the client. Comment 4 to that rule further emphasizes that the client "has a right to discharge a lawyer at any time, with or without cause."

¶ 44 Accepting Mr. Pang's argument would upset this careful weighing of two important public policies—deterring crime and protecting a client's right to choose a lawyer. If organizational clients faced a potential wrongful termination suit every time they terminate an in-house lawyer with whom they disagreed, it would be more difficult for such clients to secure the representation of their choice—and there is no doubt that a client's right to choose a lawyer occupies a position of paramount importance throughout the rules of professional conduct. Accordingly, we conclude that countervailing policies outweigh the public policy Mr. Pang has raised in this case—that an in-house counsel who "reports up" illegal activity under rule 1.13 should be shielded from the consequences of the at-will employment doctrine.[516.2]

[516.2] *Id.* at 1203-04 (internal footnotes omitted).

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