

FILED

DEC 21 2012

CLERK OF COURT
STATE OF WASHINGTON
SPokane, WA

COA 309509-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

JANETTE WORLEY,
Appellant

v.

PROVIDENCE PHYSICIAN SERVICES CO.,
Respondent

APPELLANT REPLY BRIEF

Paul J. Burns
Paul J. Burns, P.S.
One Rock Pointe
1212 N. Washington, Suite 116
Spokane, WA 99201
(509) 327-2213
Attorney for Appellant

TABLE OF CONTENTS

Page

I. INTRODUCTION..... 3-7

II. ARGUMENT.....7-19

1. RCW 43.70.075 provides no adequate remedy to vindicate the public policy at issue.....7

2. The evidence demonstrates a factual question concerning whether plaintiff’s report of scope of practice and medical charting issues was a substantial factor in the discharge decision..... 12

3. The record demonstrates a triable issue of fact concerning whether Providence had an overriding justification for the discharge.....16

4. The record demonstrates a triable issue of fact concerning whether defendant breached its handbook promise of non retaliation for employees reports of compliance concerns.....17

III. CONCLUSION.....19

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Bulman v. Safeway, Inc.</i> 144 Wn.2d 335, 344 (2001).....	18
<i>Cudney v. ASLCO, Inc.</i> 172 Wn.2d 524, 259 P.3d 244 (2011).....	8,9,10, 11
<i>Gardner v. Loomis Armored, Inc.</i> 128 Wn.2d 931, 935, 913 P.2d 377 (1996).....	8
<i>Hubbard v. Spokane County</i> 146 Wn.2d 699, 718, 50 P.3d 602 (2002).....	12
<i>Korslund v. DynCorp Tri-Cities Services, Inc.</i> 156 Wn.2d 168, 125 P.3d 119 (2005).....	8, 10, 11
<i>Renz v. Spokane Eye Clinic, P.S.</i> 114 Wn.App. 611, 624, 60 P.3d 106 (2002).....	15,16,17
 <u>Statutes:</u>	
RCW 43.70.075.....	6,7,9,10,11
WAC 246-840-300(6).....	9
RCW 49.60.....	9

I. INTRODUCTION

Plaintiff Janette Worley was employed with defendant Providence Physician Services, Inc., as an Advanced Registered Nurse Practitioner (ARNP). She worked under Dr. Andrew Howlett who, by all accounts, had a uniquely complex orthopedic surgery practice. Ms. Worley's supervisor at Providence was the orthopedic clinic office manager, Heidi Brown. Ms. Brown had no medical training.

The evidence in the record demonstrates that from a period early in her employment Ms. Worley was being directed by Ms. Brown to engage in medical practices which were outside her training and scope of practice as an ARNP. Ms. Brown also directed Worley to put entries in patients' medical charts when she had not seen the patients. When Worley complained about this, Brown retaliated against her. When Worley raised scope of practice and medical charting concerns, Brown subjected her to discipline, altered her work schedule, and imposed further discipline on her.

In early June 2009 Ms. Worley requested a meeting with Providence CEO Kris Fay and HR personnel to discuss her scope of practice and medical charting issues. That meeting was scheduled for June 10, 2009. On June 9, 2009 Worley was issued a

“Final Written Warning” for alleged performance deficiencies. The alleged performance deficiencies reflected Heidi Brown’s criticism of Worley’s job performance which escalated only after she raised scope of practice and medical charting issues.

At the June 10, 2009 meeting with Providence CEO Kris Fay, Worley reported her scope of practice and medical charting concerns. Ms. Fay responded by telling her she was an inadequate ARNP. At this point Worley had reported scope of practice and medical charting issues to her immediate supervisor, Heidi Brown, and Providence CEO Kris Fay. The evidence in the record supports findings that Brown retaliated against her and Fay ignored her.

Providence’s employee handbook/code of conduct directed employees to report medical compliance and integrity issues internally to its compliance officer. The handbook promises that employees who make such reports in good faith will not be retaliated against. When CEO Fay ignored Worley’s scope of practice and medical charting concerns at the June 10, 2009 meeting, Worley followed the code of conduct and reported these issues to Providence’s internal compliance officer, Kari Lidbeck.

Ms. Lidbeck directed Worley to fax any documents she had that supported her concerns. Following that directive Worley took a stack of patient “face sheets” from the Providence premises

intending to fax them to Lidbeck. Ms. Worley redacted all patient identifying information from the face sheets.

Apparently Heidi Brown observed Worley take the patient face sheets from the Providence premises. Brown reported this to CEO Fay. On June 11, 2009 Fay summoned Worley to Providence offices and directed her to return the patient face sheets. Worley told her she had taken them to fax them to the compliance officer, Kari Lidbeck, at Ms. Lidbeck's direction. Worley also told Fay she had removed all patient identifying information.

Providence discharged Worley the next day, June 12, 2009. Providence concedes Worley was not discharged for any alleged performance deficiencies identified in the June 9, 2009 "Final Written Warning." The discharge notice states she was terminated for removing confidential patient information from the workplace. The evidence demonstrates that (1) Worley removed the patient face sheets at the direction of Providence's compliance officer, (2) she redacted all patient identifying information from the face sheets, and (3) independent of her report to the compliance officer, Worley routinely took patient face sheets home with her to complete her work. This was a known and accepted practice. (CP 339-340)

Ms. Worley brought this action against Providence alleging wrongful termination premised on theories of violation of public policy and breach of handbook promises. The trial court dismissed both claims on summary judgment.

On appeal Providence defends the trial court's decision, arguing RCW 43.70.075 provides an adequate remedy to vindicate the public policy at issue. Therefore, defendant contends plaintiff cannot establish the jeopardy element of her public policy claim. Defendant further argues that the evidence is insufficient to demonstrate a factual question concerning whether it breached its handbook promise of non retaliation for reporting medical compliance and integrity issues to Providence's internal compliance officer.

Defendant's argument fails, both legally and factually. First, as a matter of law, the Washington Health Care Act, RCW 43.70.075 provides no remedy to a health care employee who is retaliated against for reporting concerns of unsafe health care practices internally to the employer's compliance office at the direction of the employer. Therefore, plaintiff has established the jeopardy element of her public policy claim. Further, the record demonstrates a genuine issue of material fact concerning whether Worley's report of scope of practice and medical charting issues to

the Providence compliance officer was a substantial factor in defendant's discharge decision. The same evidence demonstrates a factual question concerning whether Providence breached its handbook promise of non retaliation by discharging Worley for reporting scope of practice and medical charting issues to the internal compliance officer.

Defendant's argument is legally wrong with respect to the impact of RCW 43.70.075 on plaintiff's public policy claim. Defendant ignores the evidence which demonstrates factual questions on the causation element of the public policy claim, and the issue of breach on the handbook claim. The trial court made these same errors in dismissing plaintiff's claims on summary judgment. Plaintiff respectfully requests this court to reverse the trial court's summary judgment order and remand this case for trial on the merits.

II. ARGUMENT

1. RCW 43.70.075 provides no adequate remedy to vindicate the public policy at issue.

The elements of the tort of wrongful discharge in violation of public policy are now well established. The plaintiff must demonstrate (1) the existence of a clear public policy (clarity element), (2) that discouraging the conduct in which she engaged

would jeopardize the public policy (jeopardy element), (3) that the public policy linked conduct caused the dismissal (causation element), and (4) defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element). *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996). The Washington court has held that a plaintiff cannot establish the jeopardy element where a statutory or regulatory scheme provides an adequate remedy to vindicate the public policy at issue. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011); *Korshund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005). Defendant argues (and the trial court found) that the Washington Health Care Act, RCW 43.70.075 provides an adequate remedy to vindicate the public policy at issue. Therefore defendant argues (and the trial court found) that plaintiff failed to establish the jeopardy element of her public policy claim.

This argument is simply wrong, legally. First, it is important to identify the public policy at issue. The parties stipulated that plaintiff had established the clarity element of her public policy claim. There is a clear mandate of public policy in Washington that protects health care workers from retaliation for reporting concerns of unsafe health care practices. This makes

common sense. It is also reflected in RCW 43.70.075 and administrative regulations such as WAC 246-840-300, which defines the scope of practice of an Advanced Registered Nurse Practitioner. The parties agreed that there is a clear mandate of public policy protecting health care workers from retaliation for reporting concerns of unsafe health care practices. That is what Ms. Worley did when she reported her scope of practice and medical charting concerns internally to Providence's compliance officer (consistent with Providence's Code of Conduct Handbook).

RCW 43.70.075 provides whistleblower protection to health care employees who report concerns of unsafe health care practices to the state department of health. The statute prohibits retaliation against whistleblowers. The statute does not provide any administrative process as a remedy for employees who are retaliated against for reporting concerns to the department of health. The statute does provide that a whistleblower who is retaliated against may sue in superior court and obtain the remedies available under the Washington Law Against Discrimination, RCW 49.60. However the statute provides no remedy to someone like Ms. Worley who is retaliated against for reporting concerns of unsafe health care practices internally to her employer. RCW

47.70.075 provides a remedy only to a health care worker who makes a complaint to the department of health.

This is fundamentally different from the situation presented in *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, and *Korlund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168. In both *Cudney* and *Korlund* the workers reported concerns of unsafe work practices internally to their employers. They were then discharged. These employees had available to them an administrative process established by statute that provided a complete remedy for being discharged in retaliation for raising concerns of unsafe work practices internally to their employers. Therefore, the Washington court held that the plaintiffs in *Cudney* and *Korlund* could not establish the jeopardy element of their public policy wrongful discharge claims.

RCW 43.70.075 provides no similar remedy to a health care worker who is discharged in retaliation for reporting concerns of unsafe health care practices internally to the employer's compliance department. This statute protects only employees who report these concerns to the state department of health. Since Ms. Worley reported her concerns of unsafe health care practices internally to the Providence compliance officer (consistent with the Providence Code of Conduct), and did not report her concerns to

the state department of health, RCW 43.70.075 provides no remedy to her.

Public policy protects health care workers who report concerns of unsafe health care practices. Under defendant's argument, and the trial court's ruling, this policy does not protect employees like Ms. Worley who raise these issues internally with their employer. That makes no sense. It is disingenuous to suggest that a health care employer would want employees to first report concerns of unsafe health practices to a state agency before trying to resolve those concerns internally. Yet that is precisely the logic of the defendant's argument and the trial court's ruling.

More importantly, as a matter of law, RCW 43.70.075 does not provide protection to any employee like Ms. Worley who reports concerns of unsafe health care practices internally to her employer. In *Cudney* and *Korlund*, the employees who reported concerns of unsafe work practices internally to their employer had comprehensive administrative remedies established by statute available to them. Therefore they could not establish the jeopardy element of their public policy claim. These remedies are not available to Ms. Worley to protect her from retaliation for reporting concerns of unsafe health care practices internally to her employer. Public policy protects this conduct. The only remedy

available to Ms. Worley to protect her against retaliation, and to vindicate the public policy at issue, is a common law public policy wrongful discharge claim. Plaintiff has established the jeopardy element. The trial court erred in ruling otherwise.

2. The evidence demonstrates a factual question concerning whether plaintiff's report of scope of practice and medical charting issues was a substantial factor in the discharge decision.

Generally, the causation element of a public policy wrongful discharge claim presents a factual question for jury determination. *Hubbard v. Spokane County*, 146 Wn.2d 699, 718, 50 P.3d 602 (2002). Defendant contends Ms. Worley failed to raise a factual question on the causation element because she was fired for removing confidential patient information from the workplace, and not for reporting scope of practice and charting concerns to the compliance officer. This argument simply ignores the evidence in the record which clearly demonstrates a factual question on this issue.

Ms. Worley received a "Final Written Warning" for alleged performance deficiencies on June 9, 2009. Providence concedes she was not discharged for those alleged performance deficiencies. (See Brief of Respondent, p. 26) She was discharged three days

later only after reporting scope of practice and medical charting issues to the compliance officer.

Defendant's contention that Ms. Worley's removal of patient information from the workplace justified her discharge as a matter of law ignores the evidence in the record. First, the evidence demonstrates that Worley removed the redacted patient face sheets at the direction of Kari Lidbeck, the Providence compliance officer. Worley told Providence CEO Kris Fay that Ms. Lidbeck had directed her to fax the face sheets which provided documentation of her scope of practice and medical charting concerns.

Second, contrary to defendant's unsupported factual assertion, the patient face sheets Worley removed contained no confidential information. Worley had redacted all patient identifying information before removing these documents from the premises. Ms. Worley testified:

Q. And did you also tell them that you were the one who had redacted the information off the, that you had redacted information off the patient face sheets?

A. I told them that there was not any identifying names, that I had either blacked them out or removed them.

Q. At this meeting with Kris Fay and Jennifer Rollins, do you recall them

telling you that removing patient identifiable information from the office was not in keeping with HIPAA?

A. I believe they said that. That would be the reason that I explained to them that the documents didn't have any patient identification on them.

Q. Did they also explain to you that this was not in keeping with organizational confidentiality requirements?

A. No.

(CP 341-342)

Third, the evidence demonstrates that it was common and accepted practice for Ms. Worley to take these patient face sheets home with her to complete her work. Again, she testified:

Q. Did you prior to, prior to taking the documents, did you ever ask anyone in a position of authority with Providence, ever ask them permission to take those documents?

A. I was supposed to take documents home to prep for the next day. I was supposed to take documents home to finish dictating. I was supposed to take documents home so that I could meet with Dr. Howlett either later that day or early the next morning.

It was common practice to take the documents because it was expected of me, so I have a briefcase that has a lock on it, because that's what is expected.

Q. In this situation, though, was that the reason why you took the documents at this point?

A. I took the documents because the compliance officer said I needed to send her every document that I had, that I was talking about.

(CP 339-340)

Providence argues Worley was discharged for removing confidential patient information from the workplace, not for reporting scope of practice concerns to the compliance officer. However, evidence rebutting the believability of an employer's proffered reason for discharge is sufficient to demonstrate a factual question concerning whether the employee's protected conduct was a substantial factor in the discharge decision. *Renz v. Spokane Eye Clinic*, 114 Wn.App. 611, 624, 60 P.3d 106 (2002). In the instant case Ms. Worley testified she told Providence CEO Kris Fay that (1) she removed the patient face sheets from the premises at the direction of compliance officer Kari Lidbeck, and (2) she redacted all patient identifying information from the face sheets. This evidence demonstrates a factual question concerning whether Ms. Fay, as the decision maker, had a good faith belief that Worley in fact had removed confidential patient information from the workplace. More importantly, Ms. Worley testified that it was routine for her, and an accepted practice to remove patient face

sheets from the workplace to complete her work in the evening. This evidence raises a factual question concerning whether defendant's claim that plaintiff was discharged for removing patient face sheets from the workplace is worthy of belief. This evidence is sufficient to demonstrate a triable issue of fact concerning whether plaintiff's report of scope of practice and medical charting issues was a substantial factor in the discharge decision. *Renz*, 114 Wn.2d, at 623-625. These factual questions preclude summary judgment and require reversal of the trial court's decision.

3. The record demonstrates a triable issue of fact concerning whether Providence had an overriding justification for the discharge.

Providence concedes that Ms. Worley was not terminated for the alleged performance deficiencies that triggered the June 9, 2009 "Final Written Warning." (Respondent's brief, p.26) Therefore, these alleged performance deficiencies cannot establish an overriding justification for the discharge. However, defendant contends it is "uncontroverted" that Worley was advised by the decision makers that she was discharged for removing confidential patient information. Therefore, Providence argues it established an

overriding justification for the discharge. Once again, defendant ignores the evidence.

The fact that the decision makers told Worley that she was being discharged for removing confidential patient information certainly does not resolve the issue. Employers rarely openly reveal that retaliation was a motive for adverse employment actions. *Renz*, 114 Wn.2d, at 621. As discussed above, the record supports finding that (1) no confidential patient information was removed because Worley redacted patient identifying information, (2) Worley informed CEO Kris Fay of this fact, and (3) removal of patient face sheets was an otherwise common practice for Ms. Worley to complete her work. Therefore the record falls far short of establishing as a matter of law that defendant had an overriding justification for the discharge.

4. The record demonstrates a triable issue of fact concerning whether defendant breached its handbook promise of non retaliation for employees reports of compliance concerns.

In addition to the public policy claim, plaintiff alleged Providence breached its handbook promise of non retaliation for reporting unsafe health care practice issues to the internal compliance officer. To prevail on her breach of promise claim, plaintiff must establish:

- 1) The employer made a specific promise of specific treatment in specific situation;
- 2) She justifiably relied upon any such promise; and
- 3) The employer breached the promise.

Bulman v. Safeway, Inc., 144 Wn.2d 335, 27 P.3d 1172 (2001)

Defendant conceded elements one and two in the summary judgment proceeding. However, Providence argues the evidence is insufficient to demonstrate a factual question on the issue of breach. This argument lacks merit.

Providence's argument with respect to this issue is essentially the same as the one advanced on the causation issue relative to the public policy claim. Defendant contends the evidence establishes as a matter of law that Worley was discharged for removing confidential patient information, not for reporting concerns to the compliance officer. However, as explained in detail above, the evidence demonstrates factual questions concerning whether the decision makers reasonably believed Ms. Worley had removed confidential patient information when they knew that she had redacted all patient identifying information from the face sheets. The evidence demonstrates factual questions concerning whether the decision makers reasonably believed Worley violated policy in removing the face sheets when it was well known and accepted that she routinely did this to complete her work at home.

Therefore, the evidence demonstrates triable issues of fact concerning whether Providence breached its handbook promise by discharging Ms. Worley for reporting scope of practice and medical charting issues to the compliance officer. These factual questions preclude summary judgment on plaintiff's breach of promise claim. The trial court's order dismissing that claim should be reversed.

CONCLUSION

Plaintiff/Appellant respectfully requests this court to reverse the decision of the trial court with respect to both the public policy and breach of promise wrongful termination claims, and remand this case for trial on the merits.

RESPECTFULLY SUBMITTED this 20 day of
December, 2012.

PAUL J. BURNS, P.S.

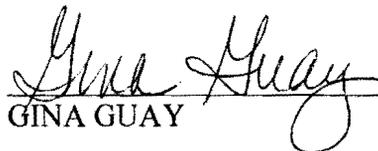
By:


PAUL J. BURNS, WSBA #13320
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 20 day of December, 2012, at Spokane, Washington, the forgoing was caused to be served on the following person(s) in the manner indicated:

Workland & Witherspoon Michael B. Love 601 West Main Avenue Suite 714 Spokane, WA 99201	<input type="checkbox"/> Regular Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail
---	---


GINA GUAY