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Division I
State of Washington
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No. ______

Appellate Court No. 75671-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KING COUNTY CORRECTIONS GUILD,

Appellant,

v.

JARED KARSTETTER and JULIE KARSTETTER,

Respondents.

RESPONDENTS' PETITION TO REVIEW DECISION OF THE COURT OF APPEALS FOR DIVISION ONE

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A. Identity of Petitioner:

Jared Karstetter, Petitioner, respectfully asks this court to accept review of the decision of the Court of Appeals terminating review, designated in Part B of this motion.

B. Court of Appeals Decision

1. The petitioner requests that this Court review the decision of the Court of Appeals, Division One, reversing the decision of the trial court and remanding the case to the trial court to dismiss two of claims in the case (wrongful discharge and breach of contract).

2. The date the decision was entered or filed is: December 26, 2017. Petitioner filed a timely Motion for Reconsideration, which was denied on January 19, 2018.

3. The decision is reported at 1 Wn.App. 2d 822, 407 P.3d 384.[1]

C. Issues Presented for Review

This case presents the following issues for review:

1. Whether the decision of the appellate court conflicts with this Court's decisions in *Becker v. Community Health Systems,* 184 Wn.2d 252, 359 P.3d 746 (2015), *Rose v. Anderson Hay and Grain,* 184 Wn.2d 268, 358 P.3d 1139

[1] The decision contained in the Appendix, for the Court's ease of reference.

(2015); and *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015);[2]

2. Whether the lower court erred in applying an incorrect legal standard to Mr. Karstetter's wrongful discharge claim.

3. Whether, given Washington's strong public policies protecting employees from arbitrary dismissal, the court below erred in removing all job protection from the countless numbers of in-house counsel employed in our State, leaving them without any redress.

4. Whether in-house attorneys in the State of Washington can enforce an employment contract to the extent that it does not directly conflict with the Rules of Professional Conduct.

5. Whether, given the inconsistent appellate opinions regarding contractual rights of in-house counsel, this Court should accept review in order to provide clear guidance to the lower courts and litigants regarding the enforceability of employment agreements with staff attorneys.

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[2] These three cases are hereinafter referred to as "the *Rose* Trilogy."

D. Statement of the Case

Mr. Karstetter has worked for labor organizations representing King County Corrections Officers since 1984.[3] From 1984 to 1987, he was employed as a Business Representative by Public Safety Employees Local 519.[4]

After graduating from law school and passing the Bar in Washington, Mr. Karstetter remained employed with Local 519 in the position of Legal Advisor, which included the job functions that were predominately that of a Business Representative and peripherally as the union's in-house advisor for non-litigation matters. Throughout his employment with Local 519, Mr. Karstetter received a continuing employment contract, which contained terms like those found in the subsequent employment contracts signed by the King County Corrections Guild.[5] Specifically, Mr. Karstetter received the benefit of a just cause standard and an expectation of continuing employment.[6]

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[3] Appx. at 2 (the Declaration of Jared Karstetter in Support of Answer to Motion for Discretionary Review was submitted to the appellate court as part of the Appendix to his responsive brief). All references herein to "Appx" refer to pages in that appellate Appendix. Because the case arose on a CR 12(b)(6) motion, the record consists only of declarations submitted regarding that motion and the subsequent motion for discretionary review.

[4] *Id.*

[5] *Id.* at 2-3; Appx. at 9, 15-17 (Declaration of Henry H. Cannon).

[6] Appx. at 26 (Declaration of Rick Hubl). (CP 137-46).

Similar to his position with Local 519, Mr. Karstetter worked as an employee of the Guild, performing a hodgepodge of labor relations work.[7] When court appearances or similar attorney work was necessary, the Guild would retain the services of outside counsel for litigation or external disciplinary proceedings.[8] In March, 2016, the King County Ombudsman's Office contacted Mr. Karstetter requesting that he produce, either voluntarily or in response to a subpoena, financial records of the Guild related to a whistleblower complaint against a Guild officer. Mr. Karstetter checked with the Guild Vice President who directed him to cooperate with the investigation. 1 Wn.App. 822, 824.

On April 27, 2016, the Guild summarily terminated Mr. Karstetter's employment without warning, opportunity to confer with the Executive Board or any observation of just cause standards in the employment agreement. *Id.* On May 24, 2016, Mr. Karstetter filed suit, claiming *inter alia*, wrongful discharge in violation of public policy, retaliation for whistleblowing, and breach of contract.

In the trial court, the parties engaged in a substantial amount of early motions practice, but little or no discovery. The motions practice resulted in submission of a number of declarations and responses.[9] The

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[7] Appx. at 4.
[8] Appx. at 4.
[9] CP 128-52.

Guild filed a motion to dismiss, which, after significant briefing, the trial court granted dismissal of some claims, but permitted Mr. Karstetter to proceed on claims of breach of contract and wrongful termination.[10] 1 Wn.2d 822, 825. The Guild then sought interlocutory review of this matter, which was granted. *Id.* The case on appeal was briefed and argued and the decision of this Court was issued on December 26, 2017.

E. Argument Why Review Should Be Granted

1. The Appellate Decision Regarding Petitioner's Wrongful Discharge Claim Conflicts With This Court's Decisions in the *Rose* Trilogy

The course of the development of the tort of wrongful discharge in Washington has been fraught with difficulty, and often misunderstood and misapplied by the lower courts. *See. e.g. Martin v. Gonzaga,* 200 Wn.App. 332, 402 P.3d 294 (Div. III, 2017); *Billings v. Town of Steilacoom*, 2018 Wash. App. LEXIS 100 (Div. II, 2017). In *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 655 P. 1084 (1984), this Court first recognized the tort of wrongful discharge as an exception to the at-will doctrine, and held that the employee bears the initial burden of proving that the dismissal violated clear public policy. Explaining its rationale, the *Thompson* Court said:

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[10] CP 39-40.

> We believe that this narrow public policy exception should be adopted because it properly balances the interests of the employer and employee . . . [It] protects against frivolous lawsuits and allows trial courts to weed out cases that do not involve any public policy principle. It allows employers to make personnel decisions without fear of incurring civil liability while at the same time ensuring job security is protected against employer actions that contravene a clear public policy.

Thompson, at 232-33.[11]

Lower courts continued to struggle with the parameters of the public policy tort, limiting claims of wrongful discharge to only four categories of conduct: 1) refusing to commit an illegal act; 2) performing a public duty or obligation; 3) exercising s legal right or privilege; or 4) whistleblowing. *Dicomes v. State*, 113 Wn.2d 612, 618, 792 P.2d 1002 (1989) (hereinafter referred to as "*Dicomes* categories").

In *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996), this Court articulated a four-part test for establishing a wrongful discharge claim: 1) a plaintiff must prove the existence of a clear public policy (the "clarity" element); 2) a plaintiff must prove that discouraging the conduct in which s/he engaged would jeopardize the public policy (the "jeopardy" element); 3) a plaintiff must prove that the public-policy-linked conduct caused the dismissal (the "causation"

[11] Citing *Thompson*, this Court noted in *Rickman*, 184 Wn.2d at 309: "[W]e adopted the public policy tort in recognition that the at-will doctrine gives employers potentially 'unfettered control of the workplace and, thus, allows the employer to take unfair advantage of its employees." That is certainly the case here.

element; and 4) the employer must not be able to offer an overriding justification for the dismissal (the "absence of justification" element). This four-part test is referred to as the "Perritt framework" because it was based on an academic treatise by Professor Henry Perritt Jr.[12]

In the *Rose* Trilogy, this Court held that courts should not apply the Perritt framework in cases that present one or more of the *Dicomes* scenarios:

> [W]hen the facts do not fit neatly into one of the four [*Dicomes*] categories, a refined analysis may be necessary. In those circumstances, the courts should look to the four-part Perritt framework for guidance. But that guidance is unnecessary . . . [where] the facts fall directly within the realm of wrongful discharge in violation of public policy.

Rose v. Anderson Hay & Grain, 184 Wn.2d at 287. Thus, where, as here, an employee alleges that his conduct falls within a *Dicomes* category and that such conduct was a substantial factor motivating his discharge, he has met his burden of proving the tort of wrongful discharge. *Rickman* , 184 Wn.2d at 314. No more "refined analysis" using the Perritt framework is warranted. *Rose*, 184 Wn.2d at 287.

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[12] Henry J. Pettitt Jr., Workplace Torts: Rights and Liabilities, 1991.

Mr. Karstter's complaint described conduct that fell squarely within items number 2 and 4 of the *Dicomes* categories:[13]

> On March 4, 2016, Mr. Karstetter was contacted by the King County Ombudsman's Officer regarding a whistleblower complaint involving parking reimbursement to two Guild members. The Guild Vice President directed Mr. Karstetter to cooperate fully with the Ombudsman. Pursuant to the King County Code, Mr. Karstetter was compelled to produce certain documentation under threat of Superior Court action for compelled compliance.

Docket #1, ¶22. Mr. Karstetter's Complaint made two separate claims for relief which "fit neatly" into the *Dicomes* scenarios: wrongful discharge for performing a public duty [Count II] and whistleblower retaliation [Count III].[14]

It cannot be said that complying with requests for information necessary to the outcome of a public investigation, or even complying with a subpoena for such purpose, falls outside of this Court's definition of clear public policy. *Id.* Assisting a public official in an official

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[13] The record herein establishes that plaintiff would be able to prove sufficient facts to justify recovery on his wrongful discharge claim. The complaint avers that he exercised a public duty by providing information requested by a governmental official to aid in a whistleblowing investigation (¶22), that his employer knew of such activities(¶¶ 22,23) and that he was discharged for those reasons (¶26).

[14] The Court of Appeals apparently conflated these two separate claims by deducing that Mr. Karstetter was pursuing only a whistleblower claim. Actually, his claims fell into two of the *Dicomes* scenarios: #2 – when employees are fired for performing a public duty and #4 – when employees are fired in retaliation for reporting employer misconduct. See also: *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984); *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 96, 913 P.2d 377 (1996); *Rose v. Anderson Hay & Grain*, 184 Wn.2d 268, 287, 358 P.3d 1139 (2015).

investigation falls squarely in *Dicomes* area #2 – "where the discharge resulted due to the employee performing a public duty or obligation." Nothing in *Dicomes* or its progeny removes activity from the protections of the public policy tort if the activity results from a subpoena or a law that compels cooperation in an investigation.

Karstetter's action also falls within *Dicomes* area #4 – "where the employee was fired for reporting employer misconduct." Here, Karstetter reported to the King County Ombudsman misconduct by a Guild officer – a representative of his employer. It advances the public interest in law enforcement and investigation of misuse of public funds to encourage employee to cooperate with investigation of such issues. *See: Gaspar v. Peshastin Hi-Up Growers*, 131 Wn.App. 630, 128 P.3d 627 (Div. III, 2006), wherein a general manager sued his employer alleging that he was fired for assisting a police investigation about his employer's questionable purchases of postage stamps. Citing *Gardner v. Loomis Armored Inc,*[15] for the proposition that there is a clear public policy encouraging citizens to assist law enforcement, the *Gaspar* court held that "recognition of a public policy to assist law enforcement is fundamental," opining that "[t]here is no public policy more important or more fundamental than the one

[15] 128 Wn.2d 931, 913 P.2d 377 (1996).

favoring effective protection of the lives and property of citizens." *Id.* at 637.[16]

In blatant disregard of this Court's *Rose* directive not to apply the Pettitt framework where, as here, the facts fall squarely in the *Dicomes* scenarios, the Court of Appeals nonetheless applied the Perritt framework and ruled that "[b]cause Karstetter's complaint fails to allege facts showing that he engaged in public-policy linked conduct, the trial court should have dismissed the wrongful discharge claim" 1 Wn.2d 822, 833. Review should be granted to clarify that the Pettitt framework should be considered only in those rare wrongful discharge cases that do not fit within one or more of the *Dicomes* scenarios. The Court of Appeals decision is in direct conflict with a decision of the Supreme Court. RAP 13.4(b)(1).[17]

2. The Decision Below Improperly Renders The Entire Population of In-House Attorneys in Washington "At-Will" Employees, Without Redress

Washington has a long history of protecting employee rights and

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[16] The issue here – seeking unjustified reimbursement by the County for parking – is a misappropriation of citizen's property, to wit: money paid into the public fisk by taxpayers.

[17] The lower court also applied the wrong standard for assessing the sufficiency of the complaint at the CR 12(b)(6) stage. Its analysis appears closer to the stricter requirement of federal pleading under *Ashcroft v. Iqbal*, 556 U.S. 544, 570, 127 S. Ct. 1955 (2007), a doctrine rejected by this Court in *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 101-02, 233 P.3d 861 (2010); *Handlin v. On-Site Manager Inc.*, 187 Wn.App. 841, 845, 351 P.3d 226 (2015).

preventing employers from abusive employment practices. *See e.g.:* RCW Chapter 49, RCW 39.12, RCW 18.27.040, RCW 60.04, RCW 60.28, and RCW 39.08. Indeed, this Court frequently has noted "Washington's long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000); *accord: Pellino v. Brink's Inc.*, 164 Wn.App. 668, 684, 267 P.3d 383 (Div. I, 2011). By making in-house counsel "at will" employees, regardless of whether or not they have an employment contract, and leaving them without any redress, even for contract damages, the decision below deviates from that "proud history."

Across the State of Washington and this nation, multitudes of members of the Bar are employed by corporations, unions, governmental agencies and other corporate entities. To protect their status as employees, and prevent arbitrary treatment by their employer, these "in-house" lawyers often have contracts with their one employing entity, providing terms and conditions of their employment.[18] Such arrangements are fundamentally different from a retainer between a client and an attorney in private practice whose income is derived from representing numerous clients. An in-house attorney is, in all respects, an employee with the same

[18] WSBA reports that currently 3,021 Washington lawyers self-report that they serve as in-house counsel. See: www.wsba.org/docs/default-source/licensing/membership.

concerns and vulnerabilities as a non-lawyer employee; and in some respects is even more worthy of protection given the importance to their reputation and ability to perform as an attorney elsewhere in the legal community.[19]

But despite Washington's long and proud history, the decision below invalidates employment agreements between employers and only those employees who fall within the narrow band of those who have a law license. Even assuming *arguendo* that portions of such contracts might be unenforceable pursuant to the Rules of Professional Conduct §1.16, Comment 4, which states: "A client has a right to discharge a lawyer at any time, with or without cause," the decision of the court below does not even preserve the employee's right to recover damages for the employer's unilateral termination.[20]

To reach such anomalous result, the court below relied on cases involving lawyers in private practice. *E.g: LK Operating, LLC v. Collection Group, LLC,* 181 Wn.2d 48, 331 P.3d 1147 (2014). (1 Wn.App. 2d at 827-28). In that case, as cited by the appellate court, the "RPCs are

[19] There are benefits to both parties from an employment agreement – for example, the employer has unlimited access for legal advice or guidance at a fixed, often lower cost; the employee has a guaranteed salary and administrative assistance at no cost to the employee. These are contracts negotiated at arm's-length, by mutual agreement.

[20] Of course, rather than fire Mr. Karstetter, the Guild could simply have revised his job description to preclude any lawyer work and retained him as a business representative – work that historically had constituted the lion's share of his duties.

clearly directed at promoting the public good and preventing public injury." *LK Operating,* 181 Wn.2d at 86-87. Such considerations are in recognition of the relative lack of sophistication inherent in the non-legally trained public versus the presumptively more sophisticated and legally trained provider of legal services. There is no basis for such considerations where a corporation such as the union here seeks to hire an attorney, not for one legal matter at a fee dictated by the attorney, but for full-time employment at compensation negotiated between the parties and to perform duties dictated by the employer.

In *LK Operating*, this Court analyzed former RPC 1.8(a) and whether the terms of a joint venture proposal between an attorney and client were unfair to the client's interests, or if there lacked an appreciable disclosure of terms to the client. When considering whether a contract is unenforceable because it violates public policy, the Court had to decide whether the contract itself is injurious to the public. 181 Wn.2d at 87. Clearly, a contract of employment – *even one that involves an attorney-employee* – is neither prohibited, nor does it violate the public good. Even when a RPC violation is asserted as a defense to a contract claim, there is no rule that declares such contracts as automatically unenforceable. *Id.* at 87-88. Referring to its reluctance to establish a strict rule, this Court stated that the following:

> Such a holding would shift the guiding inquiry from whether the *contract* is injurious to the public to whether the *RPC violation* is injurious to the public — the former is relevant when determining whether a contract is unenforceable because it violates public policy, while the latter is relevant in attorney disciplinary proceedings. It would also ignore the clear admonishment that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."

Id. (*citing* Model Rules, Scope at ¶ 20) (*italics and internal quotes in the original*).

Clearly the Guild cannot be considered an unsophisticated consumer of legal services that needed protection. It had negotiated employment contracts with Mr. Karstetter for decades; it was represented in negotiation of such contracts by an outside attorney, and successfully dictated many of the crucial provisions of those contracts. *See Appx. 2-6; 8-14; 25-31.* Although the appellate court opined that "Karstetter cannot show that the challenged contract terms do not violate the policy behind the applicable RPC" (1 Wn.App. 2d at 828), that conclusion ignored the declarations in the record attesting to the knowledge and sophistication of the Guild as a consumer of legal services and its decades-long participation in an employment relationship with Mr. Karstetter. By so doing, the appellate court ignored this Court's admonishment in *LK Operating* that "the

purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."[21]

The admonishment is particularly relevant here where the employer simply invoked RPC 1.16 to defend against its misdeeds and establish a plausible excuse for terminating a long-term employee four years into a five-year term.[22] Even assuming *arguendo* that Mr. Karstetter's employment agreement violated RPC 1.16, rather than dismiss the case, the lower court should have simply remanded it to the trial court to conduct a separate factual inquiry outside the context of the Guild's 12(b)(6) motion.[23] Like the inquiry in *LK Operating*, there will be additional relevant facts, documents and witness perspectives that are more appropriate for consideration by the trial court in the context of a CR 56 summary judgment motion. *LK Operating*, 181 Wn.2d at 73 (*e.g., What was the contractual intent of the Guild officers when contracting with its employee and repeatedly extending his contracts?*). An attorney's compliance or non-compliance with ethical rules is likely a factual inquiry

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[21] The court below erroneously asserted that "Karstetter identifies no facts or hypothetical facts that would support a finding that the termination provision does not violate public policy." (1 Wn.App. 2d at 832).

[22] CP 1-16. Seeking to bolster its reasons for termination, the Guild asserted that Karstetter had disclosed "Guild client confidences." (1 Wn.App. 2d at 826). But there is nothing in the record to prove that the Guild officer accused of the misdeeds being investigated by the King County Ombudsman had ever sought legal advice from Karstetter or otherwise established a lawyer-client privilege. As the only employee of the Guild, Mr. Karstetter knew about the parking reimbursement issue as any other employee would, lawyer or non-lawyer.

that cannot be resolved easily on summary judgment, let alone on a 12(b)(6) motion to dismiss, as here. *See e.g., Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan*, 109 Wn.App. 436, 445-46, 988 P.2d 467 (Div. I, 1999).

3. The *Karstetter* Decision Is Inconsistent With Other Appellate Decisions Involving Employment Contracts With Attorneys.

In *Chism v. Tri-State Constr., Inc.*,[24] the appellate court considered the interplay between the Rules of Professional Conduct and the breach of contract claims brought by an attorney-employee of a construction company. The appellate court struggled with the application of RPC 1.5 and 1.7 to disputes over attorney-employee wage contracts. For example, a finding that an ethical conflict exists inherently between an attorney-employee and client-employer when negotiating compensation, "would cast doubt on the wage negotiations of scores of Washington attorneys – not only in-house corporate counsel like Chism, but also government attorneys and numerous nonprofits attorneys." *See Chism*, 193 Wn. App. at 848.

When evaluating RPC 1.8, the *Chism* court concluded that because there is a fundamental difference between an employment contract and a fee agreement, applying RPC 1.8 risks disruption of a variety of

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[23] CP 17-30.

employment arrangements. A broad interpretation would render each compensation agreement of an attorney-employee as *prima facie* fraudulent, thus "disturbing the settled expectations of many lawyer-employees." *See Chism*, 193 Wn. App. at 852. Notably, Mr. Chism also relied on a WSBA advisory opinion stating that RPC 1.8 does not apply to the negotiation of an employment contract as in-house legal counsel.[25] *Id.* at 853.

The appellate court's decision here, if allowed to stand, would yield untenable and absurd results like those contemplated and rejected in *Chism*. *Id.* at 852. For example, an employer may simply preempt any potential liability on statutory or contractual claims by specifying a decision to terminate the attorney-client portion of their relationship and, therefore, enable the employer to disregard its legal responsibilities. Notably, the court below offered no Washington authority to suggest that an employer may sever a contracted employment relationship unilaterally, even if it does possess the right to terminate the co-existing attorney-client relationship. Assuming that RPC 1.16 applies to an employment

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[24] 193 Wn. App. 818, 374 P.3d 193 (Div. I, 2016).
[25] Appx. 89 (a true and correct copy of the WSBA Rules of Pro'l Conduct Comm., Advisory Op. 1045 (1986) is included in the Appendix to this petition for ease of reference.) The undersigned could not locate any relevant advisory opinions on RPC 1.16. Advisory Op. 2219 (2012) addresses the responsibilities of in-house counsel regarding supervision of others, but does not provide any meaningful guidance on the issues contested herein.

relationship with an attorney-employee, the court below failed to acknowledge that the Guild still had options to avoid a breach of the employment agreement; it could have placed Mr. Karstetter on administrative leave through the end of his contract, provided him the opportunity to meet and respond to the concerns of the Executive Board, or limited his work responsibilities to non-legal, non-representational tasks.

Corey v. Pierce Co., 154 Wn.App. 752, 225 P.3d 367 (Div. I, 2009) also demonstrates the confusion extant in the appellate courts. Ms. Corey faced the decision to accept a promotion, but lose her job security as a consequence of the advancement. Before she accepted the position as the third-highest ranking deputy prosecutor for her employer Pierce County, Ms. Corey secured an agreement for just cause protections applicable to her position. *Corey*, 154 Wn.App. at 757. Although the *Corey* court found a lack of consideration for an express or implied contract to provide due process, it allowed her to pursue a promissory estoppel claim using the same evidence. *Corey*, 154 Wn.App. at 768. Similar to the facts in *Corey*, Mr. Karstetter received a clear and definite promise of employment security and just cause protections.[26] Notwithstanding *Chism* and *Corey*, the court below invalidated Mr.

Karstetter's contract in its entirety, without allowing him even recovery of contract damages or other appropriate relief. This Court should accept review to bring consistency to appellate decisions in this area and to clarify how in-house attorneys can enjoy the same job protection as their non-lawyer compatriots. RAP 13.4(b)(2).

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court grant review of the decision of the court below.

DATED this 15th day of February, 2018.

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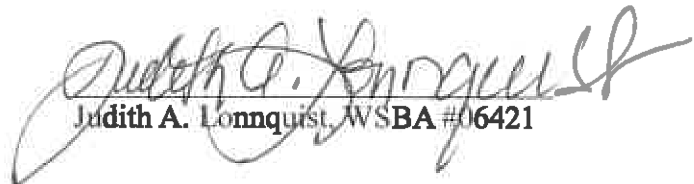

Judith A. Lonnquist, WSBA #06421

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[26] *Id.* at 768-70.

APPENDIX

Karstetter v. King County Corr. Guild

Court of Appeals of Washington, Division One

November 1, 2017, Oral Argument; December 26, 2017, Filed

No. 75671-1-I

Reporter

1 Wn. App. 2d 822 *; 407 P.3d 384 **; 2017 Wash. App. LEXIS 2940 ***; 2017 WL 6570601

JARED KARSTETTER ET AL., *Respondents*, v. KING COUNTY CORRECTIONS GUILD ET AL., *Petitioners*.

Subsequent History: Reconsideration denied by Karstetter v. King County Corr. Guild, 2018 Wash. App. LEXIS 134 (Wash. Ct. App., Jan. 19, 2018)

Prior History: [***1] Appeal from King County Superior Court. Docket No: 16-2-12397-0. Judge signing: Honorable Patrick H Oishi. Judgment or order under review. Date filed: 07/21/2016.

Core Terms

public policy, trial court, termination, wrongful discharge claim, termination provision, whistle-blower, in-house, just cause, attorney-client, violate public policy, breach of contract, services, contract claim, without cause, violates, alleges, asserts, fired

Case Summary

Overview

HOLDINGS: [1]-The trial court should have dismissed the lawyer's claim against his former employer for breach of the "just cause" termination provision in his employment contract because the termination provision conflicts with the well-established rule that a client may fire a lawyer at any time and for any reason; [2]-The trial court should have dismissed the lawyer's claim for wrongful discharge in violation of public policy because he did not plead sufficient facts to support his claim--i.e., he did not adequately allege that he was engaged in the protected activity of whistleblowing; [3]-The lawyer alleged that he provided information to the investigator of a whistleblowing complaint but was not a whistleblower himself--the lawyer did not show that he reported any misconduct to remedy that misconduct or that his actions were motivated by a desire to further the public good.

Outcome

Order denying the employer's motion to dismiss the claims was reversed and the case was remanded for the trial court to dismiss the claims.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1[] **Reviewability of Lower Court Decisions, Adverse Determinations**

Wash. R. App. P. 2.3(b)(2) allows review if a trial court committed probable error that substantially altered the status quo or that substantially limited a party's freedom to act.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Dismissal > Involuntary Dismissals > Motions

HN2[] **Motions to Dismiss, Failure to State Claim**

Wash. Super. Ct. Civ. R. 12(b)(6) allows a court to dismiss a claim only when it appears beyond doubt that the claimant can prove no set of facts, consistent with its complaint, which would justify recovery. The court assumes the truth of all facts alleged in the complaint and may consider hypothetical facts supporting the claim. A trial court should grant a Wash. Super. Ct. Civ. R. 12(b)(6) motion sparingly and with care in the unusual case where the claimant's allegations show an insuperable bar to relief on the face of the complaint.

Civil Procedure > Dismissal > Involuntary Dismissals > Appellate Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3 Involuntary Dismissals, Appellate Review

A trial court's Wash. Super. Ct. Civ. R. 12(b)(6) decision presents a question of law, which an appellate court reviews de novo.

Civil Procedure > Attorneys

Legal Ethics > Client Relations

Labor & Employment Law > Employment Relationships > At Will Employment

Labor & Employment Law > Wrongful Termination > Breach of Contract > For Cause Standard

HN4 Civil Procedure, Attorneys

It is a well-established rule that a client may fire a lawyer at any time and for any reason. Over many years, Washington courts have repeatedly recognized this rule and applied it in fee disputes between an attorney and a client. The Washington Supreme Court has noted the unique nature of the attorney-client relationship and stated that the rule permitting a client to fire its attorney is necessary to protect both the client and the public.

Civil Procedure > Attorneys

Legal Ethics > Client Relations

Labor & Employment Law > Employment Relationships > At Will Employment

Labor & Employment Law > Wrongful Termination > Breach of Contract > For Cause Standard

HN5 Civil Procedure, Attorneys

Unlike general contract law, under a contract between an attorney and client, a client may discharge his attorney at any time with or without cause. A client may, at any time, either for good or fancied cause, or out of whim or caprice, or wantonly and without cause whatever, discharge his attorney and terminate the attorney-client relationship. Clients have the right to discharge their attorney at any time, for any reason.

Civil Procedure > Attorneys

Legal Ethics > Client Relations

Labor & Employment Law > Employment Relationships > At Will Employment

Labor & Employment Law > Wrongful Termination > Breach of Contract > For Cause Standard

HN6 Civil Procedure, Attorneys

Given the special nature of the attorney-client relationship, the image of a client unwillingly saddled with an attorney the client neither wants nor needs is highly disturbing. This rule, though a harsh and stringent one against the attorney, exposing the attorney frequently as it does to undeserved censure and criticism, is thought necessary for the protection of the client in particular and the public in general.

Civil Procedure > Attorneys

Legal Ethics > Client Relations

Labor & Employment Law > Employment Relationships > At Will Employment

Labor & Employment Law > Wrongful Termination > Breach of Contract > For Cause Standard

HN7 Civil Procedure, Attorneys

Wash. R. Prof. Conduct 1.16(a) provides that a lawyer shall withdraw from the representation of a client if the lawyer is discharged. Comment 4 to the rule states that a client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Neither the rule nor the comment excludes in-house counsel from the rule's application.

Civil Procedure > Attorneys

Legal Ethics > Client Relations

Labor & Employment Law > Employment Relationships > At Will Employment

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > Discharges

Labor & Employment Law > Wrongful Termination > Breach of Contract > For Cause Standard

HN8[] **Civil Procedure, Attorneys**

A "just cause" termination provision in a contract employing a lawyer directly conflicts with the rule that a client may fire a lawyer for any reason at any time. It also purports to modify the lawyer's ethical obligations by requiring cause for discharge and allowing the lawyer to dispute a discharge rather than withdrawing when discharged.

Civil Procedure > Attorneys

Legal Ethics > Client Relations

Labor & Employment Law > Employment Relationships > Employment Contracts

HN9[] **Civil Procedure, Attorneys**

The Washington Rules of Professional Conduct (RPCs) are clearly directed at promoting the public good and preventing public injury. It is therefore possible, as a general matter, to find principles of public policy relevant to the enforceability of contracts in the RPCs. A contract violating *Wash. R. Prof. Conduct 1.8(a)*--limiting a lawyer's ability to enter into a business transaction with a client--presumptively also violates the public policy underlying the rule. A contract entered in violation of *Rule 1.8(a)* may still be enforced where it is shown, based on the specific factual circumstances that, notwithstanding the violation, the contract itself does not contravene the public policy underlying the Rule. A contract entered in violation of *Rule 1.8(a)* may not be enforced unless it can be shown that notwithstanding the violation, the resulting contract does not violate the underlying public policy of the rule.

Civil Procedure > Appeals > Citations, Precedence & Publication

Governments > Courts > Judicial Precedent

HN10[] **Appeals, Citations, Precedence & Publication**

An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.

Civil Procedure > Appeals > Citations, Precedence & Publication

Governments > Courts > Judicial Precedent

HN11[] **Appeals, Citations, Precedence & Publication**

The Washington Court of Appeals is obliged to follow the decisions of the Washington Supreme Court.

Labor & Employment Law > Wrongful Termination > Public Policy

HN12[] **Wrongful Termination, Public Policy**

A wrongful discharge in violation of a public policy claim has three elements that must be proved by the plaintiff: (1) the existence of a clear public policy (the clarity element), (2) that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy (the jeopardy element), and (3) the public-policy-linked conduct caused the dismissal (the causation element), plus (4) the defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element).

Labor & Employment Law > Wrongful Termination > Public Policy

HN13[] **Wrongful Termination, Public Policy**

To establish the jeopardy element of a claim for wrongful discharge in violation of public policy, a plaintiff must show that he engaged in particular conduct, and the conduct directly related to the public policy, or was

necessary for the effective enforcement of the public policy. The plaintiff must also show how the threat of discharge will discourage others from engaging in desirable conduct and that other means of promoting the public policy are inadequate.

Labor & Employment Law > Wrongful Termination > Public Policy

HN14[] **Wrongful Termination, Public Policy**

The Washington Supreme Court has noted the four areas where a clear public policy against an employee's discharge exists: (1) where the discharge was a result of refusing to commit an illegal act; (2) where the discharge resulted due to the employee performing a public duty or obligation; (3) where the termination resulted because the employee exercised a legal right or privilege; and (4) where the discharge was premised on employee "whistleblowing" activity.

Labor & Employment Law > Wrongful Termination > Public Policy

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Scope & Definitions

HN15[] **Wrongful Termination, Public Policy**

Whistleblowing occurs when an employee reports employer misconduct in an attempt to remedy that misconduct.

Civil Procedure > Appeals > Costs & Attorney Fees

Labor & Employment Law > Wage & Hour Laws > Remedies > Costs & Attorney Fees

Labor & Employment Law > Wrongful Termination > Remedies > Costs & Attorney Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN16[] **Appeals, Costs & Attorney Fees**

Wash. Rev. Code § 49.48.030 permits a person to recover attorney fees if that person is successful in recovering judgment for wages or salary owed to him or her.

Headnotes/Syllabus

Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: A lawyer whose employment as legal counsel for a public employees labor union was summarily terminated by the union sought relief on claims for breach of contract, wrongful discharge, retaliation, negligent infliction of emotional distress, tortious interference with employment, and specific performance of contract.

Superior Court: On the defendants' motion to dismiss all of the plaintiffs' claims, the Superior Court for King County, No. 16-2-12397-0, Patrick H. Oishi, J., on July 21, 2016, dismissed the claims for retaliation, tortious interference, and specific performance. The plaintiffs subsequently sought discretionary review of the trial court's decision not to dismiss the claims for breach of contract and wrongful discharge.

Court of Appeals: Holding that the claim for breach of contract should have been dismissed because the "just cause" termination provision in the lawyer's employment contract conflicted with the well-established rule that a client may fire a lawyer at any time for any reason and that the claim for wrongful discharge should have been dismissed because the plaintiffs did not show that the lawyer engaged in the protected activity of whistle-blowing, the court *reverses* the trial court's decision not to dismiss the claims for breach of contract and wrongful termination and *remands* the case with instructions for the trial court to dismiss the two claims.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1][] [1]

Attorney and Client > Attorney-Client Relationship > Termination > At Will.

A lawyer may be discharged by a client at any time, for any reason.

WA[2][] [2]

Attorney and Client > In-House Counsel > Termination > At Will.

An organization's in-house counsel may be discharged

by the organization at any time, for any reason.

WA[3][] [3]

Attorney and Client > Attorney-Client Relationship > Employment Contract > Termination > Necessity for Cause > Validity.

A provision in a lawyer's employment contract requiring the employer to have just cause to terminate the lawyer's employment and requiring notice to the lawyer of behavior the employer deems inappropriate, an opportunity to correct the behavior, and arbitration of any disputed termination is invalid and unenforceable as it conflicts with the rule that a lawyer may be discharged by a client at any time, for any reason.

WA[4][] [4]

Courts > Stare Decisis > Supreme Court Holding > Compliance > By Court of Appeals > Necessity.

The Court of Appeals is obliged to follow the decisions of the Supreme Court.

WA[5][] [5]

Employment > Termination > Violation of Public Policy > Clear Public Policy > Necessity.

A claim for wrongful discharge in violation of public policy is not actionable absent proof that the claimant engaged in an activity protected by public policy.

WA[6][] [6]

Employment > Termination > Violation of Public Policy > Categories.

A claim for wrongful discharge in violation of public policy may arise when an employer discharges an employee for (1) refusing to commit an illegal act, (2) performing a public duty or obligation, (3) exercising a legal right or privilege, or (4) engaging in whistle-blowing activity.

WA[7][] [7]

Employment > Termination > Violation of Public Policy > Whistle-Blowing > What Constitutes > In General.

To constitute whistle-blowing, an employee's communication must report employer misconduct in an attempt to remedy the misconduct.

WA[8][] [8]

Employment > Termination > Violation of Public Policy > Whistle-Blowing > What Constitutes > Compelled Participation.

An employee's helping with an investigation because doing so is required by law and because of a threat of court action does not constitute whistle-blowing.

LEACH, J., delivered the opinion for a unanimous court.

Counsel: *Dmitri L. Iglitzin* and *Katelyn M. Sypher* (of *Schwerin Campbell Barnard Iglitzin & Lavitt LLP*), for petitioners.

Judith A. Lonnquist (of *Law Offices of Judith A. Lonnquist PS*), for respondents.

Judges: Authored by J. Leach. Concurring: Mary Kay Becker, Ronald Cox.

Opinion by: J. Leach

Opinion

[*823] [386]**

¶1 LEACH, J. — We granted discretionary review of the trial court's denial of King County Corrections Guild's (Guild) motion to dismiss Jared ***Karstetter***'s breach of contract and wrongful discharge claims. The trial court should have dismissed ***Karstetter***'s breach of contract claim **[*824]** because Washington public policy makes the contract's termination provision unenforceable. And ***Karstetter***'s wrongful discharge claim fails because he did not plead sufficient facts to support that claim. We reverse and remand to the trial court for dismissal of these two claims.

FACTS

¶2 The Guild is a labor organization and the exclusive bargaining representative of corrections **[***2]** officers and sergeants employed by the King County Department of Adult and Juvenile Detention. ***Karstetter***

has served as legal counsel for the Guild since 1996. This case involves the parties' most recent contract, signed in 2011 by the Guild and the Law Offices of Jared C. ***Karstetter*** Jr. PS. Titled an employment agreement between the Guild and the law firm, it had a term of five years. The contract required that the Guild have just cause to terminate ***Karstetter*** and required notice, an opportunity to correct, and arbitration of any disputed termination.

¶3 In March 2016, the King County Ombudsman's Office (Ombudsman) contacted ***Karstetter*** about a whistle-blower complaint. ***Karstetter*** claims the Guild's vice-president told ***Karstetter*** to cooperate with the Ombudsman. ***Karstetter*** then complied by producing requested documents.

¶4 On April 27, 2016, the Guild summarily fired ***Karstetter***. ***Karstetter*** alleges that the Guild fired him "ostensibly for disclosure of information to the Ombudsman and for disloyalty." The Guild claims that it fired ***Karstetter*** because of strong evidence that he disclosed the Guild's client confidences.

¶5 ***Karstetter***, along with his wife, Julie ***Karstetter***, who worked for the law firm as a **[***3]** legal assistant, sued the Guild and others, alleging several claims. The Guild moved to dismiss all claims against it: breach of contract, wrongful discharge, retaliation, negligent infliction of emotional distress, tortious interference with employment, and specific **[*825]** performance of contract. The trial court granted the Guild's motion in part, dismissing ***Karstetter***'s retaliation claim, tortious interference claim, and request for specific performance. The Guild requested discretionary review of the court's decision not to dismiss the breach of contract and wrongful discharge claims. We granted review under HN1[] RAP 2.3(b)(2). This rule allows review if the trial court committed probable error that substantially alters the status quo or substantially limits the Guild's freedom to act.

ANALYSIS

¶6 The Guild claims that the trial court should have dismissed ***Karstetter***'s breach of contract and wrongful termination claims against it. HN2[] CR 12(b)(6) allows a court to dismiss a claim only when it appears beyond doubt that the claimant can prove no set of facts, consistent with its complaint, that would justify recovery.[1] The court assumes the truth of all facts alleged in the complaint and may consider hypothetical facts supporting **[***4]** the claim.[2] A trial court should grant a CR 12(b)(6) motion "'sparingly and with care'" in the unusual case where the claimant's allegations show an insuperable bar to relief on the face of the complaint.[3] HN3[] **[**387]** The trial court's CR 12(b)(6) decision presents a question of law, which this court reviews de novo.[4]

Breach of Contract

WA[1-3][] [1-3] ¶7 The Guild contends that the trial court should have dismissed ***Karstetter***'s breach of contract claim because the contract's termination provision violates Washington **[*826]** public policy about a client's ability to terminate an attorney-client relationship. ***Karstetter*** claims that this policy does not apply when the attorney is the client's employee. We agree with the Guild.

¶8 Specifically, the Guild asserts that the termination provision conflicts with HN4[] the well-established rule that a client may fire a lawyer at any time and for any reason. Over many years, Washington courts have repeatedly recognized this rule and applied it in fee disputes between an attorney and a client.[5] Our Supreme Court has noted the unique nature of the attorney-client relationship and stated that the rule permitting a client to fire its attorney is necessary to

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[1] ***Bravo v. Dolsen Cos., 125 Wn.2d 745, 750, 888 P.2d 147*** ***(1995).***

[2] FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014).

[3] ***Southwick v. Seattle Police Officer John Doe No. 1, 145 Wn. App. 292, 296, 186 P.3d 1089 (2008)*** (internal quotation marks omitted) (quoting ***Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998)***).

[4] ***Tenore, 136 Wn.2d at 329-30.***

[5] ***Belli v. Shaw, 98 Wn.2d 569, 577, 657 P.2d 315 (1983)*** (HN5[] "Unlike general contract law, under a contract between an attorney and client, a client may discharge his attorney at any time with or without cause."); ***Kimball v. Pub. Util. Dist. No. 1 of Douglas County, 64 Wn.2d 252, 257, 391 P.2d 205 (1964)*** ("A client may, at any time, either for good or fancied cause, or out of whim or caprice, or wantonly and without cause whatever, discharge his attorney and terminate the attorney-client relationship."); ***Fetty v. Wenger, 110 Wn. App. 598, 600 n.4, 36 P.3d 1123 (2001)*** ("Clients have the right to discharge their attorney at any time, for any reason.").

protect both the client and the public.[6]

¶9 Washington's [***5] Rules of Professional Conduct reflect this policy. HN7[] RPC 1.16(a) provides that a lawyer shall "withdraw from the representation of a client if ... (3) the lawyer is discharged." Comment 4 to this rule states, "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." Neither the rule nor the comment excludes in-house counsel from the rule's application.

¶10 The contract's termination provision states,

> *Just Cause For Termination*: It is understood by the parties that ATTORNEY is expected to perform in a manner consistent [*827] with the quality and expectations of the GUILD. It is further understood that ATTORNEY is primarily answerable to the President of the GUILD and secondarily answerable to the Executive Board of the GUILD. Consistent with the rights and expectations of the members that the GUILD represents ATTORNEY may be terminated for just cause. The definition of Just Cause shall be the same definition that is currently contained in the Collective Bargaining Agreement for GUILD members. In the event that the GUILD wishes to exercise this provision, due notice shall be provided to ATTORNEY and an opportunity to correct [***6] any behavior that GUILD deems inappropriate. ATTORNEY shall be afforded fundamental due process and an opportunity to answer to any and all charges. Termination of this Agreement shall be reserved as a final option. In the event that ATTORNEY disputes the findings and determination of the GUILD with regard to a Just Cause termination, ATTORNEY and GUILD agree to arbitrate said dispute in a manner consistent with the Arbitration Clause contained in the Collective Bargaining Agreement.

HN8[] This provision directly conflicts with the rule that a client may fire a lawyer for any reason at any time. It also purports to modify ***Karstetter***'s ethical obligations by requiring cause for discharge and allowing him to dispute his discharge rather than withdrawing when discharged.

¶11 ***Karstetter*** does not dispute that the Guild is his client. Instead, he claims a contractual [**388] right to challenge and arbitrate his client's decision to fire him. This attempted modification of ***Karstetter***'s ethical obligations violates a long- and well-established public policy adopted by our Supreme Court to protect both clients and the general public. For these reasons, it is unenforceable.

¶12 We find support for our conclusion in *LK Operating, LLC [***7] v. Collection Group, LLC.*[7] In that case, the court observed, HN9[] "The RPCs are clearly directed at promoting the public good and preventing public injury ... . It is therefore possible, as a general matter, to find principles of public [*828] policy relevant to the enforceability of contracts in the RPCs."[8] It specifically found that a contract violating RPC 1.8(a)—limiting a lawyer's ability to enter into a business transaction with a client—presumptively also violated the public policy underlying the rule.[9] The court stated, "A contract entered in violation of former RPC 1.8(a) [(2000)] may still be enforced where it is shown, based on the specific factual circumstances that, notwithstanding the violation, the contract itself does not contravene the public policy underlying former RPC 1.8(a)."[10] The court added,

> We do not purport to set out any all-encompassing rule for how violation of any RPC in connection with a contract might affect that contract's enforceability. We simply reaffirm that a contract entered in violation of former RPC 1.8(a) may not be enforced unless it can be shown that notwithstanding the violation, the resulting contract does not violate the underlying public policy of the rule.[11]

[6] ***Barr v. Day, 124 Wn.2d 318, 328, 879 P.2d 912 (1994)*** (HN6[] "Given the special nature of the attorney-client relationship, we find the image of a client unwillingly saddled with an attorney she neither wants nor needs highly disturbing."); ***Kimball, 64 Wn.2d at 257*** ("This rule, though a harsh and stringent one against the attorney, exposing him frequently as it does to undeserved censure and criticism, is thought necessary for the protection of the client in particular and the public in general.").

[7] 181 Wn.2d 48, 331 P.3d 1147 (2014).

[8] LK Operating, 181 Wn.2d at 86-87.

[9] LK Operating, 181 Wn.2d at 89.

[10] LK Operating, 181 Wn.2d at 89.

[11] LK Operating, 181 Wn.2d at 89-90. Any difference between the former and current versions of RPC 1.8(a) is not significant or important to our decision.

Like the attorney in *LK Operating*, ***Karstetter*** [***8] cannot show that the challenged contract terms do not violate the policy behind the applicable RPC.

¶13 ***Karstetter*** correctly notes that the procedural posture of this case differs from *LK Operating*. There, the court reviewed a summary judgment decision. ***Karstetter*** asserts that a dismissal based on the allegations in his complaint is inappropriate. He claims that if the contract violates the RPCs, some factual inquiry is still necessary to decide if the contract violates public policy. But ***Karstetter*** identifies no facts or hypothetical facts that would support a finding that the termination provision does not violate public policy. Unlike *LK Operating*, the trial court needed no more factual inquiry to determine that the termination provision violated [*829] public policy. No hypothetical set of facts could reconcile this provision with Washington's strong public policy of allowing a client great freedom in a decision to fire its attorney.

¶14 ***Karstetter*** asserts that his status as an employee of the Guild[12] distinguishes his case from Washington cases allowing a client to fire an attorney at any time and for any reason because courts decided those cases in the context of a typical attorney-client relationship. [***9] [13] He asserts that the principles of contract and employment law should take precedence over established Washington public policy and govern the parties' relationship.

¶15 ***Karstetter*** relies on *Corey v. Pierce County*.[14] There, a Pierce County deputy prosecutor made a promissory estoppel claim based on a representation that her employment contract contained a "just cause" provision.[15] But our *Corey* decision does not help [**389] ***Karstetter*** because we were not asked to consider and did not decide whether the alleged contract violated public policy.[16]

¶16 ***Karstetter*** also relies on *Chism v. Tri-State Construction, Inc.*[17] ***Karstetter*** cites *Chism* for the proposition that no inherent conflict of interest exists when an attorney negotiates with his employer about his compensation. ***Karstetter***'s claim does not turn on that issue. And *Chism* did not consider any contract provision limiting the client's [*830] right to sever the attorney-client relationship. Chism sought only earned bonuses, consistent with his compensation agreement, for services provided.[18] Here, ***Karstetter*** seeks lost future income for services that he will never provide. *Chism* provides no support for this claim.

¶17 Finally, ***Karstetter*** relies on a California [***10] Supreme Court case, *General Dynamics Corp. v. Superior Court*.[19] In *General Dynamics*, the California Supreme Court held that an attorney employed as in-house counsel could bring a contract claim against a client-employer for breach of a "good cause" termination provision.[20] We do not find this decision helpful because the California Supreme Court has limited a client's unfettered right to discharge its attorney in a way that our Supreme Court has not.

WA[4][↑] [4] ¶18 In *General Dynamics*, the court limited a client's right to fire an attorney without liability for future damages to contingent fee personal injury

[12] ***Karstetter***'s complaint alleged that he was an employee of the Guild. The Guild does not contest the adequacy of this allegation. We assume for purposes of this decision that ***Karstetter*** was an employee of the Guild.

[13] ***Barr, 124 Wn.2d at 328; Belli, 98 Wn.2d at 577; Kimball, 64 Wn.2d at 257.***

[14] ***154 Wn. App. 752, 225 P.3d 367 (2010).***

[15] ***Corey, 154 Wn. App. at 757.*** Corey had no contract claim because the county received no consideration for the promise that she could be fired only for just cause. ***Corey, 154 Wn. App. at 768.***

[16] ***Cont'l Mut. Sav. Bank v. Elliott, 166 Wash. 283, 300, 6 P.2d 638 (1932)*** (HN10[↑] "An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.").

[17] 193 Wn. App. 818, 374 P.3d 193, ***review denied, 186 Wn.2d 1013 (2016).***

[18] Chism served as in-house counsel to Tri-State Construction. *Chism, 193 Wn. App. at 825-26*. He negotiated his own salary arrangement and bonuses. *Chism, 193 Wn. App. at 825-34*. After Chism resigned from his in-house position with Tri-State Construction, he sued to recover unpaid bonuses. *Chism, 193 Wn. App. at 835*. The jury awarded Chism $750,000 in unpaid earned bonuses. *Chism, 193 Wn. App. at 836*. The trial court, however, ordered Chism to disgorge a portion of the award because it found Chism had committed numerous RPC violations. *Chism, 193 Wn. App. at 837*. We reversed the trial court because we found no Supreme Court precedent for the order. *Chism, 193 Wn. App. at 858-60*.

[19] ***7 Cal. 4th 1164, 876 P.2d 487, 32 Cal. Rptr. 2d 1 (1994).***

[20] ***Gen. Dynamics, 876 P.2d at 496.***

cases.[21] The Washington Supreme Court has not similarly limited the client's termination rights. In *Kimball v. Public Utility District No. 1 of Douglas County*,[22] our Supreme Court applied Washington's rule to a professional services contract between a law firm and a public utility for complex legal services related to a large hydroelectric dam project. The court held that the public utilities district could terminate the law firm at any time with or without cause and was liable for **[*831]** the reasonable value of services provided up to the time of termination.[23] The court's use of Washington's **[***11]** rule in *Kimball* informs our decision here. Because HN11[] we are obliged to follow the decisions of our Supreme Court, we decline ***Karstetter***'s invitation to follow *General Dynamics*.[24]

¶19 We note that ***Karstetter*** does not base his contract claim on an allegation that the Guild fired him for an illegal or improper reason. He makes that allegation in the context of his wrongful discharge claim only, which we address next.

Wrongful Discharge Claim

¶20 The Guild asserts that the trial court should have dismissed ***Karstetter***'s wrongful discharge claim because ***Karstetter*** did not adequately plead it. We agree.

[390]**

¶21 Other jurisdictions have split on whether an attorney-employee may bring a wrongful discharge claim against his client-employer.[25] We need not decide this question here, however, because ***Karstetter*** failed to plead all elements of his wrongful discharge claim.

WA[5,6][] [5, 6] ¶22 HN12[] A wrongful discharge in violation of a public policy claim has four elements:

> (1) The plaintiffs must prove the existence of a clear public policy (the *clarity* element).
>
> (2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element).
>
> **[*832]** (3) The plaintiffs **[***12]** must prove that the public-policy-linked conduct caused the dismissal (the *causation* element).
>
> (4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).[26]

HN13[] "To establish jeopardy, the plaintiff must show that he 'engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy.'"[27] He must also show "how the threat of discharge will discourage others from engaging in desirable conduct" and "that other means of promoting the public policy are inadequate."[28] HN14[] Our Supreme Court has noted the four areas where a clear public policy exists:

> (1) where the discharge was a result of refusing to commit an illegal act, (2) where the discharge resulted due to the employee performing a public duty or obligation, (3) where the termination resulted because the employee exercised a legal right or privilege, and (4) where the discharge was premised on employee "whistleblowing" activity.[29]

WA[7,8][] [7, 8] ¶23 ***Karstetter*** relies on the fourth of

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[21] ***Gen. Dynamics, 876 P.2d at 494-95.***

[22] ***64 Wn.2d 252, 391 P.2d 205 (1964).***

[23] ***Kimball, 64 Wn.2d at 257.***

[24] *General Dynamics* also held that in-house counsel may bring a retaliation claim against a client-employer. ***Gen. Dynamics, 876 P.2d at 502-03.*** We do not intend this decision to comment on the merits of that issue.

[25] Compare ***Gen. Dynamics, 876 P.2d at 502*** (explaining the circumstances where in-house counsel may bring a retaliation claim), *and* Burkhart v. Semitool, Inc., 2000 MT 201, ¶ 41, 300 Mont. 480, 5 P.3d 1031 (relying on *General Dynamics* to hold that right to discharge an attorney without consequences did not apply to an attorney-client relationship where the attorney is an employee of the client), *with* Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d 104, 110, 164 Ill. Dec. 892 (1991) (declining to extend the tort of retaliatory discharge to in-house counsel and holding that the rule that a client may discharge his attorney at any time, with or without cause, applies equally to in-house counsel and outside counsel).

[26] ***Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 941, 913 P.2d 377 (1996)*** (citations omitted).

[27] *Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 290, 358 P.3d 1139 (2015)* (quoting ***Gardner, 128 Wn.2d at 945***).

[28] *Rose, 184 Wn.2d at 290.*

[29] ***Dicomes v. State, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989)*** (citations omitted).

these recognized public policies—protection from discharge for "whistleblowing"—but does not adequately allege that he was engaged in [***13] this protected activity. HN15[] Whistle-blowing occurs when an employee reports employer misconduct in an attempt to remedy that misconduct.[30] ***Karstetter***'s complaint states,

> [*833] On March 4, 2016, Mr. ***Karstetter*** was contacted by the King County Ombudsman's Office regarding a whistleblower complaint involving parking reimbursement to two Guild members. The Guild Vice President directed Mr. ***Karstetter*** to cooperate fully with the Ombudsman. Pursuant to the King County Code, Mr. ***Karstetter*** was compelled to produce certain documentation under threat of Superior Court action for compelled compliance.

In other words, ***Karstetter*** alleges that he provided information to the investigator of a whistle-blowing complaint but was not a whistle-blower himself. ***Karstetter*** does not show that he reported any misconduct to remedy that misconduct or that his actions were motivated by a desire to further the public good.[31] To the contrary, ***Karstetter*** alleges that he helped with the investigation because the King County Code and the threat of superior court action compelled him to. Thus, the whistle-blower protection contemplated by [**391] Washington courts does not apply to ***Karstetter***.

¶24 Because ***Karstetter***'s complaint fails to allege [***14] facts showing that he engaged in public-policy-linked conduct, the trial court should have dismissed the wrongful discharge claim.

Attorney Fees

¶25 ***Karstetter*** requests attorney fees and costs under *RAP 18.1* and *RCW 49.48.030*. HN16[] *RCW 49.48.030* permits a person to recover attorney fees if that person "is successful in recovering judgment for wages or salary owed to him or her." As ***Karstetter*** does not prevail in this appeal, we deny his request for attorney fees.

CONCLUSION

¶26 Because the termination provision of the Guild contract is unenforceable and ***Karstetter*** did not plead all facts [*834] necessary to maintain his wrongful discharge claim, the trial court should have dismissed ***Karstetter***'s breach of contract and wrongful discharge claims.[32] We reverse, remand, and direct the trial court to dismiss those claims.

BECKER and COX, JJ., concur.

Reconsideration denied January 19, 2018.

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[30] ***Dicomes, 113 Wn.2d at 618-19.***

[31] *See* *Rickman v. Premera Blue Cross, 184 Wn.2d 300, 313, 358 P.3d 1153 (2015)*.

[32] Because the record before us is sufficiently complete to permit a full decision on the merits of the issues presented, we deny ***Karstetter***'s motion to supplement the record.

WSBA

Advisory Opinion: 1045
Year Issued: 1986
RPC(s): RPC 1.8
Subject: Conflict of interest; negotiation of employment contract for legal services

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A lawyer negotiated with corporate management over an employment contract to serve as legal counsel. The contract provided that part of the lawyer's compensation would be shares in the publicly traded corporation. The Committee was of the opinion that negotiations as described by you in working out an employment contract for the full time job of legal counsel for a corporation does not violate RPC 1.8. It appeared to be an arm's length transaction, and it did not appear that you were in any way giving legal advice to the corporation.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

CERTIFICATE OF SERVICE

I, Morissa Knudsen, an employee of the Law Offices of Judith A. Lonnquist, P.S., declare under penalty of perjury that on February 16, 2018, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of the foregoing document.

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Dated: this 16th day of February, 2018.

Morissa Knudsen

LAW OFFICES OF JUDITH A. LONNQUIST, P.S.

February 16, 2018 - 2:28 PM

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