91040-5

NO. 707003

WASHINGTON STATE SUPREME COURT

ERICKA RICKMAN,

Petitioner

vs.

PREMERA BLUE CROSS,

Respondent

PETITION FOR REVIEW

DENO MILLIKAN LAW FIRM, PLLC
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A. IDENTITY OF PETITIONER

Petitioner Ericka Rickman (hereafter "Ericka") asks this court to accept review of the Division I Court of Appeals' decision terminating review, designated in part B below.

B. COURT OF APPEALS' DECISION

Ericka asks the Supreme Court to review the decision of Division I of the Court of Appeals, entered on September 2, 2014 (Appendix at pages A-001 - 015) and its denial of Ericka's Motion for Reconsideration on October 17, 2014 (A-016).

C. ISSUES PRESENTED FOR REVIEW

1. Does the decision of the Division I Court of Appeals below conflict with the the Supreme Court's decisions in Piel v. City of Federal Way, 177 Wn.2d 604, 306 P.3d 879 (2013), and Hubbard v. Spokane County, 146 Wn.2d 699, 50 P.3d 602 (2002), and with the Division III Court of Appeals decision in Becker v. Community Health Systems, Inc., ___ Wn. App. ___, 332 P.3d 1085 (2014)?

2. Should the Supreme Court Review this case to address an issue of substantial public interest pertaining to the tort of wrongful discharge in violation of public policy?

3. Does an employer's termination of an employee after she prevents her employer's law violation constitute wrongful termination in violation of public policy?

4. Does the need for the tort for wrongful discharge in violation of public policy exist, despite the existence of an employer's internal reporting system and non-exclusive statutory remedies, when an employee's actions prevent a law violation?

5. Should the Supreme Court remand this case to the Court of Appeals to address the "absence of justification" element of the tort of wrongful discharge in violation of public policy?

D. STATEMENT OF THE CASE

1. Factual Background

From August 31, 2004 through November 3, 2009, Ericka worked for Respondent, Premera Blue Cross ("Premera"), as Director of its subsidiary known as Washington Alaska Group Services, Inc. ("WAGS") and later known as Ucentris Insured Solutions ("Ucentris") (CP 178-179).

In mid-September 2009, Ericka learned that Pacific Benefits Trust (PBT), a large association underwritten by Premera, was likely merging with another association, Washington Grocers Trust (WGT), underwritten by Providence. (CP 187, ¶*34*). Premera would lose PBT membership if the merger happened. (CP 187). Ericka confirmed this information with

Premera's Director of "Small Business Group", Robin Hilleary. (CP 187). Ericka also told Ms. Hilleary that a Ucentris Captive Agent (independent insurance broker) had a client who wanted the agent to look for other non-Premera insurance for his business due to this merger. (CP 187). Ericka asked Ms. Hilleary if it was okay for her Captive Agent to do so. In response, Ms. Hilleary told Ericka Premera was strategizing to retain the membership rather than have agents look outside Premera for insurance for their clients. (CP 187, ¶*34*). Ms. Hilleary also told Ericka Premera planned to use Ucentris agents to move the membership of preferred groups of the merged associations into associations that were underwritten by Premera. (CP 187). Ericka believed this would be an illegal form of "risk bucketing" (separating riskier policy holders from less risky ones and putting them into separate "buckets" for underwriting) because it would require disclosure of private policyholder information. (CP 187).

When an employee has ethical concerns, Premera's Code of Conduct encourages her to "do the right thing" and to review the circumstances with her "supervisor, the Compliance and Ethics Department, Human Resources, ***or*** the Legal and Regulatory Affairs Department" without fear of retaliation. (CP 313, 314, 315). Specifically, Premera's Code of Conduct provides:

> **Reporting Violations and Seeking Guidance**
> To promote reporting of legal and Code violations, Premera supports an environment of open communications. [...] You may report the matter to your supervisor, the Compliance and Ethics Department or to a member of either the Legal and Regulatory Affairs Department or Human Resources Department.

(CP 314-315). Contacting Premera's Compliance and Ethics Hotline is an option only for those wishing to remain anonymous:

> If, for whatever reason, an associate wishes to remain anonymous, Premera has established a Compliance and Ethics Hotline (EthicsLine)[.]

(CP 315).

Following Premera's Code of Conduct, Ericka informed her boss, Rick Grover[1], of her conversation with Ms. Hilleary and of her concern with the "risk bucketing" strategy, saying that using Ucentris agents to move non-Premera membership into associations underwritten by Premera "had HIPAA written all over it." (CP 187-188, ¶*35*). Ericka told Mr. Grover she thought he should take her HIPAA concerns up the chain of command to make sure everything was legal. (CP 187-188). Mr. Grover dismissed this suggestion, telling Ericka, "There's a new Sheriff in town." (CP 188).

[1] Mr. Grover is Premera's Vice President and General Manager for Ancillary Business and Distribution Strategy at Ucentris Insured Solutions.

On September 28, 2009, Mr. Grover forwarded an email trail to Ericka confirming her concern that Premera leadership planned on engaging in a form of "risk bucketing" that would potentially violate health insurance privacy laws. (CP 188, ¶*36*). Ericka told Mr. Grover she appreciated him sending the email, and reiterated her concern that the "risk bucketing" plan was inappropriate and possibly illegal. (CP 189, ¶*38*). Mr. Grover simply replied he was more concerned about "stepping on the toes" of the agent, Drew Butler. (CP 189, ¶*36*).

For purposes of summary judgment, the trial court resolved Respondent's conflicting testimony regarding the legality of the "risk bucketing" proposal in Ericka's favor. (CP at 16-17).[2] In written discovery, Premera admitted the risk bucketing plan Ericka discussed with Mr. Grover was illegal:

> Identify and describe the date, subject matter and Premera executive, including, but not limited to, Rick Grover, involved in **any and all conversations with, and/or complaints by plaintiff, regarding risk bucketing and/or the potential for violations of Health Insurance Portability and Accountability Act.**

(CP at 67 (emphasis supplied)).

Without objection, Premera answered as follows:

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[2] "[B]ecause this is a Motion for Summary Judgment, the Court accepts [...] Ms. Rickman's deposition testimony that, in the middle of September 2009, she learned [of the risk bucketing plan, then discussed it with Mr. Grover]. Within the month, the concept was abandoned. This is documented in an email string that Mr. Grover sent to Ms. Rickman and others."

> Mr. Grover recalls one meeting in which risk bucketing was briefly discussed. **The group quickly determined that risk bucketing was not a lawful option for that particular situation**, and ended the discussion. Mr. Grover does not recall the date of this meeting.

(CP at 67, (emphasis supplied)).

On or about September 11, 2009, Premera received an anonymous complaint about Ericka through its "ethics hotline" internet link, alleging Ericka was violating Premera's conflict of interest policy by not disclosing the fact that her son "worked" for Premera. (CP 189). Although Ericka's son was an independent "Captive Agent", not a Premera employee, Premera nonetheless investigated the complaint and terminated Ericka's employment on or about November 3, 2009, not for the alleged conflict of interest[3], but for "lack of integrity" and "poor judgment". (CP 190). Ericka avers Premera terminated her employment because she expressed concerns that Premera's intended "risk bucketing" would violate health insurance privacy laws. (CP 190-191).

2. Procedural Background

On December 15, 2010, Ericka filed a Complaint against Premera in Snohomish County Superior Court for retaliation and wrongful

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[3] Even Defendant's own management team provided conflicting testimony as to whether a conflict of interest was a reason for Ms. Rickman's termination. *See Rick Grover Deposition Transcript at 127:19-15 to 128:1-13* (CP 83-84) *and see Nancy Ferrara Deposition Transcript at 51:2-5* (CP 115), *53:4-11* (CP 117).

discharge in violation of public policy. (CP 390-396). On July 17, 2013, the Superior Court granted Premera's motion for summary judgment dismissing Ericka's Complaint (CP 9-13), specifically concluding Ericka presented no genuine issues of material fact on the "jeopardy" and "absence of justification" elements of the tort of wrongful discharge in violation of public policy. (CP 19). Ericka appealed the Superior Court's Decision, and on September 2, 2014, the Division 1 Court of Appeals affirmed the Superior Court's Decision on the "jeopardy" element, without ruling on the "absence of justification" element. (A-001 - 015). Ericka moved for reconsideration, and on October 17, 2014, the appellate court denied her motion. (A-016).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals decision conflicts with the Supreme Court's decisions in Piel and Hubbard, *supra,* and with the Division III's decision in Becker, *supra.* RAP 13.4(b)(1) and (2). This Petition for Review involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

The Court of Appeals erred in finding "No genuine issues of material exist as to whether discouraging [Ericka's] conduct would jeopardize the public policy of maintaining and protecting patient privacy interests." (A-012-013). The Supreme Court in Hubbard, *supra,*

announced the importance of protecting employees from retaliation when they speak up before public policy violations occur. Hubbard, *supra*, 146 Wn.2d at 717. Distinguishing the facts in Cudney v. ALSCO, 172 Wn.2d 524, 259 P.3d 244 (2011), from those in Hubbard, the Supreme Court specifically endorsed the survival of the tort of wrongful discharge in violation of public policy in cases like the present one. Cudney, *supra*, 172 Wn.2d at 537.

The Court of Appeals also erred in concluding Premera's internal system "[...] provided an available adequate alternative means by which Rickman could have reported her concerns, thereby promoting the public policy in favor of maintaining and protecting patient privacy interests." (A-015). The Supreme Court in Piel, *supra*, cautioned against an overbroad reading of Korslund v. Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 125 P.3d 119 (2005) and Cudney, *supra*, in failing to account for a "[...] long line of precedent allowing wrongful discharge tort claims to exist alongside sometimes comprehensive administrative remedies." Piel, *supra*, 177 Wn.2d at 614-15. Premera's internal systems for reporting concerns regarding the protection of private health care information do not preclude its liability for discharging Ericka in violation of public policy after she raised such concerns. As the Piel Court noted, "the tort of wrongful discharge seeks to vindicate the public interest in

prohibiting employers from acting in a manner contrary to fundamental public policy." Piel, *supra*, 177 Wn.2d at 612, quoting Smith v. Bates Technical College, 139 Wn.2d 793, 809, 991 P.2d 1135 (2000).

Finally, the Court of Appeals erred in failing to rule on whether the trial court erred in granting summary judgment on the "absence of justification" element of the tort of wrongful discharge in violation of public policy. The 'absence of justification' element "inquires whether the employer has an overriding reason for terminating the employee despite the employee's public-policy-linked conduct." Gardner v. Loomis Armored, Inc., 128 Wash.2d 931, 947, 913 P.2d 377 (1996). This element requires a court to balance the public policy concerns raised by an employee against the employer's asserted 'legitimate' interests to determine whether the public policy concerns outweigh the employer's interests. *Id.* at 948-949. To date, this element has not figured prominently in Washington jurisprudence, likely because such factual disputes require trials. *See* Hubbard, *supra,* 146 Wn.2d at 718 (dispute over whether plaintiff was fired for reasons violating public policy or due to a reorganization required a trial to determine absence of justification).

1. **This Case is Squarely Controlled by *Piel* and *Hubbard*, but the Court of Appeals Refused to Apply *Piel* and *Hubbard*.**

To establish jeopardy, plaintiffs must show they engaged in particular conduct, and the conduct *directly relates* to the public

> policy, or was *necessary* for the effective enforcement of the public policy. This burden requires a plaintiff to "argue that other means for promoting the policy ... are inadequate." Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct.

Piel, *supra.*, 177 Wn.2d at 611, quoting Gardner, *supra,* 128 Wn.2d at 945, (1996) (internal citations omitted).

Ericka's conduct was necessary for the enforcement of the public policy in favor or protecting private healthcare information. No statutory or administrative means of protecting the public policy were available to Ericka because her actions *prevented* a law violation. The statutory private right of action under Washington's Uniform Health Care Information Act (UHCIA) and the administrative process under the Health Insurance Portability and Accountability Act (HIPAA) are only available for actual *violations* and suspected *noncompliance* with those laws. *See* RCW 70.02.170(1); 45 C.F.R. §§160.306(a), 160.316, 164.530(g). Further, UHCIA's remedies are limited to actual damages and prevailing party attorney's fees, meaning if Ericka were to file a complaint under UHCIA and lose because there was no actual law violation, she would be

responsible for paying Premera's attorney's fees and costs.[4] No consequential or emotional distress damages are available. *See* RCW 70.02.170. Additionally, HIPAA's monetary sanctions are available only for actual violations of the law:

> Subject to § 160.410 [affirmative defenses], the Secretary will impose a civil money penalty upon a covered entity or business associate if the Secretary determines that the covered entity or business associate has violated an administrative simplification provision.

45 C.F.R § 160.402. Civil monetary penalties imposed by the Secretary of DHHS for HIPAA violations are limited to $50,000 per violation (*see* 45 C.F.R. §160.400, 45 C.F.R. §160.404, and 42 U.S.C. § 1320d-5).

Filing a lawsuit that would likely be dismissed because no law violation occurred can hardly be said to promote the public policy, especially with a "loser pays" attorney fee provision. Similarly, although the Office of Civil Rights (OCR) may consider a complaint regarding *potential* law violations, OCR's consideration of a complaint on which it

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[4] The UHCIA civil remedy statute, RCW 70.02.170, provides as follows:

(1) A person who has complied with this chapter may maintain an action for the relief provided in this section against a health care provider or facility *who has not complied with this chapter* [emphasis supplied].

(2) The court may order the health care provider or other person to comply with this chapter. Such relief may include actual damages, but shall not include consequential or incidental damages. The court shall award reasonable attorneys' fees and all other expenses reasonably incurred to the prevailing party.

would likely take no action can hardly be said to promote the public policy.

Even if the statutory and administrative schemes under UHCIA and HIPAA were available for *potential* rather than *perceived* violations, the Supreme Court in Piel clarified that the tort of wrongful discharge in violation of public policy can survive despite the existence of other statutory and administrative remedies. Piel, *supra,* 177 Wn.2d at 616. In reversing the trial and appellate court's dismissal of the plaintiff's case under the jeopardy prong, the Piel Court reasoned that, if the tort could not survive alongside other comprehensive statutory and administrative schemes,

> other cases which have recognized the need for a public policy tort despite the existence of statutory remedies would be called into question. *See, e.g., Thompson,* 102 Wash.2d 219, 685 P.2d 1081 (allowing claim for reporting violation of federal Foreign Corrupt Practices Act of 1977); *Ellis v. City of Seattle,* 142 Wash.2d 450, 13 P.3d 1065 (2000) (recognizing claim for retaliation for making safety complaints); *Roberts v. Dudley,* 140 Wash.2d 58, 993 P.2d 901 (2000) (allowing tort claim under RCW 49.12.200 and Washington's Law Against Discrimination (WLAD), chapter 49.60 RCW); *Bennett v. Hardy,* 113 Wash.2d 912, 784 P.2d 1258 (1990) (recognizing claim under WLAD). An overbroad reading of *Korslund* and *Cudney* would fail to account for this long line of precedent allowing wrongful discharge tort claims to exist alongside sometimes comprehensive administrative remedies. Importantly, neither case purported to overrule anything.

Piel, *supra,* 177 Wn.2d at 614-615. Like the plaintiff's claim in Piel, Ericka's claim survives alongside other comprehensive statutory and

administrative schemes for reporting health care insurance law violations. Additionally, like the cases cited in Hubbard, Ericka's complaints about potential law violations present jury questions on the jeopardy element. *See* Hubbard, 146 Wn.2d at 715-716.

2. Division I's Focus on Premera's Internal Reporting System is Erroneous.

Without deciding whether UHCIA and HIPAA provided available adequate means for promoting the public policy, the Court of Appeals in the present case concluded Premera's internal reporting system provided such means. (A-015). This ruling comports neither with the Supreme Court's decisions in Piel and Hubbard, nor with Division III's decision in Becker. These cases highlight the importance of having a tort remedy to fully vindicate violations of public policy, despite the existence of other robust remedies and mechanisms. *See* Piel, *supra*, 177 Wn.2d at 612, Hubbard, *supra*, 146 Wn.2d at 716-17, *and see* Becker, *supra*, ___ Wn. App. at ___, 322 P.3d at 1091.

The Becker court rightly relied on the Piel court's recognition of a private common law tort remedy as necessary to fully vindicate public policy where statutory remedies supplement others, reasoning as follows:

> Our recent cases faithfully analyzed the jeopardy element in a manner we thought the reasoning of Korslund and Cudney required. We now realize our jeopardy analysis overemphasized the abstract adequacy of statutes and regulations while forgetting

> the concrete public policy impact of chilling protected employee conduct. This approach tended to foreclose private common law tort remedies for employees any time statutes or regulations provided some means of promoting public policy. But doing so actually undermined public policy enforcement by chilling employee conduct advocating compliance with statutes and regulations.

Becker, *supra*, ___ Wn. App. at ___, 332 P.3d at 1090-91. For the same reason robust statutory remedies were not dispositive in Becker and Piel, the availability to Ericka of Premera's anonymous 'compliance' line is not dispositive in the present case. Use of Premera's compliance line is not exclusive. Indeed, Premera's Code of Conduct encourages its employees to "do the right thing" and to "review the circumstances with your supervisor, the Compliance and Ethics Department, Human Resources, **or** the Legal and Regulatory Affairs Department" without fear of retaliation. (CP 313, 314, 315). Specifically, Premera's Code of Conduct provides:

> **Reporting Violations and Seeking Guidance**
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(CP 314-315).

Contacting Premera's Compliance and Ethics Hotline is an option only for those wishing to remain anonymous:

> If, for whatever reason, an associate wishes to remain anonymous, Premera has established a Compliance and Ethics Hotline (EthicsLine)[.]

(CP 315).

Foreclosing Ericka's private right of action because she bravely chose the option of going directly to her supervisor rather than calling the anonymous compliance line undermines public policy enforcement by chilling conduct the public policy demands we promote: namely, taking affirmative action to prevent disclosure of private healthcare information. Such foreclosure also over-emphasizes reliance on individual pro-compliance efforts to promote the public policy. *See* Becker, *supra*, 332 P.3d at 1090-91.

Ericka stuck her neck out in following Premera's Code of Conduct by raising concerns about potential health care privacy violations to her direct supervisor, Rick Grover. Mr. Grover was compelled by Premera's Code of Conduct to ensure Premera's compliance with the law and to protect Ericka from retaliation:

> Leaders have an additional responsibility of showing by example what it means to act with the highest standards of ethical business conduct and to encourage discussion of the ethical and legal implications of business decisions. [...] Leaders are also accountable to maintain a system of internal controls to ensure those corporate objectives and compliance obligations are met.

(CP 316).

Rather than follow his ethical duty to lead by example, Mr. Grover told Ericka, "[T]here's a new Sheriff in town[,]" and replied he was more concerned about "stepping on the toes" of the agent, Drew Butler, than he was about Ericka's health insurance privacy concerns. (CP 187 - 189). After Ericka raised health insurance privacy concerns to Mr. Grover, he fired her. Taking these facts in the light most favorable to Ericka, Premera material factual disputes preclude summary judgment on the jeopardy element of the tort of wrongful discharge in violation of public policy.

Dismissing Ericka's claim because she did not make an anonymous complaint overemphasizes the abstract adequacy of that reporting mechanism. That Ericka's complaint prevented a law violation does not promote the public policy when the chilling result of her bravery is the loss of her job. The existence of robust administrative and statutory remedies in Piel, Hubbard, and Becker, *supra*, did not preclude the tort of wrongful discharge in violation of public policy in those cases. Neither should the existence of an internal reporting system in the present case preclude Ericka's claim.

3. Division I Erred in Failing to Rule on the "Absence of Justification" Element.

Ericka presented material factual disputes to the trial court precluding summary judgment on the "absence of justification" element.

The trial court erroneously found no genuine issue of material fact on the "absence of justification" element based on the fact that that Associate Relations Manager Nancy Ferrara's recommendation to terminate Ericka was made without her knowledge of the "risk bucketing"/HIPAA compliance issue. (CP 19, ¶2). However, Mr. Grover, not Ms. Ferrara, made the decision to terminate Ericka's employment, and his testimony on the reason for Ericka's termination conflicted with Ms. Ferrara's. Mr. Grover testified Ericka was terminated for a "conflict of interest" in not disclosing her relationship with her son, and Ms. Ferrara testified Ericka was terminated for "judgment" and "lack of integrity." (CP 34, 83:11 - 84:13, 115:2-5, 117:4-11). Ericka did not hide the fact that independent contractor Taylor Vidor was her son, disclosed this relationship to former Vice President Steve Melton (*See Rickman Declaration at ¶31*) (CP 185-186), and kept a picture of Mr. Vidor on her desk. (CP 88, 94, 166, 176). The motives of the person making the ethics complaint against Ericka regarding her relationship with her son were suspect. (CP 165-177.) Viewing the facts in the light most favorably to Ericka, Mr. Grover was intimately aware of the risk bucketing/HIPAA compliance issue. (CP 16, ¶3 - CP 17, ¶1). Ericka presented material factual disputes at the trial court level on whether Premera terminated her for a "conflict of interest", as Mr. Grover claimed, or whether it terminated her for raising concerns

about the disclosure of private health care information. Division I erred in not ruling on this issue.

F. CONCLUSION

Public policy is not served when an employer can terminate an employee whose actions prevent law violations. Had Ericka made an anonymous call to Premera's ethics line, she may or may not have been terminated, but her anonymous call also may or may not have prevented a law violation. That the anonymous line was available to Ericka does not make it an adequate means to promote the public policy. By raising her concerns to her direct supervisor, Ericka *did* prevent a law violation and paid the ultimate price - she lost her job and livelihood. Public policy is violated when employers are allowed terminate with impunity employees whose brave actions protect the public. The only adequate means of promoting the public policy is to hold such employers accountable in tort.

The Court should grant Ericka's Petition for Review to apply the Supreme Court decisions in Piel and Hubbard, and to address an issue of substantial public interest: an employee who is terminated after her actions prevent a law violation has a cause of action against her employer for wrongful termination in violation of public policy. Finally, the Court should remand this matter to the Court of Appeals to address the issue of whether genuine issues of material fact preclude summary judgment on

the "absence of justification" element of the tort of wrongful discharge in violation of public policy.

RESPECTFULLY SUBMITTED this 17 day of November, 2014.

DENO MILLIKAN LAW FIRM, PLLC

JOEL P. NICHOLS, WSBA #23353
Attorney for Plaintiff and Petitioner, Ericka Rickman

DECLARATION OF SERVICE

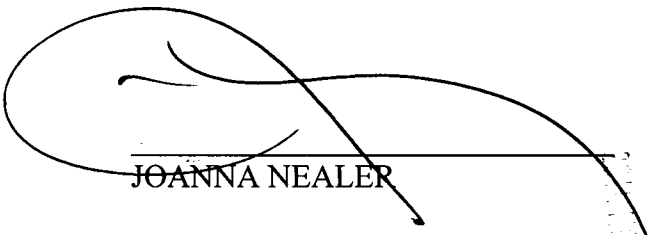
I, JOANNA NEALER, DECLARE THAT THE FOLLOWING IS MY VOLUNTARY SWORN STATEMENT:

On November 17, 2014 I sent out via email (by agreement of the parties) and by regular U.S. Mail, postage prepaid, a true and correct copy of the PETITION FOR REVIEW to:

Skylar Anne Sherwood (*ssherwood@riddellwilliams.com*)
Robert M. Howie (*rhowie@riddellwilliams.com*)
Riddell Williams, PS
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154-1192

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

Executed at Everett, Washington this 17th day of November, 2014.



JOANNA NEALER

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

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

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

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

I

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

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

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

(Emphasis added.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rickman appeals.

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

113 Wn.2d at 619.

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

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

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

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

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

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

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

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

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

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

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

We concur:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ERICKA M. RICKMAN Appellant, v. PREMERA BLUE CROSS, Respondent.	)	DIVISION ONE No. 70766-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Ericka Rickman, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 17th day of October, 2014.

For the Court: