Supreme Court No. 91029-4

SUPREME COURT OF THE STATE OF WASHINGTON

JOETTA RUPERT,

Appellant,

vs.

KENNEWICK IRRIGATION DISTRICT

Respondent,

ANSWER TO PETITION FOR REVIEW

JERRY J. MOBERG, WSBA No. 5282
JERRY MOBERG & ASSOCIATES, P.S.
Attorneys for Respondent
P.O. Box 130
124 3rd Ave S.W.
Ephrata, WA 98823
(509) 754 2356

TABLE OF CONTENTS

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

I. IDENTITY OF RESPONDENT

Respondent Kennewick Irrigation District (hereafter District) asks the Court to deny Joetta Rupert's petition for review.

II. COUNTER-STATEMENT OF THE CASE

1. INTRODUCTION

Joetta Rupert, an at-will employee, sued the District after it terminated her employment. She claimed that her termination was in retaliation for opposing activity protected by the Washington Law against Discrimination (49.60 RCW) and in violation of Washington public policy because she had engaged in whistleblower activity. Prior to her termination she had never made any complaint that she was being retaliated against because she was opposing any protected activity. She also failed to file any claim under the Whistleblower Policy of the District. The trial court dismissed her lawsuit on summary judgment. The Court of Appeals affirmed the summary dismissal holding that she had not made a *prima facie* showing of the elements of a WLAD retaliation claim or a public policy tort claim.

2. FACTS RELATED TO RETALIATION CLAIM.

In her Retaliation claim, Plaintiff claims she opposed a hostile work environment directed at her based on her gender. Her hostile work

environment claim is based on a few sporadic instances of disagreement in the work place that, after she was terminated, she claimed were acts of gender discrimination.

Ms. Rupert was an "at-will" employee of the District who reported directly to the District's Board of Directors. (CP 420) Ms. Rupert was hired by the District to work in the real estate department. She was initially hired as an administrative assistant and then promoted to manager of that department. (CP 136, 146, 147)

Charles Freeman is the Manager of the District. On June 17, 2010, Ms. Rupert claims that she informed District Board member Gene Huffman that she needed to speak to Mr. Freeman about work problems she was having with Mr. Revell, a co-worker. Mr. Huffman allegedly told Ms. Rupert not to contact Mr. Freeman because he had been "burned before" and "was not comfortable being alone with [a] woman." (CP 136, 238-239, 420-421, 424)[1] In her Interrogatory answers she claimed that she told Mr. Huffman it was "unprofessional conduct on his [Freeman] part and that it was hampering business." (CP 223) In her sworn deposition testimony she admits that she did not actually recall the

[1] In her Petition, Ms. Rupert claims that Mr. Freemen "refused to speak to her in person because she was a woman." She also claims that Mr. Huffman "ordered [her] not to have any contact with Mr. Freeman. (Petition at 5) This is more argument than fact. Her sworn deposition testimony does not support this argument. (CP 235-38)

substance of the conversation but recalled her displeasure that Realty business was being hampered because of two managers not being able to communicate one-on-one. (CP 236) She could not recall if she met one-on-one with Mr. Freeman after that. (CP 239) She admits that she did not report this issue to anyone in management although she may have mentioned it to her administrative assistant Judy Smith. (Id)[2]

On March 6, 2010, Ms. Rupert presented the board her easement recommendations for certain KID-owned property. She complained that Patrick McGuire, a board member, "berated her for a full minute" at an executive board meeting where other board members were present. She admits that she "tried to discuss my displeasure of this" with Mr. Pringle and Mr. Huffman. She did not report this conduct to anyone as being discriminatory. (CP 226) She further explained the "meeting" in her deposition. She admits that it was really an evaluation session between her and the board. She was directly supervised by the board. The board members were unhappy with her performance and let her know how they

[2] Ms. Rupert claims in her Petition that she protested that this was discriminatory conduct. The problem is that she makes this claim in her declaration submitted in opposition to the summary judgment motion. (CP 185-202) This declaration is contrary to her earlier sworn responses to Interrogatories (CP 227) and her earlier sworn deposition testimony (CP 235-39) and should be disregarded. *In Sun Mountain Prod., Inc. v. Pierre*, 84 Wash.App. 608, 617–18, 929 P.2d 494 (1997); See also, *Marshall v. AC & S, Inc.*, 56 Wash.App. 181, 185, 782 P.2d 1107 (1989), *Dalton v. State*, 130 Wash.App. 653, 661, 124 P.3d 305, 309 (2005).

felt. (CP 244-247) She never reported to anyone that she perceived the evaluation session to be gender based harassment. (Id.).

The same day, Board members and managers attended a retreat where Ms, Rupert claims both President Jaksch and Board member, Gene Huffman, made comments about not wanting to sit next to her. (CP 41, 136) Ms. Rupert alleges Mr. Jaksch was invited to sit by her in a public meeting and he jokingly said to Gene Huffman "why do I have to sit next to her?" referring to Ms. Rupert. Both gentlemen laughed about the comment. Ms. Rupert admits that she did not report the conduct to anyone. (CP 226) She did not consider it discrimination at the time. (Id.)

She complained about an incident that occurred in May of 2010 where Patrick McGuire and his wife, Penney approached her at a board meeting break and said that Patrick McGuire was going to come down hard on her because she had been rude to him at an earlier meeting. (CP 226) She "told Gene Huffman and John Jaksch" [board members] about the conversation. She did not claim that this was sex-based discrimination. (Id)

She alleges that she told Jon Jaksch about another incident occurring in May 2010 at a realty committee meeting where Gene Huffman and John Pringle "belittled me and were very condescending in their responses to my questions and concerns." The concerns were about

her posting and advertising a job position for an office assistant. She did not suggest that this was gender based nor did she make a complaint about it. She simply told Mr. Jaksch about it and confronted Mr. Freeman (who was not at the meeting) to ask what his involvement was with the decision to not post the position. (CP 227)

On July 15, 2010, Ms. Rupert met with Board member Huffman. The meeting was precipitated by her threat earlier in that week to file a hostile work environment claim against Board member Pat McGuire because Mr. McGuire had contacted the executive director of the Port of Kennewick and accused Ms. Rupert of lying. (CP 383, 290) She did not claim that the hostility was gender based. Again, she changed her story in her later filed declaration in support of summary judgment, claiming that she specifically complained of gender discrimination. Her earlier sworn testimony does not support that claim. The hostility resulted from her belief that Mr. McGuire had accused her of lying. (CP 290)

In her declaration filed in opposition to summary judgment Ms. Rupert claimed for the first time that she complained to Board member John Pringle that she was being discriminated against based on her gender. (CP 189). She does not identify a date of this conversation. This claim is contradictory to her Interrogatory answers where she was asked to identify every complaint she made about gender harassment. She did not identify

any conversation with Mr. Pringle in that regard. (CP 378, 381-84) Likewise, when asked in her sworn deposition testimony to identify any persons to whom she complained about gender discrimination she never mentioned any conversation with Mr. Pringle. (CP 287 – 92)

In the same declaration she also claims she made similar complaints to Board member John Jaksch at a lunch meeting at the Country Gentleman restaurant. However this claim is inconsistent with in her earlier answers under oath to Interrogatories propounded to her and her sworn deposition testimony. Id.

These are the sum total of the incidents Plaintiff claims constituted gender based harassment while working for KID. She did not report any of these events as being in violation of WLAD nor claim they were gender based. They were simply work place complaints. It was not until after she was terminated that she claimed sexual harassment and retaliation.

3. FACTS RELATED TO PUBLIC POLICY TORT CLAIM.

Her public policy whistleblower claim is based primarily on issues related to the District's utilization of endowment funds. Ms. Rupert sets out the salient facts on this claim in her Petition so they will not be restated in this Response. (Petition at 2-5) She did not pursue any whistleblower claim under the District's policy. She simply brought this public policy tort claim after her termination.

4. COURT OF APPEALS DECISION

The Court of Appeals affirmed the trial court's summary dismissal in an unpublished opinion. *Rupert v. Kennewick Irrigation District,* 2014 WL 5216477, (Div. 3,2014) It held that:

- Employers may generally terminate at-will employees without cause;
- Ms. Rupert did not establish that she had engaged in any statutorily protected activity under RCW 49.60;
- Ms. Rupert failed to show *prima facie* causation in her retaliation claim;
- Ms. Rupert could not establish the jeopardy element in her public policy tort claim since the statutory whistleblower protections of the Local Government Whistleblower Protection Act (LGWPA), RCW 42.41.303-040 provides adequate protections of the public policy negating any need to rely on a public policy tort claim.
- *Piel v. City of Federal Way,* 177 Wn.2d 604, 609–10, 306 P.3d 879 (2013) does not apply to this case since the statutory protection in *Piel* (RCW 41.56.905) is different than the LGWPA protections provided to Ms. Rupert.

- Ms. Rupert failed to establish the causation element of the public policy tort claim.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. THE COURT OF APPEALS RULING ON THE RETALIATION CLAIM IS CONSISTENT WITH EXISTING CASE LAW.

The Court of Appeals opinion on the WLAD retaliation claim is entirely consistent with previous case law in Washington. Ms. Rupert spends much of her time simply arguing that the Court of Appeals misapplied these established principle of law in her case. The Court did not. Furthermore, that is not a valid reason for this Court to review the opinion.

The Court of Appeals properly identified and applied the elements of a *prima facie* claim to this appeal. The Court properly noted that "Absent some reference to the plaintiff's protected status, a general complaint about an employer's unfair conduct does not rise to the level of protected activity under WLAD." (Opinion at 6) The Court of Appeals concluded from the review of the record that all of Ms. Rupert's complaints were involving workplace issues, not harassment or discrimination. Ms. Rupert simply failed to come forward with sufficient evidence to create a material question of fact on this point. A review of the record in this case demonstrates the Court of Appeal's wisdom in this

regard. Ms. Rupert complained about a number of workplace encounters but never once claimed that she was opposing a forbidden practice or that the interactions were discriminatory to her based on her gender. The Court of Appeals applied the proper law to this case and its ruling is correct. Furthermore, the Court of Appeals determined that Ms. Rupert did not create a triable issue on causation. Ms. Rupert failed to demonstrate sufficient facts to establish that her alleged "oppositional conduct"[3] was a substantial motivating factor in the District's decision to terminate her at-will status. In her Petition Ms. Rupert spends most of her effort on arguing with the Court of Appeals ruling on the merits of her case. The ruling is correct and entirely consistent with the well-established principles under WLAD. Furthermore, disagreement with the Court's substantive ruling is not a recognized basis for granting review.

Mr. Rupert does eventually argue that the decision is in conflict with *Scrivener v. Clark College*, 334 P.3d 541 (2014) regarding the issue of pretext. The pretext argument is simply a "straw man" argument made in an effort to create a basis for review by this court. The Court of Appeals did not base its ruling on a "pretext" analysis and never discussed the pretext issue. Therefore, Ms. Rupert's pretext argument is irrelevant. The Court of Appeals decided this case on the basis that Ms. Rupert did

[3] Actually the Court of Appeals did not find any evidence in the record of oppositional

not create a question of fact on her claim of oppositional activity or causation. As the Court of Appeals noted at page 4 of its opinion:

> Ms. Rupert's complaints were not specific or formally made. Moreover, she initially did not claim the actions were discriminatory. Instead, she complained solely about workplace issues, not harassment or discrimination. She expressed professional concern to Mr. Huffman about being unable to meet with Mr. Freeman because it interfered with her work, even though Mr. Huffman told her Mr. Freeman "had been burned before" by female employees and was not comfortable being alone with them. CP at 238. Ms. Rupert deposed she did not recall the entirety of the conversation but recalled her displeasure that business was being hampered because of two managers not being able to communicate. Ms. Rupert admitted she did not report this conversation to anyone in management. Ms. Rupert claims Mr. Huffman tried to give her a hug as she left a meeting and she thought that was sexual harassment. But, again, this was unreported.
>
> Ms. Rupert fails to show she engaged in statutorily protected activity or persuade us genuine material fact issues remain. She did not complain to any supervisor or to the human resource department of activity that was forbidden by WLAD. Her complaints were centered on financial issues related to the reserve fund and unprofessional treatment, not gender based discrimination issues. Ms. Rupert did not make complaints under *Alonso* or *Estevez* fairly considered as opposition to employment practices forbidden by anti-discrimination law or other practices she reasonably believed to be discriminatory. *Short,* 169 Wn.App. at 205. (Emphasis added)

It is clear that after Ms. Rupert was terminated she started looking for a way to challenge her "at-will" termination. It was not until she filed

---

conduct so the causation ruling logically follows.

this suit that she made any claim that she was discriminated because of her gender and that her termination was in retaliation for her oppositional activity. Her belated claims of discrimination were legally insufficient to overcome her lawful "at-will" termination. The Court of Appeals correctly noted that the Board "had become dissatisfied for some time with Ms. Rupert's performance, [the fact that] her department was over budget, and she took sick leave contrary to [District's] sick leave policy." Id. Ms. Rupert did not create a material factual dispute to show either that she had engaged in oppositional activity or that the District's adverse employment action was substantially motivated by her alleged and non-existent oppositional activity.

2. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH *PIEL V. CITY OF FEDERAL WAY.*

Ms. Rupert argues, *Pet. at 16-17,* that the Court of Appeals' decision conflicts with this Court's decision in *Piel v. City of Federal Way,* 177 Wash.2d 604, 306 P.3d 879 (2013). It does not. *Piel* involved the very narrow question of whether Piel had met the requirements of the "jeopardy prong" of the limited common law tort of termination in violation of public policy where he alleged "a tort claim for wrongful termination in violation of public policy is viable based on provisions of chapter 41.56 RCW involving the Public Employees Relations

Commission (PERC)." Id. at 607. The trial court held that the remedies permitted under RCW 41.56 provided sufficient protections for the public policy implicated in Piel's claim and therefore dismissed Piel's public policy tort claim. The trial court's ruling was directly contrary to the holding in *Smith v. Bates Technical College,* 139 Wash.2d 793, 991 P.2d 1135 (2000) where the Supreme Court recognized that an employee protected by a collective bargaining agreement may bring a common law claim for wrongful termination based on the public policy provisions of RCW 41.56 notwithstanding the administrative remedies available under that statute. In reversing the trial judge's obvious error in ignoring the holding in *Smith,* the Court took the opportunity to better explain its jeopardy analysis and harmonize the recent decisions in *Cudney v. ALSCO, Inc.,* 172 Wash.2d 524, 259 P.3d 244 (2011), and *Korslund v. DynCorp Tri–Cities Services., Inc.,* 156 Wash.2d 168, 125 P.3d 119 (2005), with *Smith. Piel* at 607 Neither *Piel* nor *Smith* address the specific protections provided in the LGWPA, chpt. 42.41 RCW which are implicated in this case.

The employer in *Piel* argued that the Court in *Smith* did not address the "jeopardy prong" argument. *Piel* made it clear that *Smith* did resolve the jeopardy argument and that RCW 51.46 did not provide sufficient protections to advance the public policy of that statute. More

importantly, *Piel* made it clear that the Court was not retreating from its holdings in *Cudney* and *Korslund*, two cases that found their respective statutes did provide sufficient protections to promote public policy thereby defeating the "jeopardy" element. The Court of Appeals in this case carefully considered the holdings of *Piel, Cudney* and *Korsland. Rupert* at 5-7. It then held:

> Here, the LGWPA provides remedies of reinstatement, back pay, injunctive relief, costs, reasonable attorneys' fees, and civil penalties and does not contain a provision providing "provisions of this chapter are intended to be additional to other remedies and shall be liberally construed" as was the case in *Piel.* 177 Wn.2d at 617 (quoting RCW 41.56.905). Ms. Rupert argues the LGWPA protections are inadequate because she cannot get compensatory damages. But, "[t]he other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy." *Hubbard v. Spokane County,* 146 Wn.2d 699, 717, 50 P.3d 602 (2002). Moreover, "the tort of wrongful discharge is not designed to protect an employee's purely private interest ... rather, the tort operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." *Smith v. Bates Technical Coll.,* 139 Wn.2d 793, 801, 991 P.2d 1135 (2000). The question here, as it was in *Korslund,* is "whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy." *Korslund,* 156 Wn.2d at 183. In this case, we conclude they are.

Contrary to Ms. Rupert's claim that the Court of Appeals opinion is in conflict with *Piel* the ruling is, in fact, entirely consistent with *Piel.*[4]

3. THIS CASE DOES NOT INVOLVE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Ms. Rupert argues that this Court should grant the Petition and declare that the LGWPA (RCW 42.41. et. seq) remedies are inadequate as a matter of law to promote the public policy espoused in the act. She claims that this is a matter of substantial public interest. She is mistaken.

Firstly, it is not the LGWPA that is in controversy in this case but, instead, it is the District's local Whistleblower policy. (CP 67-74) While the local policy provides substantially all of the protections found in the LGWPA, the local policy does not command the broad public attention suggested by Ms. Rupert. The provisions of the local policy do not involve an issue of substantial public interest.

Secondly, even if the local policy involved issues of substantial public interest, the policy is legally sufficient. It provides significant

[4] Ms. Rupert suggests that the "*Piel* Court determined that statutory remedies were 'inadequate where no recovery for emotional distress is available.' Id. at 614 (citing and quoting *Danny v. Laidlaw Transit Services, Inc.,* 165 Wn.2d 200, 232-233, 193 P.3d 128 (2008). *Piel* does not make such a direct holding. The citation in *Danny* is to the dissenting/concurring opinion. The majority in *Danny* only addressed the "clarity" element not "jeopardy" element. Emotional distress is a private remedy. Thus, in Washington the tort of wrongful discharge is not designed to protect an employee's purely private interest in his or her continued employment; rather, the tort operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy. *Smith v. Bates Technical College,* 139 Wash.2d 793, 801, 991 P.2d 1135, 1140 (2000).

protections that clearly promote the public policy, including the right to keep the reporting employee's identification confidential., the right to a prompt investigation and the right to a hearing before an administrative law judge. (Id.)

Thirdly, even if the LGWPA is implicated, its remedies are sufficient to promote the public policy of the statute. They include the right to reinstatement, with or without back pay, and such injunctive relief as may be found to be necessary in order to return the employee to the position he or she held before the retaliatory action and to prevent any recurrence of retaliatory action. The administrative law judge may also award costs and reasonable attorneys' fees to the prevailing party. If a determination is made that retaliatory action has been taken against the employee, the administrative law judge may, in addition to any other remedy, impose a civil penalty personally upon the retaliator of up to three thousand dollars payable by each person found to have retaliated against the employee and recommend to the local government that any person found to have retaliated against the employee be suspended with or without pay or dismissed. RCW 42.41.040

Ms. Rupert argues that these protections are inadequate to promote the public policy. She claims that the statute is lacking because it does not provide her with a private right to seek emotional distress damages. This

private remedy does not make the statutory protections inadequate. See argument, supra. She also claims the statute is deficient because it does not provide for an award of "front pay." However, since she is entitled to a complete and unconditional reinstatement, front pay would never be an implicated remedy under this statutory scheme.

She complains that the attorney fee provision in the statute is inadequate because the award can only be made to a prevailing party. It only seems reasonable that the fee award should go to the prevailing party.[5]

She next argues that because she must file the retaliation claim within 30 days, the statute does not promote the public policy. This Court in *Cudney* specifically rejected this argument and upheld RCW 49.17.160 as sufficient even though it contained the same 30 day notice requirement.[6] *Cudney* at 533 Ms. Rupert argues that the statute fails to promote public policy because she is required to exhaust the administrative remedies of the statute before being entitled to pursue a public policy tort claim. Again, she is mistaken. If the LGWPA did not adequately promote the public policy she could proceed with her public policy tort claim without exhausting the administrative remedies of the

[5] Interestingly, the public policy tort claim would not, by itself, provide the successful employee the remedy of an award of attorney fees.

LGWPA. *Smith v. Bates Technical College*, 139 Wash.2d 793, 810-811, 991 P.2d 1135, 1144 (2000)(Concluding that the employee is not required to exhaust her administrative remedies) However, since the LGWPA provides adequate protections Ms. Rupert must proceed with her administrative remedies in order to receive the full protection of the act.

Finally, Ms. Ruppert suggests that this Court grant review to provide clarity regarding the jeopardy element. However, her bold presumption that the law is not clear is misguided. This court in *Cudney, Korsland* and now *Piel* has provided all the clarity needed for the court or the practitioner to determine if a particular statute has sufficient remedies to promote the public policy. No further clarity is required. This is not an area of law that this Court can provide a bright-line rule. If that was feasible this Court would have done so long ago.

IV. CONCLUSION

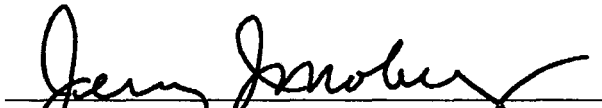
Ms. Rupert made a few workplace complaints while she was employed by the District. The complaints mostly involved her inability to get along with the Board members and her disagreements with how the Board members decided to spend District funds. At no time during her employment did she actually complain that she was being discriminated

[6] The remedies provided by RCW 49.17.160 are nearly identical to those provided under

against because of her gender. It was only after her dismissal from employment, and in an effort to get around her at-will status that she claimed that her interactions at work were now, in fact, gender discrimination. She has not established a *prima facie* claim under WLAD. Furthermore, she is not entitled to maintain a termination in violation of public policy tort claim since she has not and cannot make out a *prima facie* claim on the jeopardy and causation elements of that claim. The Court of Appeals was correct in its ruling. The ruling is consistent with Washington law. This case does not involve significant public policy issues that would justify review by this Court. The Court's precious resources are better spent on other more significant cases. The Court should deny Ms. Rupert's Petition.

RESPECTFULLY SUBMITTED this 8th day of December, 2014.

JERRY MOBERG & ASSOCIATES, P.S.



JERRY J. MOBERG, WSBA No. 5282
Attorney for Kennewick Irrigation District

---

the LGWPA.

CERTIFICATE OF SERVICE

I certify that on this date I mailed a copy of the document to which this is affixed by U.S. mail to:

Michael B. Love
Workland & Witherspoon, PLLC
601 W Main Ave Ste 714
Spokane, WA 99201-0677

Michael F. Cressey
Law Office of Michael F. Cressey
2910 East 57th Ave., Suite 5
Spokane, WA 99223

I further certify that on this date I sent a copy of the documents to which this is affixed by electronic mail to:

Michael B. Love
mlove@workwith.com

Michael F. Cressey
mfcres@comcast.net

DATED this 8th day of December, 2014 at Ephrata, WA.

MINDY KLINGENBERG, Paralegal

OFFICE RECEPTIONIST, CLERK

To: Mindy Klingenberg
Subject: RE: Rupert v Kennewick Irrigation District - No. 91029-4

Received 12-8-14

From: Mindy Klingenberg [mailto:mklingenberg@jmlawps.com]
Sent: Monday, December 08, 2014 3:17 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Rupert v Kennewick Irrigation District - No. 91029-4

Good afternoon,

Please see attached the Answer to Petition for Review submitted by Respondent:

Jerry J. Moberg, WSBA No. 5282
jmoberg@jmlawps.com
Tele: (509) 754-2356

Have a great afternoon,

Mindy

Mindy Klingenberg
mklingenberg@jmlawps.com
Paralegal
JERRY MOBERG & ASSOCIATES, PS
124 3rd Avenue S.W.
P.O. Box 130
Ephrata, WA 98823
Tele: (509) 754-2356
Fax: (509) 754-4202