

74200-1

74200-1 RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 02, 2015, 1:52 pm
BY RONALD R. CARPENTER
CLERK

74200-1
NO. 91896-1

RECEIVED BY E-MAIL *bjh*

SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY SUPERIOR COURT
CASE NO. 15-2-04785-0 SEA

GEORGE E. ENGSTROM and JOHN E. STOCKWELL,

Plaintiffs/Appellants,

v.

MICROSOFT CORPORATION,

Defendant/Respondent.

RESPONDENT'S BRIEF

Robert J. Maguire, WSBA #29909
John A. Goldmark, WSBA #40980
Taylor S. Ball, WSBA #46927
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150

Attorneys for Respondent



TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF ISSUES 4

III. COUNTERSTATEMENT OF THE CASE..... 4

 A. The Complaint’s Allegations 4

 B. The Trial Court’s Dismissal..... 8

IV. STANDARD OF REVIEW 9

V. ARGUMENT..... 10

 A. Plaintiffs Seek to Dramatically Expand the
 “Narrow” Exception to the At-Will Employment
 Doctrine..... 10

 B. The Supreme Court’s Precedent on the Jeopardy
 Element Dictates Dismissal of Plaintiffs’ Claim. 13

 C. A Plethora of Comprehensive and Robust Remedies
 Adequately Promote the Public Policy in the FCPA. 17

 1. Two Federal Agencies Dedicate Entire Specialized
 Units to FCPA Enforcement and Impose Severe
 Penalties for Violations..... 18

 2. SOX and Dodd Frank Each Provide Robust
 Protections for FCPA Whistleblowers..... 19

 D. The Trial Court Correctly Applied this Court’s
 Jeopardy Analysis and Plaintiffs Show No Error. 21

 1. *Thompson* Did Not Address and Does Not Control
 the Jeopardy Analysis. 23

 2. *Piel* Does Not Change the Result Here..... 24

 3. *Becker* Was Wrongly Decided and Significantly
 Differs From the Circumstances in this Case. 26

E.	The Court Should Not Abandon Twenty Years of Jeopardy Precedent and Drastically Broaden the “Narrow” Public Policy Tort.	31
1.	Plaintiffs Show No Reason to Disregard Stare Decisis.....	31
2.	Plaintiffs’ Rationale for Abandoning Jeopardy is Misguided and Does Not Support Their Claim. ...	36
VI.	CONCLUSION.....	40

TABLE OF AUTHORITIES

	Page(s)
Washington State Cases	
<i>Becker v. Cmty. Health Inc.</i> , 182 Wn. App. 935, 332 P.3d 1085 (2014).....	<i>passim</i>
<i>Cudney v. ALSCO, Inc.</i> , 172 Wn.2d 524, 259 P.3d 244 (2011).....	<i>passim</i>
<i>Danny v. Laidlaw Transit Servs., Inc.</i> , 165 Wn.2d 200, 193 P.3d 128 (2008).....	12, 32
<i>Farnam v. Crista Ministries</i> , 116 Wn.2d 659, 807 P.2d 830 (1991).....	12
<i>Gardner v. Loomis Armored</i> , 128 Wn.2d 931, 913 P.2d 377 (1996).....	11, 13, 39
<i>Gorman v. Garlock, Inc.</i> , 155 Wn.2d 198, 118 P.3d 311 (2005).....	10
<i>Hoffer v. State</i> , 110 Wn.2d 415, 755 P.2d 781 (1988).....	9, 10
<i>Hubbard v. Spokane Cnty.</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	38
<i>Keene v. Edie</i> , 131 Wn.2d 822 935 P.2d 588 (1997).....	31
<i>Korlund v. DynCorp Tri-Cities Services</i> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	<i>passim</i>
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 166 Wn.2d 264, 208 P.3d 1092 (2009).....	31, 32, 35
<i>McCurry v. Chevy Chase Bank</i> , 169 Wn.2d 96, 233 P.3d 861 (2010).....	10

<i>Noble Manor Co. v. Pierce Cnty.</i> , 133 Wn.2d 269, 943 P.2d 1378 (1997).....	25
<i>Pedersen v. Klinkert</i> , 56 Wn.2d 313, 352 P.2d 1025 (1960).....	25
<i>Piel v. City of Federal Way</i> , 177 Wn.2d 604, 306 P.3d 879 (2013).....	<i>passim</i>
<i>Reninger v. Dep't of Corr.</i> , 134 Wn.2d 437, 951 P.2d 782 (1998).....	11
<i>Rodriguez v. Loudeye Corp.</i> , 144 Wn. App. 709, 189 P.3d 168 (2008).....	10
<i>Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC</i> , 171 Wn.2d 736, 257 P.3d 586 (2011).....	12
<i>Sedlacek v. Hillis</i> , 145 Wn.2d 379, 36 P.3d 1014 (2001).....	11, 12, 33
<i>Smith v. Bates Technical College</i> , 139 Wn.2d 793, 991 P.2d 1135 (2000).....	16
<i>State ex rel. Gallwey v. Grimm</i> , 146 Wn.2d 445, 48 P.3d 274 (2002).....	24
<i>State v. Kier</i> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	32
<i>State v. Potter</i> , 68 Wn. App. 134, 842 P.2d 481 (1992).....	26
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	<i>passim</i>
<i>Webster v. Schauble</i> , 65 Wn.2d 849, 400 P.2d 292 (1965).....	11
<i>White v. State</i> , 131 Wn.2d 1, 929 P.2d 396 (1997).....	11

<i>Wilmot v. Kaiser Aluminum & Chem. Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	11
<i>Worley v. Providence Physician Servs. Co.</i> , 175 Wn. App. 566, 573, 307 P.3d 759 (2013).....	33
Federal and Other State Cases	
<i>Asadi v. GE Energy (USA), L.L.C.</i> , 720 F.3d 620 (5th Cir. 2013)	21
<i>Burnham v. Karl & Gelb, P.C.</i> , 252 Conn. 153 (Conn. 2000).....	37
<i>Carnero v. Boston Sci. Corp.</i> , 433 F.3d 1 (1st Cir. 2006).....	35
<i>Collier v. Insignia Fin. Grp.</i> , 981 P.2d 321 (Okla. 1999).....	37
<i>Crews v. Memorex Corp.</i> , 588 F. Supp. 27 (D. Mass. 1984).....	37
<i>Day v. Staples, Inc.</i> , 555 F.3d 42 (1st Cir. 2009).....	27, 28, 35
<i>Dukowitz v. Hannon Sec. Servs.</i> , 841 N.W.2d 147 (Minn. 2014).....	36
<i>Flenker v. Willamette Indus.</i> , 266 Kan. 198 (Kan. 1998).....	37
<i>Hein v. AT&T Operations, Inc.</i> , 2010 WL 5313526 (D. Colo. Dec. 17, 2010).....	28, 36
<i>Jones v. SouthPeak Interactive Corp. of Del.</i> , 982 F. Supp. 2d 664 (E.D. Va. 2013)	20
<i>LeFande v. Dist. of Columbia</i> , 864 F. Supp. 2d 44 (D.D.C. 2012).....	36

<i>Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor,</i> 717 F.3d 1121 (10th Cir. 2013)	20
<i>Mann v. Fifth Third Bank,</i> 2011 U.S. Dist. LEXIS 44853 (S.D. Ohio Apr. 25, 2011)	28
<i>McLean v. Hyland Enters.,</i> 34 P.3d 1262 (Wyo. 2001).....	37
<i>McEuen v. Riverview Bancorp, Inc.,</i> 2013 WL 646045 (W.D. Wash. Feb. 21, 2013).....	27
<i>Nunnally v. XO Commc 'ns,</i> 2009 WL 112849 (W.D. Wash. Jan. 15 2009).....	26, 27
<i>Porterfield v. Mascari II, Inc.,</i> 374 Md. 402, 823 A.2d 590 (Md. 2003).....	36
<i>Repetti v. Sysco Corp.,</i> 300 Wis. 2d 568, 730 N.W.2d 189 (Wis. 2007)	28
<i>Ross v. Stouffer Hotel Co.,</i> 879 P.2d 1037 (Haw. 1994).....	37
<i>Stevenson v. Superior Court,</i> 16 Cal. 4th 880, 941 P.2d 1157 (Cal. 1997)	37
<i>Stewart v. Everywhere Global, Inc.,</i> 68 F. Supp. 3d 759, 766 (S.D. Ohio 2014)	27, 29
<i>Taylor v. Fannie Mae,</i> 65 F. Supp. 3d 121, 127 (D.D.C. 2014).....	27
Statutes and Regulations	
15 U.S.C. §§ 78dd-2	18
15 U.S.C. § 78ff(a).....	19
15 U.S.C. § 78ff(c).....	18

15 U.S.C. § 78m(b)(2)(A).....	7
15 U.S.C. § 78u-6	21
15 U.S.C. § 78u(d)(3)	19
18 U.S.C. § 1514A	20
17 C.F.R. § 201.1004	19
17 C.F.R. § 240.21F-2(b)(1)	21
29 C.F.R. § 1980.112	20
 Other Authorities	
H.R. REP. NO. 94-831 (1977) (Conf.)	8
S. REP. NO. 95-114 (1977)	7
S. Rep. No. 107-146 (2002)	20
 <i>Resource Guide to the U.S. Foreign Corrupt Practices Act,</i> by the DOJ & SEC, Nov. 2012, available at http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf	
	18, 19

I. INTRODUCTION

Plaintiffs/Appellants are former Microsoft employees who allege they wrongfully lost their jobs because they had raised “concerns” three years earlier about the level of detail in a subordinate’s expenses. Plaintiffs contend their ultimate termination—occurring along with the termination of their entire team as part of a reduction in force—violated a public policy in the Foreign Corrupt Practices Act (“FCPA”) requiring companies to keep accurate books and records. But comprehensive and robust alternative remedies already exist to enforce the FCPA, including civil and criminal enforcement tools with stiff penalties, whistleblower protections and incentives, and civil actions allowing recovery of reinstatement, double back pay, fees, and even large bounty awards. After the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 strengthened FCPA enforcement and remedies, the FCPA represents one of the most heavily regulated, enforced, and draconian laws in existence. Indeed, the Department of Justice and Securities and Exchange Commission recently created specialized “FCPA Units,” each dedicated to investigating and enforcing FCPA violations.

The public policy tort has from its inception been a *narrow* exception to the long-established rule of at-will employment, existing only when necessary to vindicate a public policy. Because the FCPA provides

more than adequate remedies to vindicate the public policy in the context of this case, the trial court correctly held that Plaintiffs could not establish the jeopardy element of the “narrow” tort and dismissed their claim.

This Court should affirm.

As the trial court correctly found, the Supreme Court’s established jeopardy precedent dictates dismissal in this case. In *Korlund v. DynCorp Tri-Cities Services*, 156 Wn.2d 168, 182-83, 125 P.3d 119 (2005), this Court rejected the tort where the federal statute provided “comprehensive remedies,” such as whistleblower protections, reinstatement, back pay, and other damages (the same remedies also available in this case). The Court likewise rejected the tort in *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 5301-32, 259 P.3d 244 (2011), where the statute provided “extensive protections” and remedies, including reinstatement, back pay, and civil and criminal enforcement mechanisms (again, available here). By contrast, in *Piel v. City of Federal Way*, 177 Wn.2d 604, 616-17, 306 P.3d 879 (2013), the Court allowed a claim to proceed where “limited statutory remedies” for asserting contract rights were inadequate to vindicate the public policy (not the case here).

The existing means to promote the FCPA public policy are *more* comprehensive, *more* robust, and *more* significant than those found adequate in *Korlund* and *Cudney*, and nothing like the “limited statutory

remedies” found inadequate in *Piel*. Plaintiffs rely heavily on *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). But *Thompson* was decided twelve years before the Supreme Court adopted the jeopardy analysis that now controls, and long before the vast expansion of FCPA remedies, enforcement, and whistleblower protections under SOX and Dodd-Frank. Because a plethora of adequate means already promote the FCPA, the public policy is not in jeopardy and the “narrow” tort need not be recognized. Under the Supreme Court’s precedent, Plaintiffs cannot show jeopardy and their claim fails.

Because they cannot satisfy the jeopardy element, Plaintiffs ask the Court to do something radical—overturn twenty years of Supreme Court precedent and eliminate the jeopardy element. But they show no basis to disregard stare decisis and embark on such an extreme upheaval of established law. Nor can they justify discarding the reasonable limits the Supreme Court has long imposed on the “narrow” public policy tort. Indeed, many other jurisdictions apply the sound principle underlying this Court’s jeopardy analysis and preclude a public policy tort when adequate alternative remedies exist. The jeopardy element preserves the tort’s fundamental purpose—protecting the public policy—while preserving the employment at-will doctrine and guarding against meritless suits. The Court should not abandon this careful and sensible balance.

II. STATEMENT OF ISSUES

1. Did the trial court correctly dismiss Plaintiffs' public policy tort under the jeopardy analysis established in *Korlund*, *Cudney*, and *Piel*, where comprehensive and robust alternative remedies already exist to protect the FCPA public policy at issue, including dual criminal and civil enforcement regimes with harsh penalties, stout whistleblower protections and incentives, broad civil remedies—providing “all relief necessary to make the employee whole”—and even large “bounty” award incentives?

2. Should the Court abandon twenty years of established jeopardy analysis precedent, dramatically broaden the “narrow” public policy tort, and recognize and allow a separate tort claim to proceed when the public policy is not threatened or jeopardized?

III. COUNTERSTATEMENT OF THE CASE

A. The Complaint's Allegations

Plaintiffs George Engstrom and John Stockwell were Microsoft employees in the Bing Mobile group. CP 3-4 ¶¶ 2.8-2.14. In 2010, Plaintiffs began working with a Microsoft employee referred to as John Doe, who was on loan to Bing Mobile from a different Microsoft team to assist in pitching a project to a corporate partner. CP 4 ¶¶ 2.17-2.18.

In February or March 2011, Stockwell alleges he became “concerned” about certain “entertainment expenses” Doe submitted while

working in Korea. CP 5 ¶¶ 2.20, 2.22. Doe explained he had incurred the expenses for meetings with corporate partner executives at “hostess bars,” *id.* ¶ 2.22, a common venue for business meetings in Korea. Stockwell asked if this included “expensing prostitution services of hostesses”; Doe said it did not. *Id.* Although Stockwell approved many of these expense reports, *id.* ¶ 2.20, he later told Engstrom that he “believed Doe was ‘expensing hostess bars’ and potentially prostitution.” CP 5-6 ¶ 2.23. Engstrom reported this suspicion to his boss, who referred them and their report to Human Resources. CP 6 ¶ 2.24. Neither Engstrom nor Stockwell allege any facts to support their hunch about the expenses at issue, which totaled about \$22,000 for the entire time Doe worked in Korea. *Id.* ¶ 2.26.

Engstrom and Stockwell admit Microsoft immediately investigated their expense concerns. *Id.* ¶ 2.27 (“Microsoft commenced an investigation into Doe’s expense reports”). They omit from the complaint, however, the results of that investigation. Nowhere do they allege (or acknowledge) Microsoft’s findings from the investigation or their response after being informed of those findings. *See* CP 6-11 ¶¶ 2.28-2.51. Plaintiffs do not allege Microsoft’s investigation was inadequate in any respect. Nor do they allege they attempted to “blow the whistle” or report any concerns about Microsoft’s investigation or its conclusion.

Engstrom and Stockwell claim that, several years later, they suffered retaliation for reporting their concerns. They complain their group's initiative "went unacknowledged" and unsupported. CP 7-9 ¶¶ 2.33-2.38. Engstrom then chose to become a manager of the User-Centric Advertising team, a different Microsoft team, which Stockwell also later joined. CP 8-9 ¶¶ 2.37-2.38. In 2012, Engstrom and his User-Centric Advertising team developed another initiative, which ultimately did not succeed. CP 9-11 ¶¶ 2.39-2.46.

In December 2013 and January 2014, nearly three years after raising the expense concerns, Engstrom, Stockwell, and the rest of their User-Centric Advertising team, all lost their jobs. CP 11 ¶ 2.50.

Based on these allegations—that they lost their jobs because three years earlier while on a different team they raised suspicions about certain expenses—Engstrom and Stockwell sued Microsoft for wrongful discharge in violation of public policy. CP 12 ¶ 3.2. Although they now seek to vindicate a public policy in the FCPA, CP 6 ¶ 2.25, Plaintiffs do not allege they ever raised any concerns—with Microsoft, a regulator or government official, or anyone—that they believed Doe's expense reports violated the FCPA (or any law). Rather, Engstrom and Stockwell allege the only concern they raised was their suspicion in February 2011 that some of Doe's hostess bar expenses might have included illicit services,

see CP 5-6 ¶¶ 2.20-2.26, which they suggest violated company policy.

See Appellants' Brief ("Br.") at 7-8.

Engstrom and Stockwell allege no facts to support their assertion that Doe's expenses for hostess bars included payment for illicit services (and Microsoft is not aware of any evidence supporting such a claim). Indeed, their brief acknowledges (as they did below) that their concerns about illicit activity are based solely on hypotheticals and speculation. *See* Br. at 5-8, CP 84-87, 90, 96, 98, 102, 106.

In the trial court, Plaintiffs neither alleged nor argued (or even hypothesized) any conduct implicating the FCPA's core provision barring bribery of foreign officials. Instead, their sole allegation concerns the "books and records" provision, which operates in tandem with the anti-bribery provision to prevent concealment of corporate bribes. *See* S. REP. NO. 95-114, at 3 ("In the past, corporate bribery has been concealed by the falsification of corporate books and records," and the accounting provision "removes this avenue of coverup.") (provided at CP 56-65). This provision requires public companies to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the [company]." 15 U.S.C. § 78m(b)(2)(A). Congress adopted the "in reasonable detail" qualification "in light of the concern that such a standard, if unqualified, might connote

a degree of exactitude and precision which is unrealistic.” H.R. REP. NO. 94-831, at 10 (1977) (Conf.) (provided at CP 67-74).

Plaintiffs’ core allegation—and the sole public policy at issue—is that Doe’s expense reports for “entertainment expenses” did not contain sufficient detail to identify what Plaintiffs believe (based on speculation and hypotheticals) was illicit entertainment. CP 6, 12 ¶¶ 2.25, 3.2; *see also* RP 19 (“the essence of our argument is that [the expenses] didn’t provide sufficient detail”). This is the supposed clear mandate of public policy they claim must be vindicated through a private tort.

B. The Trial Court’s Dismissal

Microsoft moved to dismiss the complaint under CR 12(b)(6). After hearing argument, King County Superior Court Judge Sean O’Donnell ruled that Plaintiffs’ claim failed because they could not establish the jeopardy element as a matter of law. CP 211 ¶ 8.

In accordance with Supreme Court jeopardy precedent, the trial court examined the regulatory regime and remedies available to promote the FCPA policy at issue. CP 210 ¶¶ 3-6. Judge O’Donnell noted the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have specialized units dedicated to investigating and enforcing FCPA violations. CP 210-211 ¶ 5. Judge O’Donnell also noted that the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Act of 2010 both

provide strong protections for FCPA whistleblowers, including remedies of reinstatement, back pay, fees, and even hefty bounty awards. *Id.* Given the “backdrop of expansive FCPA enforcement, tough penalties, and robust civil remedies,” the court found “nothing suggests a public policy promoting accurate books and records will be jeopardized if Plaintiffs are unable to avail themselves of a civil action under state law.” CP 211 ¶ 6.

The court explained that this case is unlike *Piel*, where “limited statutory remedies” were inadequate, but rather like *Korlund* and *Cudney* because the FCPA provides “comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs.” *Id.* ¶ 7. The court further noted that the statement in *Piel* on which Plaintiffs relied was “dicta” and that *Thompson* did not control the jeopardy analysis because it “never address[ed] alternative relief” under the now-controlling test. RP 21. In this context, the court held Plaintiffs’ claim failed the jeopardy element because a plethora of adequate means exist to promote the FCPA. CP 211 ¶ 8; RP 29. It therefore dismissed the complaint.

Engstrom and Stockwell appealed, seeking direct review.

IV. STANDARD OF REVIEW

A trial court’s dismissal under CR 12(b)(6) is reviewed de novo. *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988). A complaint should be dismissed if it fails to state a claim upon which relief can be

granted. *Id.* This rule “weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy.” *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 102, 233 P.3d 861 (2010). On a motion to dismiss, the court assumes the truth of the facts alleged in the complaint, but need not accept the complaint’s legal conclusions. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717-18, 189 P.3d 168 (2008). “While a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the gravamen of a court’s inquiry is whether the plaintiff’s claim is legally sufficient.” *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005).

V. ARGUMENT

A. Plaintiffs Seek to Dramatically Expand the “Narrow” Exception to the At-Will Employment Doctrine.

Engstrom and Stockwell ask this Court to create an exception to the at-will employment doctrine to protect employees who, three years before termination, allegedly raised concerns about the level of detail in expense reports. Adopting such an exception would provide special protection for any employee who ever raised a concern about an expense report, dramatically expanding the public policy tort and eviscerating the at-will employment doctrine. Plaintiffs’ arguments are contrary to decades of Supreme Court precedent and should be rejected.

The fundamental rule in Washington is that an employment relationship, indefinite as to duration, is terminable by either the employee or employer “at any time with or without cause.” *Webster v. Schauble*, 65 Wn.2d 849, 852, 400 P.2d 292 (1965). In *Thompson v. St. Regis Paper Co.*, this Court created a “narrow” exception to this rule, recognizing a wrongful discharge tort “if the discharge of the employee contravenes a clear mandate of public policy.” 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). But in recognizing this tort, the Court emphasized the importance of keeping the exception “narrow” in order to “protect[] against frivolous lawsuits and ... weed out cases that do not involve any public policy principle.” *Id.* Since adopting it, the Court has repeatedly stressed the “narrow” scope of public policy tort. See *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 53, 821 P.2d 18 (1991) (“The exception is a narrow one.”); *Gardner v. Loomis Armored*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996) (“[T]he exception should be narrowly construed in order to guard against frivolous lawsuits.”); *White v. State*, 131 Wn.2d 1, 18, 929 P.2d 396 (1997) (“In *Thompson* this court created a *narrow* exception to the employment-at-will doctrine.”); *Reninger v. Dep’t of Corr.*, 134 Wn.2d 437, 446, 951 P.2d 782 (1998) (“We have interpreted the cause of action narrowly.”); *Sedlacek v. Hillis*, 145 Wn.2d 379, 385, 36 P.3d 1014 (2001) (the public policy tort is “a narrow exception to the employment at-

will doctrine”); *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208, 193 P.3d 128 (2008) (“the wrongful discharge tort is narrow”); *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530, 259 P.3d 244 (2011) (same).

The Supreme Court has emphasized the tort “should be applied cautiously in order to avoid allowing an exception to swallow the general rule that employment is terminable at will.” *Sedlacek*, 145 Wn.2d at 390; *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 756, 257 P.3d 586 (2011) (“The exception should be narrowly drawn so that it does not swallow the general rule of at-will employment.”). Cautious application also ensures a proper balance to the employment relationship “by protecting against frivolous lawsuits and allowing employers to make personnel decisions without fear of incurring civil liability.” *Farnam v. Crista Ministries*, 116 Wn.2d 659, 668, 807 P.2d 830 (1991).

To keep the exception narrow, the Supreme Court has refined and limited the public policy tort since its adoption. *See Sedlacek*, 145 Wn.2d at 389 (“In order to ensure that we can balance the interests of employer and employee, and to ensure judicial restraint, we have imposed additional limitations on the establishment of public policy.”). Chief among these limitations is the jeopardy element, which “strictly limits the scope of claims under the tort of wrongful discharge.” *Danny*, 165 Wn.2d at 222.

Plaintiffs' appeal attacks this jeopardy element, seeking to eviscerate the long-standing limits it imposes on the narrow tort they seek to assert.¹

B. The Supreme Court's Precedent on the Jeopardy Element Dictates Dismissal of Plaintiffs' Claim.

Supreme Court precedent establishes that Plaintiffs cannot satisfy the jeopardy element under the particular circumstances and context of this case, which defeats their claim and disposes of their appeal.

Nearly twenty years ago, in *Gardner v. Loomis Armored*, the Court adopted the jeopardy element for all public policy tort claims. 128 Wn.2d 931, 941, 913 P.2d 377 (1996) (adopting the four part test with jeopardy element for "all public policy wrongful discharge torts"). The jeopardy element requires plaintiff to show that other means of promoting the public policy are inadequate such that a state tort claim is necessary to vindicate the public policy. *Id.* at 945. This requirement serves to "guarantee[] an employer's personnel management decisions will not be challenged unless a public policy is genuinely threatened." *Id.* at 941-42.

Since its adoption, the Court "has repeatedly applied this strict adequacy standard, holding that a tort of wrongful discharge in violation of public policy should be precluded unless the public policy is inadequately promoted through other means and thereby maintaining only

¹ Engstrom and Stockwell also discuss the clarity and causation elements (*see* Br. at 13-15), but those elements are not at issue in this appeal.

a narrow exception to the underlying doctrine of at-will employment.” *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530, 259 P.3d 244 (2011) (citing cases). “[T]he point of the jeopardy prong of the analysis ... is to consider whether the statutory protections are *adequate to protect the public policy*.” *Id.* at 534 n. 3 (emphasis in original). If there are adequate remedies to protect the public policy, there is no need for an additional individual state tort claim. In a string of recent cases, the Court set forth “guideposts” for measuring whether the public policy is adequately promoted through other means, precluding the need to recognize the narrow public policy tort.

In *Korlund v. DynCorp Tri-Cities Services*, plaintiffs alleged they were discharged after reporting safety violations, mismanagement, and government fraud at the Hanford Nuclear Reservation, thereby violating a public policy in the Federal Energy Reorganization Act (ERA). 156 Wn.2d 168, 173-74, 181, 125 P.3d 119 (2005). After examining the ERA, the Court found the law already provided “comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs,” including providing whistleblower claims and remedies of reinstatement, back pay, attorney fees, and other damages. *Id.* at 182-83. The Court rejected Plaintiffs’ argument that the nonexclusive nature of ERA remedies determined whether they were adequate:

[T]he question is not whether the legislature intended to foreclose a tort claim but 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.

Id. Because the Court found these ERA remedies “adequate to protect the public policy on which the plaintiffs rely,” it held their wrongful discharge claim failed as a matter of law. *Id.* at 183.

In *Cudney v. ALSCO, Inc.*, plaintiff claimed he was discharged for reporting that his supervisor was drinking on the job and had driven a company vehicle while drunk, violating a public policy in the Washington Industrial Safety and Health Act (WISHA). 172 Wn.2d 524, 527-28, 259 P.3d 244 (2011). The Court stated that *Koroslund* represents “[t]he controlling case, governing whether statutory remedies are adequate to promote a given public policy,” and thus, the “ERA serves as a guidepost” for measuring other statutory remedies. *Id.* at 532. The Court noted WISHA’s retaliation provision provided “extensive protections” and remedies, including reinstatement, back pay, and all other “appropriate relief,” *id.* at 531-32, and DUI laws provided “a huge legal and police machinery ... designed to address this very problem,” *id.* at 537-38. It found the combination of these remedies “*more* comprehensive than the ERA and ... more than adequate” to promote the public policy. *Id.* at 533 (emphasis in original). Based on “the existence of hardy statutory

remedies that protect the relevant public policies,” the Court rejected plaintiff’s claim. *Id.* at 530-31, 538.

By contrast, in *Piel v. City of Federal Way*, the Court addressed what it described as “limited statutory remedies” under the Public Employment Collective Bargaining Act (PECBA). 177 Wn.2d 604, 616-17, 306 P.3d 879 (2013). *Piel* turned on a prior case, *Smith v. Bates Technical College*, 139 Wn.2d 793, 991 P.2d 1135 (2000), which had already found the PECBA remedies were inadequate to protect the public interest.² Following *Smith*, the *Piel* court held: “In the particular context of PERC, *Smith* and later cases recognize that the limited statutory remedies under chapter 41.56 RCW do not foreclose more complete tort remedies for wrongful discharge.” 177 Wn.2d at 616. *Piel* emphasized that its holding “does not require retreat from our recent cases [*Korlund* and *Cudney*]” because “[n]either *Korlund* nor *Cudney* involved an administrative scheme that this court had previously recognized is ***inadequate*** to vindicate an important public policy.” *Id.* (emphasis in original). Further, unlike the comprehensive remedies found adequate in

² The narrow majority in *Piel* (which included pro tem Justice Seinfeld), drew sharp and lengthy dissents from the remaining four justices. Chief Justice Madsen dissented separately to emphasize “several key points,” including that (1) “*Smith* is not controlling [because] [i]t never addressed the jeopardy prong,” *id.* at 618; (2) the jeopardy “inquiry is solely to decide whether the tort must be recognized to ensure that the public policy at issue is adequately protected,” *id.* at 622; and (3) “*Korlund* and *Cudney* are the relevant precedent that must be followed if the court is to adhere to the core purpose of the tort of wrongful discharge in violation of public policy,” *id.* at 623 (Madsen, C.J., dissenting); see also *id.* at 624-35 (J.M. Johnson, J., dissenting).

Korslund and *Cudney*, the PECBA did **not** allow recovery of “emotional distress and other tort damages.” *Id.* at 613. In this “particular context,” the Court found the alternative remedies for promoting the public policy inadequate, and allowed the claim to proceed. *Id.* at 616.

As the trial court correctly ruled, *Korslund* and *Cudney* control the result in this case. The existing means to protect the FCPA public policy are more comprehensive, more robust, and more significant than those found adequate in *Korslund*, found “more than adequate” in *Cudney*, and nothing like the “limited statutory remedies” found inadequate in *Piel*.

C. A Plethora of Comprehensive and Robust Remedies Adequately Promote the Public Policy in the FCPA.

Plaintiffs base their wrongful discharge claim on an alleged public policy arising from the FCPA’s requirement for public companies to keep accurate books and records. Plaintiffs could not have chosen a public policy already promoted by more robust and comprehensive enforcement regimes and remedies. The FCPA provides dual criminal and civil enforcement regimes, complete with stiff penalties, robust whistleblower protections, comprehensive civil remedies—including “all relief necessary to make the employee whole”—and even large “bounty” award incentives for reporting violations. These protections and remedies are more than adequate to protect the public policy on which Plaintiffs base their claim.

1. Two Federal Agencies Dedicate Entire Specialized Units to FCPA Enforcement and Impose Severe Penalties for Violations.

The FCPA provides robust criminal and civil enforcement mechanisms. The DOJ and SEC share principal authority to enforce the FCPA, including its books and records provision. 15 U.S.C. §§ 78dd-2 & 78ff(c); see *Resource Guide to the U.S. Foreign Corrupt Practices Act*, by the DOJ & SEC, Nov. 2012, at p. 4 (*FCPA Guide*).³ The DOJ and SEC work with a variety of other federal agencies, including the FBI, to ensure comprehensive FCPA enforcement. *Id.* Both the DOJ and SEC recently created specialized “FCPA Units,” dedicated to responding to tips of alleged violations, investigating the allegations, and bringing enforcement actions where appropriate. *See id.* at 4-5.⁴ Both agencies also provide other resources “dedicated to the FCPA and its enforcement,” including special websites and hotlines where anyone can report suspected FCPA violations or obtain a variety of FCPA background and material. *Id.* In addition to national efforts, the DOJ, SEC, and other U.S. agencies vigorously enforce and promote the FCPA abroad. *Id.* at 5.

³ Available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>. The *FCPA Guide* is a 130-page joint DOJ/SEC publication to “provide the public with detailed information about [their] FCPA enforcement approach and priorities.” *Id.* at Foreward.

⁴ *SEC Enforcement Actions: FCPA Cases*, at <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (“In 2010, the SEC’s Enforcement Division created a specialized unit to further enhance its enforcement of the FCPA.”) (last visited Sept. 1, 2015).

The FCPA couples comprehensive federal enforcement with severe civil and criminal penalties. *See FCPA Guide*, pp. 68-72. For each accounting provision violation, companies can be fined \$25 million and individuals may be fined \$5 million and imprisoned for 20 years. *See* 15 U.S.C. § 78ff(a). The SEC can also pursue civil actions, and obtain significant penalties equaling the greater of either the (a) gross pecuniary gain to defendant or (b) specified dollar amount based on egregiousness, up to \$725,000 per violation. 15 U.S.C. § 78u(d)(3); *see* 17 C.F.R. § 201.1004 (adjustments for inflation). Further, a company found to violate the FCPA “may face significant collateral consequences,” including debarment from contracting with the federal government and/or revocation of export privileges. *FCPA Guide*, at p. 69-70.

2. SOX and Dodd Frank Each Provide Robust Protections for FCPA Whistleblowers.

In addition to recent “high-priority” FCPA enforcement,⁵ Congress enacted SOX in 2002 and Dodd-Frank in 2010, establishing new statutory and administrative regimes and creating new remedies and civil causes of action for whistleblowers alleging FCPA violations.

SOX provides broad protections and remedies for employees who allege retaliation for reporting suspected FCPA violations, as Engstrom

⁵ *SEC Enforcement Actions: FCPA Cases*, at <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (“Enforcement of the Foreign Corrupt Practices Act (FCPA) continues to be a high priority area for the SEC.”) (last visited Sept. 1, 2015).

and Stockwell claim here. The SOX whistleblower provision serves to “encourage and protect [employees] who report fraudulent activity that can damage innocent investors in publicly traded companies.” S. Rep. No. 107-146, at 19 (2002). It creates a private cause of action for such whistleblowers, with a full panoply of administrative and legal remedies. *See* 18 U.S.C. § 1514A. Aggrieved whistleblowers may file a complaint with the Secretary of Labor, and if the Secretary fails to issue a decision within 180 days, file an action directly in federal district court. *Id.* § 1514A(b)(1). And, if the whistleblower disagrees with an administrative ruling, the employee may obtain direct review of that decision at the U.S. Court of Appeals. *See* 29 C.F.R. § 1980.112.

As for remedies, SOX provides the employee “shall be entitled to all relief necessary to make the employee whole,” including reinstatement, back pay, interest, attorney fees and costs, and other compensation. 18 U.S.C. § 1514A(c). SOX whistleblowers may even recover emotional distress and noneconomic damages. *See, e.g., Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1138 (10th Cir. 2013) (emotional distress and suffering); *Jones v. SouthPeak Interactive Corp. of Del.*, 982 F. Supp. 2d 664, 678 (E.D. Va. 2013) (same).

Dodd-Frank, enacted in 2010, created yet another whistleblower program under a statute titled, “Securities Whistleblower Incentives and

Protection.” 15 U.S.C. § 78u-6. It “encourages individuals to provide information relating to a violation of U.S. securities laws” through two “related provisions that: (1) require the SEC to pay significant monetary awards to individuals who provide information to the SEC which leads to a successful enforcement action; and (2) create a private cause of action for certain individuals against employers who retaliate against them for taking specified protected actions.” *Asadi v. GE Energy (USA), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013). In addition to providing whistleblower protections and a cause of action for retaliatory discharge (like SOX),⁶ Dodd-Frank provides even more robust remedies by allowing recovery of *two times* back pay, 15 U.S.C. § 78u-6(h)(1)(C); and creating a new incentive program where whistleblowers can obtain a hefty *30% bounty* of the monetary sanctions recovered by the government. *Id.* § 78u-6(a)(3).

D. The Trial Court Correctly Applied this Court’s Jeopardy Analysis and Plaintiffs Show No Error.

As the trial court found, Plaintiffs cannot show the FCPA public policy would be jeopardized if their state tort claim is not recognized. *See* CP 211 ¶ 6. The SEC and DOJ dedicate entire specialized units to enforcing it, and impose stiff penalties for violations. CP 210-211 ¶ 5. A

⁶ The SEC recently issued an interpretive rule declaring that the Dodd-Frank whistleblower program (like SOX) applies to and protects employees who report securities violations internally to a supervisor (as Engstrom and Stockwell claim they did) without having to report violations directly to the SEC. *See* 17 C.F.R. §240.21F-2(b)(1).

web of statutes, regulations, and administrative processes operate to ensure compliance, including two whistleblower protection regimes. And FCPA whistleblowers may bring claims in federal court and recover “all relief necessary to make the employee whole,” including double back pay, attorney fees and costs, emotional distress, and even hefty bounty awards (up to 30% of multimillion dollar enforcement recoveries). *See id.*

These enforcement mechanisms and remedies are far more robust than what existed when *Thompson* was decided; nothing like the “limited statutory remedies” found inadequate in *Piel*; and far more comprehensive and significant than those this Court found adequate to protect the public policy in *Koroslund* and *Cudney*. Creating a common law wrongful discharge tort under these circumstances cannot be necessary to promote the public policy. Indeed, the existing means of enforcing the policy—such as criminal and civil penalties, recovery of double back pay and bounty awards—are **more robust** than tort-law remedies. It is difficult to fathom more robust and more comprehensive means of promoting a public policy than those existing here—carrying multiple layers of enforcement, remedies, and whistleblower protections and incentives. Thus, under Supreme Court precedent, the other means for enforcing the FCPA are more than adequate and preclude Plaintiffs’ claim.

Significantly, Engstrom and Stockwell do not contend the FCPA remedies are inadequate to promote the public policy—even though that is the controlling test. They do not offer any meaningful discussion of this Court’s jeopardy analysis in *Korlund* and *Cudney*. Nor do they explain how the trial court erred in applying these controlling decisions. Instead, they argue the trial court erred based on *Thompson* (a case decided before the Court adopted the jeopardy requirement), *Piel* (which involved “limited” statutory remedies and noted the need for considering the particular context of a case), and *Becker* (a lower court decision under review). Plaintiffs’ arguments and assignments of error have no merit.

1. *Thompson* Did Not Address and Does Not Control the Jeopardy Analysis.

Engstrom and Stockwell argue that *Thompson* precluded the trial court from assessing the adequacy of other means to promote the FCPA. Br. at 4, 15-16. This argument fails. *Thompson* was decided in 1984, twelve years before the Court adopted the jeopardy analysis that now controls, and long before the drastic expansion of FCPA remedies, enforcement, and whistleblower protections under SOX and Dodd-Frank. Because the jeopardy element did not yet exist, *Thompson* never decided the adequacy of other means to promote the FCPA. “[W]here a legal theory is not discussed in the opinion, that case is not controlling on a

future case where the legal theory is properly raised.” *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 459, 48 P.3d 274 (2002) (citation omitted). Even if *Thompson* had implicitly done so (as Plaintiffs argue), it did not consider—much less decide—the adequacy of the remedies and enforcement tools created by SOX (2002) and Dodd-Frank (2010). These legal regimes created a host of new FCPA remedies that did not exist in 1984, including: (1) specialized DOJ and SEC units dedicated to enforcing the FCPA; (2) hefty civil and criminal penalties for violations; (3) private causes of action for FCPA whistleblowers; (4) the right to “all relief necessary to make the employee whole,” including double back pay, attorney fees and costs, emotional distress, and other damages; and (5) a whistleblower incentive program allowing hefty bounty awards for reporting FCPA violations. *Thompson* did not consider any of these remedies, much less address a jeopardy element that did not yet exist.

2. *Piel* Does Not Change the Result Here.

Engstrom and Stockwell next argue that the trial court’s ruling conflicts with *Piel*. Br. at 4, 16-17. But they ignore *Piel*’s holding: “Consistent with *Smith*, we hold that the statutory remedies available to public employees through PERC are inadequate—and a wrongful discharge tort claim is therefore necessary—to vindicate the important public policy recognized in chapter 41.56 RCW.” 177 Wn.2d at 617. *Piel*

followed *Smith* (a post-jeopardy element decision), and simply held the “limited statutory remedies” under the PECBA were not adequate to protect its public policy. *Id.* at 616-17. This holding does not change the result in this case—with robust and comprehensive FCPA remedies that are anything but “limited.” Further, *Piel* emphasized “[e]ach public policy tort claim must be evaluated in light of its particular context,” and cautioned its holding “does not require retreat from our recent cases” precisely because “*Korlund* and *Cudney* addressed different statutory schemes and do not dictate the outcome here.” *Id.* Thus, *Piel* did nothing to disturb the Court’s holdings that comprehensive remedies like the “guideposts” in *Korlund* and *Cudney*—and even more robust here—adequately promote the public policy and preclude the public policy tort.

Recognizing that *Piel*’s holding does not support their claim, Engstrom and Stockwell rely on its passing reference to *Thompson*, repeatedly invoking that single reference to argue *Thompson* controls the jeopardy analysis. Br. at 2, 4, 13, 16-17, 21. But their argument rests on pure dicta, which carries no precedential value. *See, e.g., Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 320, 352 P.2d 1025 (1960) (statements in an opinion “not necessary to the decision in [the] case” are dicta and do not control future cases); *Noble Manor Co. v. Pierce Cnty.*, 133 Wn.2d 269, 289, 943 P.2d 1378 (1997) (Sanders, J., concurring) (dicta is not

controlling precedent); *State v. Potter*, 68 Wn. App. 134, 150, 842 P.2d 481 (1992) (statements “unnecessary to decide the case constitute obiter dictum, and need not be followed”). As the trial court understood: “Justice Stephens [in *Piel*] refers to the *Thompson* case. It’s dicta. And *Thompson* never addresses alternative remedies.” RP 21. More importantly, neither *Thompson* nor *Piel* addressed the adequacy of the FCPA remedies and enforcement regime available here, and thus, cannot control the outcome on this issue. See *Piel*, 177 Wn.2d at 617 (the court must “carefully consider” the statutory scheme at issue and “[e]ach public policy tort claim must be evaluated in light of its particular context”).

3. *Becker* Was Wrongly Decided and Significantly Differs From the Circumstances in this Case.

Plaintiffs rely heavily on the Court of Appeals decision in *Becker*. Br. at 17-21. But the Supreme Court is currently reviewing that decision, and should reverse *Becker* because it conflicts with *Korslund* and *Cudney* and (like this case) is distinguishable from *Piel* and the “limited” statutory remedies available there. Moreover, *Becker* is also distinguishable from this case and would not control the outcome here.

Indeed, a Washington federal court applying Washington law has held that SOX provides adequate remedies and precludes the public policy tort. In *Nunnally v. XO Communications*, Judge Robart held SOX

adequately protects whistleblowers who report what they believe to be corporate “financial improprieties or dishonesty.” 2009 WL 112849, at *11-12 (W.D. Wash. Jan. 15 2009). After assessing *Koroslund* and the SOX remedies, Judge Robart held “the jeopardy element of [plaintiff’s] public policy claim cannot be established because the other means for promoting the public policy in Sarbanes-Oxley are adequate.” *Id.* at *12; see *McEuen v. Riverview Bancorp, Inc.*, 2013 WL 646045, at *5 (W.D. Wash. Feb. 21, 2013) (“Sarbanes–Oxley provides an alternative remedy that promotes the public interest and precludes a wrongful discharge in violation of public policy claim premised on whistleblowing activities.”).

Like *Nunnally*, and contrary to *Becker*, courts across the country hold that SOX and Dodd-Frank provide adequate remedies and preclude a public policy tort. See *Day v. Staples, Inc.*, 555 F.3d 42, 59 (1st Cir. 2009) (Massachusetts law) (rejecting tort based on whistleblowing about fraudulent accounting because SOX provides appropriate remedies); *Stewart v. Everywhere Global, Inc.*, 68 F. Supp. 3d 759, 766 (S.D. Ohio 2014) (“Because SOX provides an adequate remedy, plaintiff has not shown that he can establish the jeopardy element of the Ohio common-law claim for wrongful termination.”); *Taylor v. Fannie Mae*, 65 F. Supp. 3d 121, 127 (D.D.C. 2014) (rejecting tort based on whistleblowing about securities violations because “ a suitable remedy for termination in

violation of the policy ... already exists under the Sarbanes–Oxley and Dodd–Frank statutes”); *Mann v. Fifth Third Bank*, 2011 U.S. Dist. LEXIS 44853, at *35 (S.D. Ohio Apr. 25, 2011) (because SOX “provide[s] a full panoply of remedies if someone is fired for reporting such violations ... the policy will not be jeopardized if Plaintiff cannot sue in tort for wrongful discharge based on this alleged policy”); *Hein v. AT&T Operations, Inc.*, 2010 WL 5313526, at *6 (D. Colo. Dec. 17, 2010) (“because SOX provides its own remedy for retaliatory discharge, Plaintiff’s wrongful discharge claim is not available and must be dismissed”); *Repetti v. Sysco Corp.*, 300 Wis. 2d 568, 578, 730 N.W.2d 189 (2007) (rejecting tort based on whistleblowing about accounting fraud because SOX “provided adequate mechanisms” to vindicate the policy).

As the First Circuit observed in rejecting a public policy tort based on alleged SOX violations:

In passing SOX, Congress aimed to create comprehensive legislation to fill the gaps in a patchwork of state laws governing corporate fraud and protections for whistleblowers. It would be entirely inappropriate for plaintiff to be able to use a federal statute designed to address the inadequacies of state law to create a new common law cause of action under Massachusetts law.

Day, 555 F.3d at 59-60. In also rejecting the tort, another court explained: “This court concludes that SOX provides sufficiently broad and inclusive remedies which adequately protect the public policy embodied in that

statute, and that it would not be appropriate to recognize a common-law action in tort.” *Stewart*, 68 F. Supp. 3d at 765. Courts overwhelmingly disagree with *Becker*, and it should be reversed.

In any event, the allegations in *Becker* fundamentally differ from the allegations in this case. *Becker* involved a company allegedly ordering its CFO to submit false information to the SEC, underreporting losses by \$8 million and “fraudulently misleading investors and creditors in violation of criminal laws.” *Becker v. Cmty. Health Inc.*, 182 Wn. App. 935, 939, 332 P.3d 1085 (2014). The company “gave him an ultimatum to either submit the [false] figure or lose his job.” *Id.* Those circumstances presented a “compelling case for protection under a public policy tort because by instructing him to commit a crime for which he would be personally responsible, [the company] forced him to choose between the consequences of disobeying his employer and the consequences of disobeying criminal laws.” *Id.* at 952 (citation omitted). *Becker* supported its holding by declaring: “The jeopardy element becomes easier to satisfy where, as here, the employee has special responsibilities or expertise connected with the public policy and other enforcement mechanisms are less likely to succeed.” *Id.* at 953.

None of the concerns that motivated *Becker* to recognize a public policy tort are at stake here. In contrast to *Becker*, Plaintiffs were not

company officers or controllers, nor did they have responsibility over corporate financial reporting or internal controls. Thus, *Becker's* justification for relaxing the jeopardy element does not apply. And, unlike in *Becker*, where the company refused to address its CFO's concerns of fraud (putting him in the position of committing a crime or losing his job), Microsoft promptly addressed Plaintiffs' suspicions and investigated the expenses at issue (finding their concerns unsubstantiated). Further, in sharp contrast to the \$8 million alleged fraud in *Becker*, this case involves nothing but Plaintiffs' suspicions about the manner in which \$22,000 in expenses were described. And they admit their concerns that the expenses were for illicit activities are hypotheticals. Finally, because *Becker* did not turn on a public policy in the FCPA, the court never considered the tough penalties and broad enforcement tools for promoting the FCPA, which exist apart from and in addition to SOX and Dodd-Frank.

For all these reasons, and regardless of how *Becker* is resolved, the Court should affirm the trial court's dismissal here because nothing suggests the FCPA public policy will be jeopardized if Engstrom and Stockwell cannot avail themselves of the narrow public policy tort.

E. The Court Should Not Abandon Twenty Years of Jeopardy Precedent and Drastically Broaden the “Narrow” Public Policy Tort.

Engstrom and Stockwell realize their claim fails the jeopardy element. For this reason, they ask the Court to do something radical—overturn twenty years of established Supreme Court precedent. Br. at 21-26. They obviously do not like the fact that robust alternative remedies to promote the FCPA preclude their public policy claim. But that cannot justify an extreme upheaval and reversal of this Court’s long-standing law.

1. Plaintiffs Show No Reason to Disregard Stare Decisis.

Stare decisis is a fundamental principle of law. The doctrine “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Keene v. Edie*, 131 Wn.2d 822, 831 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). It requires courts to “not only heed the relevant judicial past in arriving at a decision, but also to arrive at it within as straight and narrow a path as possible.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). Stare decisis also prevents the law from becoming “subject to incautious action or the whims of current holders of judicial office.” *Id.* (quoting *In re Rights to*

Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

“Although stare decisis limits judicial discretion, it also protects the interests of litigants by providing clear standards for determining their rights and the merits of their claims.” *Id.* For these reasons, the Court will “not lightly set aside precedent.” *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008); *Lunsford*, 166 Wn.2d at 278 (“overruling prior precedent should not be taken lightly”). Before the Court will consider overruling a decision, the proponent must make a “clear showing” that the prior decision is both “incorrect and harmful.” *Lunsford*, 166 Wn.2d at 278.

Here, Plaintiffs do not seek to overrule just one decision—they seek to overrule a twenty year span of Supreme Court decisions consistently applying the jeopardy element. They fail to demonstrate any basis for such an extreme and unprecedented departure from stare decisis.

As this Court has repeatedly held, the jeopardy element serves an important role in keeping the public policy tort a “narrow” exception to the employment at will doctrine. *See supra*, p. 11-12. By requiring plaintiff to show that other means of promoting the public policy are inadequate, the jeopardy element appropriately “limits the scope of claims under the tort of wrongful discharge.” *Danny*, 165 Wn.2d at 222. After all, the purpose of the jeopardy analysis is “to determine whether a clear mandate of public policy would be unprotected in the absence of the

private public policy wrongful discharge claim.” *Piel*, 177 Wn.2d at 622-623 (Madsen, C.J., dissenting). When existing means adequately protect the public policy, then a tort action should not be recognized since the public policy is not in jeopardy. *See, e.g., Korslund*, 156 Wn.2d at 183 (the question 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”); *Worley v. Providence Physician Servs. Co.*, 175 Wn. App. 566, 573, 307 P.3d 759 (2013) (“If other adequate means are available, the public policy is not in jeopardy and a private cause of action need not be recognized.”).

Engstrom and Stockwell ask the Court to discard this long-imposed limit on the tort, claiming “the jeopardy element has run its course and should be abandoned as an aberration.” Br. at 22. But twenty years of precedent is no aberration. Nor is the Court’s repeated and reasoned analysis in applying the jeopardy element as an important limit on the narrow exception to the at-will doctrine. The law has evolved for a reason: “In order to ensure that we can balance the interests of employer and employee, and to ensure judicial restraint, we have imposed additional limitations on the establishment of public policy.” *Sedlacek*, 145 Wn.2d at 389. The jeopardy element preserves the fundamental purpose of the narrow tort—protecting the public policy—while preserving the

employment at-will doctrine and guarding against frivolous suits.

Abandoning the jeopardy element and twenty years of precedent applying it (as Plaintiffs advocate) would destroy this balance.

Engstrom and Stockwell's suit shows why the jeopardy element remains so vital. Allowing a tort to proceed in this context would essentially eviscerate the at-will doctrine, flooding the courts with lawsuits whenever employees lose their job after having—at any point during employment—questioned the level of detail in any business expense no matter how trivial or unsubstantiated the claim. Indeed, given the breadth and depth of federal securities laws (including the FCPA, SOX, Dodd-Frank, Securities Act of 1933, Securities and Exchange Act of 1934, among a host of other statutes and regulations), plaintiffs could simply point to a policy in one of these laws (as Engstrom and Stockwell do here) and then proceed with the “narrow” public policy tort without ever having to show the conduct at issue jeopardizes that policy. This Court has long rejected such a broad and boundless public policy tort.

Moreover, without the jeopardy analysis, plaintiffs could transform *every* federal securities law or regulation (including those with their own private causes of action and federal enforcement tools, like SOX and Dodd-Frank) into a viable tort claim under Washington law. Any alleged federal securities violations occurring sometime during an employee's

tenure could then become a state wrongful discharge tort claim, with state courts deciding the contours of federal securities violations. This would thwart an important purpose of federal securities laws—uniformity. *See e.g., Day*, 555 F.3d at 59-60 (rejecting public policy tort based on alleged SOX violations because “[i]t would be entirely inappropriate for plaintiff to be able to use a federal statute designed to address the inadequacies of state law to create a new common law cause of action under Massachusetts law”); *Carnero v. Boston Sci. Corp.*, 433 F.3d 1, 11 (1st Cir. 2006) (SOX sought to establish uniformity “in light of the patchwork and vagaries of current state [whistleblower protection] laws”).

Engstrom and Stockwell also argue the jeopardy element must be discarded to make the public policy tort “reasonably certain, consistent, and predictable.” Br. at 24.⁷ But overturning twenty years of precedent that defines and limits the scope of the tort would do nothing to make the law more “certain” or “predictable.” Quite the opposite. *See Lunsford*, 166 Wn.2d at 278 (“stare decisis protects reliance interests”). It would destabilize the law and vastly expand the tort’s reach, creating uncertainty and potential liability for nearly any employment action. The Court

⁷ Plaintiffs cite the differing results in *Becker* and *Nunnally* as supposed evidence that courts cannot reasonably apply the jeopardy element. *See id.* The conflict between these cases, however, arose because *Becker* failed to consider Judge Robart’s reasoned decision in *Nunnally*, and instead, issued a results-oriented decision that squarely conflicts with *Korslund* and other Supreme Court jeopardy precedent.

should not suddenly reverse course and create a potentially boundless public policy tort from what has long been held a narrow exception.

2. Plaintiffs' Rationale for Abandoning Jeopardy is Misguided and Does Not Support Their Claim.

Plaintiffs cite *Becker*'s concurrence to support their argument for abandoning jeopardy, claiming only four jurisdictions besides Washington have adopted the Perritt test and jeopardy element. Br. at 22-23 (citing *Becker*, 182 Wn. App. at 963-64). Their references are misleading and do not support their claim of a supposed "majority rule" here. *See id.*

Many jurisdictions that have not expressly adopted the Perritt test and jeopardy element by *name* have nonetheless adopted the requirement in *substance*. *See Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 153 (Minn. 2014) (rejecting tort where "the Legislature has already provided other remedies to vindicate the public policy"); *LeFande v. Dist. of Columbia*, 864 F. Supp. 2d 44, 50 (D.D.C. 2012) (rejecting "exceptions to the doctrine of at-will employment where the legislature has already creat[ed] a specific, statutory cause of action to enforce the public policy at issue"); *Hein v. AT&T Operations, Inc.*, 2010 WL 5313526, at *6 (D. Colo. Dec. 17, 2010) ("[E]ven if a public policy exception is appropriate, it is not available when the statute in question provides a remedy for retaliatory discharge."); *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 423,

823 A.2d 590 (Md. 2003) (rejecting tort “where statutory and regulatory provisions ... already provide an adequate and appropriate civil remedy for the wrongful discharge”); *McLean v. Hyland Enters.*, 34 P.3d 1262, 1268 (Wyo. 2001) (rejecting tort unless “no other remedy is available to protect the interests of the terminated employee or of society”); *Burnham v. Karl & Gelb, P.C.*, 252 Conn. 153, 165 (Conn. 2000) (“plaintiff’s common-law cause of action for wrongful discharge is precluded because she had a [statutory] remedy ... for her alleged retaliatory termination”); *Collier v. Insignia Fin. Grp.*, 981 P.2d 321, 323 (Okla. 1999) (allowing tort only if “there is no adequate, statutorily-expressed remedy”); *Flenker v. Willamette Indus.*, 266 Kan. 198, 203 (Kan. 1998) (“The question to ask in resolving recognition of a state tort claim for retaliatory discharge is whether the statutory remedy is adequate and thus precludes the common-law remedy.”); *Stevenson v. Superior Court*, 16 Cal. 4th 880, 912, 941 P.2d 1157 (Cal. 1997) (“When the Legislature has provided an adequate statutory remedy to fully protect the interests of both the employee and the public, the courts have neither reason nor need to intercede.”); *Ross v. Stouffer Hotel Co.*, 879 P.2d 1037, 1047 (Haw. 1994) (“it is both unnecessary and unwise to permit a judicially created cause of action...to be maintained where the policy sought to be vindicated is already embodied in a statute providing its own remedy for its violation”); *Crews*

v. Memorex Corp., 588 F. Supp. 27, 29 (D. Mass. 1984) (“the theoretical reason for creating a common law tort action based on public policy is absent when a statutory remedy is available”).

Contrary to Plaintiffs’ claim, Washington is no outlier in precluding the public policy tort when adequate alternative remedies exist. Like Washington, all these jurisdictions apply the sound principle underlying the jeopardy analysis and limit the tort’s scope to those circumstances where it is necessary to vindicate the public policy.

Plaintiffs also rely on a statement in *Becker*’s concurrence that “[n]early all, if not all public policies have an alternative means for enforcement.” Br. at 25 (quoting 182 Wn. App. at 954). But this observation misses the entire point of the jeopardy analysis—to assess the *adequacy* of alternative remedies, not just their existence. As the Supreme Court has emphasized in applying jeopardy, each claim must be evaluated “in light of its particular context” and the court must “carefully consider” the “administrative scheme” to assess the adequacy of alternative remedies. *Piel*, 177 Wn.2d at 617; *see also Hubbard v. Spokane Cnty.*, 146 Wn.2d 699, 717, 50 P.3d 602 (2002) (“[e]ven though a zoning decision can be challenged administratively, this alternative is insufficient to safeguard the public policies embodied in the zoning code”). This makes sense, because “the point of the jeopardy prong of the analysis ... is

to consider whether the statutory protections are *adequate to protect the public policy.*” *Cudney*, 172 Wn.2d at 534 n. 3 (emphasis in original).

Finally, Plaintiffs contend the Court should remove any meaningful limit on the “narrow” public policy tort and “let the marketplace decide whether a particular claim may be brought as a wrongful discharge claim.” Br. at 25. In other words, they argue that plaintiffs—rather than the courts—should decide whether a tort should be recognized. Of course, plaintiffs (and their lawyers) would benefit from the *in terrorem* effect of subjecting employers to expensive and disruptive discovery, in hopes of extracting settlement, for frivolous claims that do not threaten a public policy.⁸ But that is precisely why this Court adopted the jeopardy element in the first place—to “guarantee[] an employer’s personnel management decisions will not be challenged unless a public policy is genuinely threatened.” *Gardner* 128 Wn.2d 931 at 941-42. Plaintiffs have never explained how the FCPA policy on which they base their claim would be threatened without a tort claim. It will not be threatened. This is because a vast array of means exist to promote and enforce that policy. There is no reason to create a separate and duplicative state tort claim under these circumstances.

⁸ Indeed, this is the tactic Engstrom and Stockwell employed here—immediately serving onerous discovery, demanding to depose one of Microsoft’s most senior executives, and threatening a motion to compel, which forced Microsoft to seek a protective order while the trial court considered its pending motion to dismiss. *See* CP 221-246.

VI. CONCLUSION

For the foregoing reasons, the Court should follow its established precedent and affirm the trial court's dismissal.

RESPECTFULLY SUBMITTED this 2nd day of September, 2015.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Microsoft Corporation

By s/ John A. Goldmark
Robert J. Maguire, WSBA #29909
John A. Goldmark, WSBA # 40980
Taylor S. Ball, WSBA #46927
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
robmaguire@dwt.com
taylorball@dwt.com
johngoldmark@dwt.com