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DIVISION III
STATE OF WASHINGTON
By _____

COA 309509-III

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OF THE STATE OF WASHINGTON

JANETTE WORLEY,
Appellant

v.

PROVIDENCE PHYSICIAN SERVICES CO.,
Respondent

BRIEF OF APPELLANT

Paul J. Burns
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Attorney for Appellant

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I. INTRODUCTION

Plaintiff Appellant, Janette Worley, brought this lawsuit against her former employer, Providence Physician Services, Co., alleging wrongful termination claims premised on theories of violation of public policy and breach of handbook promises. Ms. Worley was employed with Providence as an Advanced Registered Nurse Practitioner (ARNP) from June 30, 2008 through June 12, 2009. During her tenure of employment she was required to provide medical services that were outside her scope of practice. She was also required to document information in patients' medical charts when she had not seen the patients. When she reported these concerns to Providence's internal compliance officer she was discharged.

Ms. Worley sued Providence alleging that the discharge (1) violated public policy, and (2) breached the employer's handbook promise of non-retaliation for reporting medical compliance issues. The trial court granted summary judgment and dismissed both claims. The trial court held that plaintiff failed to establish the jeopardy element of a public policy wrongful discharge claim because RCW 43.70.075 provides an adequate remedy to vindicate the public policy at issue. That was error. The trial court further

concluded that Ms. Worley failed to establish the reliance element of her handbook claim. That was also error.

Ms. Worley appeals and seeks reversal of the trial court order dismissing her claims on summary judgment. The record demonstrates factual questions which preclude summary judgment on both her public policy and breach of promise wrongful discharge claims. The trial court orders granting defendant's motion for summary judgment and denying plaintiff's motion for reconsideration should be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting defendant's motion for summary judgment and dismissing plaintiff's claim of wrongful discharge in violation of public policy.

2. The trial court erred in granting defendant's motion for summary judgment and dismissing plaintiff's breach of promise wrongful discharge claim.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether RCW 43.70.075 provides an adequate means of promoting and vindicating the public policy of protecting health care workers who report concerns of unsafe health care practices, and therefore precludes plaintiff's public policy wrongful discharge claim? (Assignment of Error No. 1)

2. Whether RCW 43.70.075 applies and precludes plaintiff's public policy wrongful discharge claim where plaintiff reported her concerns of unsafe health care practices internally to her employer, and made no report to the State Department of Health? (Assignment of Error No. 1)

3. Whether the record demonstrates genuine issues of material fact which preclude summary judgment on plaintiff's public policy wrongful discharge claim? (Assignment of Error No. 1)

4. Whether the record demonstrates genuine issues of material fact which preclude summary judgment on plaintiff's breach of promise wrongful discharge claim? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

Plaintiff Janette Worley is an Advanced Registered Nurse Practitioner (ARNP). Defendant Providence Physician Services hired Ms. Worley to work for Dr. Andrew Howlett in its newly opened orthopedic clinic on June 30, 2008. Providence employed a Physician Assistant, Brandi DeSaveur whose primary duties involved providing surgical assistance to Dr. Howlett. Ms. Worley's primary duties involved attending to Dr. Howlett's

patients in the hospital, and examining and treating his patients in the Providence Orthopedic Clinic. (CP 250)

Dr. Howlett has a very advanced, complex orthopedic practice. He handles complex trauma and orthopedic tumor cases that are beyond the expertise of most other orthopedic surgeons in the area. Dr. Howlett made this clear to Ms. Worley when she was initially hired. It was common for Dr. Howlett's patients to come to him after seeing two or three other orthopedic surgeons who were not equipped to properly treat their complex orthopedic issues. (CP 250, 264-269)

Heidi Brown was the office manager in the Providence Orthopedic Clinic. She managed the day to day operations of the clinic and had general administrative oversight of the business of the clinic. Ms. Brown has no medical training. From the beginning of Ms. Worley's employment with Providence she believed, and Dr. Howlett confirmed, that she worked under the supervision of Dr. Howlett. Ms. Worley was providing medical care to Dr. Howlett's patients. Because Ms. Brown had no medical training she had no competence to supervise plaintiff with respect to her work in providing medical care to Dr. Howlett's patients. (CP 251, 270-272)

From a point early on in her employment with Providence Ms. Worley was being asked to review and interpret x-rays, CT scans, and MRI studies on patients with extremely complex orthopedic trauma and cancer conditions. She had no training in reviewing and interpreting diagnostic studies of this nature. Reviewing and interpreting these diagnostic studies was clearly outside the scope of her training, practice and licensure. See, WAC 246-840-300(6)¹. There was no trained radiologist in the Providence Orthopedic Clinic to assist Ms. Worley in reading and interpreting these studies. (CP 251, 273-275)

Ms. Brown also routinely scheduled Ms. Worley to examine patients with complex orthopedic trauma and cancer

¹ WAC 246-840-300 defines the scope of practice of an Advanced Registered Nurse Practitioner. The regulation provides in relevant part:

- (5) The ARNP shall obtain instruction, supervision, and consultation as necessary before implementing new or unfamiliar techniques or practices.
- (6) Performing within the scope of the ARNP's knowledge, experience and practice, the licensed ARNP may perform the following:
 - (a) Examine patients and establish diagnosis by patient history, physical examination and other methods of assessment;
...
 - (c) Order, collect, perform and interpret diagnostic tests;
 - (d) Manage health care by identifying , developing, implementing and evaluating a plan of treatment and care for patients.
...

issues that were far outside her scope of practice. For example, in October 2008 Brown scheduled Worley to see a 16 year old boy with a large bony tumor in his leg. The boy was at risk for losing his leg or dying. This patient presented medical issues that were far outside Ms. Worley's training, experience and scope of practice as an ARNP. She explained:

And I remember walking into a room, it was a consult for a 16-year old boy who had a huge bony tumor in his leg. He has been seen by three other specialists. I'm looking at this. These people don't know this boy is going to lose his leg and he is lucky if he doesn't die but they shouldn't be hearing it from a nurse practitioner who has been on staff for five or six months without a physician in the room when they have already seen three specialists in town. That should have been Dr. Howlett. That should not be Janette looking at the MRI and telling this poor Russian speaking family that their child is probably going to lose his leg and probably going to die.

There were times when Heidi would put somebody on my schedule that needed a review of a CT, they brought in a disk and I would tell her, "I am not qualified to look at that disk. It is a third referral. I can't read the CT."

And her response was, "Janette, they are from CHAS. We are not getting paid for it anyway. Point to the screen. They don't know any better anyway."

And that particular thing Jennifer Rollins from HR was sitting in the room with her Blackberry, playing on her Blackberry. I couldn't believe that that is okay. "They are a CHAS patient, you know we are not going to get paid for it anyway."

They don't understand it. Point to the screen and just say anything."

(CP 273-274)

Ms. Worley began to express concerns about these scope of practice issues in October 2008. She brought her concerns to Dr. Howlett's attention. She also reported them to Heidi Brown. (CP 276-278) Ms. Brown was upset that she had reported her concerns to Dr. Howlett. (CP 278) After the October 2008 episode with the 16 year old boy who had a cancerous tumor in his leg there were probably 10-15 additional incidents where Ms. Worley was required to examine and treat patients with medical issues beyond her scope of practice. Every time this occurred she reported it to Dr. Howlett. (CP 279-280)

In addition to these scope of practice issues, Ms. Worley was also instructed to complete medical charting on patients she had not seen. Because of the demands on her time in the hospital and in the clinic she was having difficulty keeping up with her responsibilities concerning medical charting. Heidi Brown instructed plaintiff to "pre-load" medical charts. This involved charting the examination of the patient before Ms. Worley had actually seen the patient. (CP 282-285) In addition Ms. Brown instructed plaintiff to complete "History and Physical" information in medical charts when she had not seen the patient. (CP 289-301)

Ms. Worley complained to both Ms. Brown and Dr. Howlett about these serious scope of practice and medical charting issues. She began expressing these concerns in October and November 2008. Ms. Brown then engaged in a concerted pattern of retaliatory conduct. Brown began to require Ms. Worley to “check in” with the office nurses before leaving at night. This was frequently impossible because Ms. Worley was often required to be outside the clinic at the hospital in the late afternoon, and at the end of regular clinic office hours. (CP 286-288)

On December 16, 2008, shortly after plaintiff began to express concern about scope of practice issues, Brown scheduled an office meeting to discuss “performance concerns” related to Ms. Worley. Brown then documented the meeting and characterized it as “disciplinary in nature.” Worley was not told in advance that the meeting was “disciplinary” in nature, and clearly saw the documentation to that effect as retaliatory. (CP 302-304)

Two similar meetings occurred in mid February 2009. (CP 305-321) Ms. Worley testified: “By February when I started bringing my concerns up in November and December, I was getting- - clearly I upset Heidi and she was changing my schedule, she was making life miserable for me and so I started requesting that HR be a part of this.” (CP 316)

When Ms. Worley was initially hired in June 2008 Dr. Howlett and the clinic agreed to accommodate her child care needs by allowing her to leave work at 3:00 p.m. on Tuesday and Thursday afternoon. This was the work schedule the parties agreed to. In April 2009, consistent with the pattern of retaliatory conduct, Heidi Brown abruptly and unilaterally changed plaintiff's work schedule, citing increased patient volume as the reason. Ms. Worley testified there was no such increase in patient volume which warranted or justified this change in her agreed upon work schedule. (CP 322-330)

On June 9, 2009 Ms. Worley was called to a meeting with Heidi Brown and Jennifer Rawlings, a Providence HR representative. She was presented with a "final warning" disciplinary notice. (CP 255)

Ms. Worley had previously asked for a confidential meeting with Providence CEO Kris Fay and a human resource representative to discuss her increasing concerns about scope of practice and medical charting issues. That meeting was scheduled for June 10, 2009. She asked that Providence's chief medical officer, Dr. Moe Nunez, be present. She also asked that Dr. Jim Shaw, the hospital ethicist, be present. That meeting was scheduled

to take place on June 10, 2009. Ms. Worley received the Final Warning Corrective Action Notice on June 9, 2009. (CP 255)

On June 10, 2009 Ms. Worley attended the previously scheduled confidential meeting with Providence CEO Kris Fay. Despite her request for medical representation, and the presence of the hospital ethicist, neither attended. Worley explained to Ms. Fay her concerns about potential medical malpractice issues, medical fraud, and scope of practice issues. She told Ms. Fay that she had raised these concerns with Heidi Brown, her supervisor, and each time she did so Brown retaliated against her. Fay responded by characterizing Ms. Worley as an inadequate nurse practitioner. (CP 255-256)

Providence has a code of conduct employee handbook captioned "Doing the Right Thing Right." As a Providence employee Ms. Worley was required to comply with the directives and terms of this handbook. The handbook provides in relevant part:

Role of Every Employee in Compliance

Every employee in each Providence organization is responsible for:

1. Following the Providence Code of Conduct.
2. Performing your job duties in accordance with any federal or state regulations that apply to the task being performed.

...

4. Asking questions of your supervisor, department manager or other appropriate person when uncertain of the correct procedure to follow when performing job duties.
5. Reporting all alleged compliance, integrity, and privacy violations promptly and according to the reporting procedures.

...

(CP 229) The handbook expressly promises that employees who report concerns in good faith will be protected from retaliation:

Providence prohibits any action directed against an employee, manager, or staff member for reporting concerns in good faith. Any manager, supervisor, or employee, who engages in retaliation or harassment directed at a person who raises a concern, or is believed to have raised a concern, is subject to disciplinary action.

...

Employees who report a possible regulatory violation will not be disciplined for reporting the violation, but will not be protected from the results of their misconduct if they are responsible for the violation or any other act that is harmful to Providence.

(CP 231)

Ms. Worley followed the handbook to the letter. She first brought her concerns of unsafe health care practices to her direct

supervisor, Heidi Brown. She was retaliated against. (CP 253) She then brought her concern to Providence CEO Kris Fay. She was ignored. (CP 255-256) When Ms. Fay would not respond to her concerns of unsafe health care practices at the confidential meeting on June 10, 2009, Ms. Worley then reported these same concerns to Providence internal compliance officer, Kari Lidbeck. (CP 256) She followed the directives and policy statements in the Providence Code of Conduct handbook to the letter.

The Providence compliance officer, Kari Lidbeck, directed Ms. Worley to fax any documentation supporting her concerns of unsafe health care practices to her. Ms. Worley had informal “patient face sheets” that she used for note taking. She also had photocopies of x-rays. Lidbeck instructed her to fax everything. (CP 256)

Ms. Worley removed all patient identifying information from the face sheets and x-rays. She took them home, intending to fax them to Ms. Lidbeck as she was instructed. The next day, June 11, she was summoned to a conference room to meet with CEO Kris Fay and HR representative Jennifer Rollins. She was ordered to return the documents she intended to fax to the compliance officer. (CP 256-257)

On June 12, 2009 Providence discharged Ms. Worley from her employment. The termination notice said nothing about any alleged performance deficiencies on Ms. Worley's part. The termination notice stated that Ms. Worley was being discharged for taking patient face sheets off Providence property without permission. (CP 235)

Ms. Worley brought this lawsuit against Providence alleging wrongful termination claims premised on theories of violation of public policy and breach of handbook promises. (CP 1-6) On January 20, 2012 Providence moved for summary judgment seeking dismissal of both claims. (CP 12-14) On March 20, 2012 the trial court issued a letter ruling granting defendant's motion. (CP 479-481) The court ruled that plaintiff failed to establish the jeopardy element of her public policy claim because RCW 43.70.075 provides an adequate effective means to protect the public policy at issue. *Id.* Further, the trial court held that plaintiff failed to establish the reliance element of her breach of handbook promise claim. *Id.* The court entered an order granting defendant's motion for summary judgment dismissing both of plaintiff's claims on April 6, 2012. (CP 482-484)

Plaintiff filed a motion for reconsideration on April 16, 2012. (CP 485) The trial court denied that motion on May 25, 2012. (CP 543) This appeal timely followed. (CP 545)

IV. ARGUMENT

A. The trial court erred in ruling that the Health Care Act, RCW 43.70.075, provides an adequate available means to promote the public policy at issue.

Absent a contract to the contrary, Washington employees are generally terminable at will. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 935, 913 P.2d 377 (1996). The common law tort of wrongful discharge in violation of public policy is an exception to the terminable at will doctrine. *Id.*, at 935-936. The tort of wrongful discharge applies when an employer terminates an employee for reasons that contravene a clearly mandated public policy. *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn. 2d 200, 207, 193 P.3d 128 (2008). The tort of wrongful discharge “operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy. *Danny*, 165 Wn.2d, at 207, quoting *Christensen v. Grant County Hospital Dist.*, 152 Wn.2d 299, 313, 96 P.3d 957 (2004).

To sustain the tort of wrongful discharge in violation of public policy plaintiff must establish (1) the existence of a clear public policy (the clarity element); (2) that discouraging the

conduct in which she engaged would jeopardize the public policy (the jeopardy element); (3) that the public policy linked conduct caused the dismissal (the 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, at 941.

In the summary judgment proceeding below the parties stipulated that plaintiff had established the clarity element of her public policy wrongful discharge claim. By statute and administrative regulation Washington has established a clear mandate of public policy promoting quality health care and protecting health care workers who complain about improper health care practices. See, e.g., RCW 43.70.075; WAC 246-840-300 (defining scope of practice for Advanced Registered Nurse Practitioners). The trial court expressly acknowledged that the parties stipulated that the clarity element had been established. (CP 480)

However, relying on *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011), the trial court held that RCW 43.70.075 provided an adequate alternative means to vindicate the public policy at issue. (CP 480) Therefore, the court concluded that

plaintiff failed to establish the jeopardy element of her public policy wrongful discharge claim. This was clearly error.

The Washington court recently addressed the jeopardy element of a public policy wrongful discharge claim in *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524. In *Cudney* the plaintiff was discharged after he complained about his manager/supervisor driving an employer owned vehicle while under the influence of intoxicating liquor. He sued, alleging that the discharge violated the public policy promoting safe work practices reflected in the WISHA statute, RCW 49.17. The court held the plaintiff could not satisfy the jeopardy element of the public policy claim because the WISHA statute provided an internal administrative remedy to employees who are retaliated against for making complaints about workplace safety. See, RCW 49.17.160. The *Cudney* court explained:

WISHA's retaliation statute provides extensive protections to employees who claim that they suffered retaliation for filing complaints related to workplace safety. *See id.* First, the statute provides that an employee may not be discharged for filing a complaint, testifying in any proceedings, or exercising *any* right discussed in WISHA. RCW 49.17.160(1). Next, the statute sets out a procedure by which any employee who believes that he or she has been terminated in violation of WISHA can file a complaint within 30 days to the director of the Department of Labor and Industries (L&I). RCW 49.17.160(2). The statute then requires the director to investigate any appropriate claim, and, if the investigation supports the employee's

claim, the director is *required* to bring suit against the person who violated the statute. *Id.* If the director does not believe that a violation has occurred, the employee is allowed to bring a suit himself or herself within 30 days of the director's determination. *Id.* The statute requires superior courts to order all appropriate relief for cause shown. *Id.* Finally, the available relief is not limited to rehiring or reinstatement with back pay; these are merely examples of what types of relief could be granted. *Id.*

(172 Wn.2d, at 531-532)

The *Cudney* court relied heavily on its prior decision in *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005). In *Korslund* the plaintiffs claimed they were wrongfully terminated by their employer for reporting safety violations, fraud and mismanagement at the Hanford Nuclear Reservation. The court held the plaintiffs failed to establish the jeopardy element of their public policy claim because the federal Energy Reorganization Act of 1974 (ERA) provided an adequate means of promoting and vindicating the public policy at issue. The *Korslund* court explained:

As explained, the plaintiffs identify the public policy to protect “the health and safety of the public and to protect against waste or fraud of public funds in the operations of the nuclear industry,” and they say that “to effectuate its purpose, the law prohibits retaliation against employees, who are in the best position to observe potential misconduct and who are strongly encouraged to report it.” Suppl.Br. of Pl./Resp’t at 6. The ERA provides an administrative process for adjudicating

whistleblower complaints and provides for orders to the violator to “take affirmative action to abate the violation;” reinstatement of the complainant to his or her former position with the same compensation, terms, conditions of employment; back pay, compensatory damages; and attorney and expert witness fees. 42 USC § 5851(b)(2)(B). The ERA thus provides comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs.

...

156 Wn.2d, at 182

In both *Cudney* and *Korsland* the statutes which defined the public policy promoting safe workplace practices provided an internal administrative process which protected employees from retaliation, provided them an adequate remedy, and vindicated the public policy at issue. Therefore, the court saw no need to recognize a common law public policy wrongful discharge claim in those circumstances. Because there was an administrative process that provided employees a remedy against retaliation and vindicated the public policy of promoting a safe work environment, the plaintiffs could not satisfy the jeopardy element.

The State Health Care Act, RCW 43.70.075 provides no similar internal administrative process to protect employees against retaliation for complaints about improper health care and to vindicate the public policy of protecting against improper health care. The statute provides in relevant part:

- (1) The identity of a whistleblower who complains, in good faith, to the department of health about the improper quality of care by a health care provider, or in a health care facility, as defined in RCW 43.72.010, or who submits a notification or report of an adverse event or an incident, in good faith, to the department of health under RCW 70.56.020 or to the independent entity under RCW 70.56.040, shall remain confidential. The provisions of RCW 4.24.500 through 4.24.520, providing certain protections to persons who communicate to government agencies, shall apply to complaints and notifications or reports of adverse events or incidents filed under this section. The identity of the whistleblower shall remain confidential unless the department determines that the complaint or notification or report of the adverse event or incident was not made in good faith. An employee who is a whistleblower, as defined in this section, and who as a result of being a whistleblower has been subjected to workplace reprisal or retaliatory action has the remedies provided under chapter 49.60 RCW.

The statute simply states that an employee who is retaliated against for complaining to the Department of Health about improper health care in a health care facility can file suit in superior court and obtain the remedies available under RCW 49.60, the Washington Law Against Discrimination. Unlike the WISHA statute at issue in *Cudney*, and the federal ERA at issue in *Korslund*, RCW 43.70.075 provides no administrative process, short of a superior court lawsuit, which supplies a remedy to an employee who is retaliated against for complaining about improper

health care practices. A superior court action precisely like the one brought by Ms. Worley is the only means available to provide a remedy against retaliation and vindicate the public policy of protecting against improper health care practices. Therefore, plaintiff has established the jeopardy element of her public policy wrongful discharge claim. *Danny v. Laidlaw Transit Services Inc.*, 165 Wn.2d 200, at 222 (2008). The trial court erred in ruling otherwise.

B. Because plaintiff reported her concerns to her employer and made no complaint to the Department of Health, the remedies provided in the State Healthcare Act do not apply in this case.

The trial court's ruling on the jeopardy element ignores the facts in this case and is, indeed, somewhat disingenuous. RCW 43.70.075 provides whistleblower protection to an employee who is retaliated against for filing a complaint with the Department of Health about improper health care practices. Ms. Worley filed no such complaint. Rather, she did precisely what her employer directed her to do in its code of conduct. She filed a complaint internally with Providence's compliance officer. Under the trial court's summary judgment ruling, the law would require an employee to complain first to the State Department of Health before attempting to resolve an issue internally with a health care

employer in order to protect herself against retaliation for raising concerns about improper health care practices. The Providence Code of Conduct handbook did not instruct or require Ms. Worley to make her complaint to the Department of Health in order to insure protection against retaliation. It is more than a little disingenuous to contend that a health care employer such as Providence would want its employees to complain about improper health care practices to a governmental agency before first attempting to resolve the issue internally. Yet this is precisely the logical conclusion of the trial court's ruling.

Ms. Worley followed the directive set forth in her employer's Code of Conduct handbook when she complained internally to the Providence compliance officer about improper health care practices. Her internal report to the compliance officer was protected conduct under WAC 264-840-300 which defined and limited her scope of practice as an ARNP, and RCW 43.70.075 which reflects a public policy of protecting the public from improper health care practices. This superior court action is the only means available to Ms. Worley to obtain a remedy for retaliation and promote and vindicate the public policy at issue. The trial court erred in holding that plaintiff failed to satisfy the jeopardy element of her public policy wrongful discharge claim.

The order granting summary judgment on plaintiff's public policy wrongful discharge claim should be reversed.

C. The record demonstrates factual questions on the causation element of the public policy wrongful discharge claim.

The trial court further held that Ms. Worley failed to establish the causation element of her public policy wrongful discharge claim. The court's letter ruling states in part: "Plaintiff has not successfully done this, since there are other non protected, legitimate and proper reasons amply present to justify her discharge." (CP 480) This was error. If the court was referring to the litany of performance criticisms argued by the defendant in the summary judgment motion, the record conclusively establishes that plaintiff was not fired for performance deficiencies. The termination notice dated June 12, 2009 makes no reference to performance deficiencies. The termination states that Ms. Worley was discharged because she allegedly took "patient protected health information from the workplace without permission." (CP 235) The litany of alleged performance deficiencies discussed in defendant's summary judgment briefing, and apparently relied upon by the trial court, simply had nothing to do with Ms. Worley's discharge. The shift in defendant's rationale for the termination is itself sufficient to demonstrate a factual question on

the causation issue. See *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 624, 60 P.3d 106 (2002)(If an employer gives multiple, inconsistent reasons for terminating an employee, there is an inference that none of the reasons given is the real reason.)

Ms. Worley complained to her supervisor, Heidi Brown, on numerous occasions that she was being asked to provide medical services that were outside her scope of practice as an ARNP. Brown's response was to criticize her work performance and subject her to discipline. The evidence demonstrates a factual question concerning whether the criticism of Ms. Worley's work performance and the discipline imposed on her were retaliatory in nature.

When she got nowhere with Ms. Brown, plaintiff asked for a confidential meeting with Kris Fay, Providence CEO. She asked for medical representation at that meeting because she wanted to discuss her scope of practice concerns. That meeting occurred on June 10, 2009. No medical representation was provided. Ms. Fay dismissed Ms. Worley's scope of practice concerns and told her she was a poor ARNP. (CP 255-256)

When the Providence CEO failed to take Ms. Worley's scope of practice concerns seriously she followed the policy of the Code of Conduct handbook and reported these concerns to

Providence's internal compliance officer. The compliance officer instructed her to fax any documentation she had to support those scope of practice concerns. Ms. Worley took patient face sheets that she had kept notes on and some x-rays. She removed all patient identifying information and took them from the premises intending to fax them to the compliance officer. The next day, June 11, before she could fax the materials, Ms. Worley was summoned to an office where the CEO directed her to return the face sheets and x-rays. The following day Worley was fired.

Ms. Worley told Ms. Fay she had taken the face sheets and x-rays to fax them to the compliance officer at the direction of the compliance officer. She told Fay that she had removed all patient identifying information from the face sheets and the x-rays. Therefore, there is a factual question concerning whether Ms. Worley removed any confidential patient information from the Providence workplace. There is a factual question concerning whether defendant's reason for discharge-removal of confidential patient information without permission-was pretextual. Therefore, there is an ultimate genuine issue of material fact concerning whether Ms. Worley's protected conduct-reporting of improper health care practices to the compliance officer-was a substantial factor in the discharge decision. See, *Hubbard v. Spokane County*,

146 Wn.2d 699, 718, 50 P.3d 602 (2002) (Causation element of public policy wrongful discharge claim presents factual question for jury determination).

As explained above, the multiple criticisms of Ms. Worley's performance described by defendant and relied on by the trial court simply had nothing to do with the discharge decision. However, even if these are considered relevant to the causation issue, the evidence demonstrates a factual question concerning whether the performance criticisms were retaliatory with respect to Ms. Worley's scope of practice complaints.

Ms. Worley testified that she first began to express concerns about scope of practice and medical charting issues in October and November, 2008. In response to that her supervisor, Heidi Brown began to change her job duties and criticize her work performance. (CP 253-255) Brown's criticism of Worley's work performance came only after Worley complained about scope of practice and medical charting issues. Those criticisms culminated in the June 9, 2009 "Final Warning." (CP 218) The timing of Brown's criticism of Ms. Worley's job performance in relation to her raising scope of practice and medical charting issues demonstrates a factual question concerning whether Brown's

criticisms were retaliatory. *Hubbard v. Spokane County*, 146 Wn.2d 699, 178.

In *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011) the United States Supreme Court considered the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of a supervising employee who influenced, but did not make, the ultimate discharge decision. The plaintiff in *Staub* worked as a medical technician for the defendant hospital. He was a member of the Army Reserve. His immediate supervisor was hostile to his military obligations and began to criticize his job performance. Ultimately the supervisor's criticisms resulted in the plaintiff's discharge. The plaintiff sued alleging, although his supervisors did not make the discharge decision, their performance criticisms, motivated by anti-military bias, influenced the discharge decision. The Supreme Court held that "if a supervisor performs an act motivated by anti military animus that is intended by the supervisor to cause an adverse employment action, and if the act is a proximate cause of the ultimate employment action, then the employer is liable under the USERRA." *Staub v. Proctor Hospital*, 131 S.Ct., at 1194.

In the instant case the evidence demonstrates a genuine issue of material fact concerning whether plaintiff's supervisor,

Heidi Brown, criticized her job performance and disciplined her in retaliation for her raising scope of practice and medical charting issues. The decision makers with respect to plaintiff's discharge were Providence CEO Kris Fay and HR representative Jennifer Rollins. Those two were completely dependent on information supplied by Heidi Brown. Under *Staub*, if Brown's criticisms of Worley's job performance were retaliatory, Providence is subject to liability on plaintiff's public policy wrongful discharge claim.

The evidence demonstrates a genuine issue of material fact concerning whether Heidi Brown's criticisms of Ms. Worley's job performance were retaliatory for her raising scope of practice and medical charting issues. Defendant contends, and the trial court found that plaintiff's alleged performance deficiencies reflected in Brown's criticism resulted in her discharge. Therefore, the evidence demonstrates a genuine issue of material fact concerning whether Ms. Worley's public policy linked conduct was a substantial factor in defendant's discharge decision. Plaintiff produced sufficient evidence to establish the causation element of her public policy wrongful discharge claim. The trial court's summary judgment order should be reversed.

D. The court erred in holding plaintiff failed to establish the absence of overriding justification element of her public policy claim.

Finally, the trial court ruled that Ms. Worley failed to establish the absence of overriding justification element of her public policy claim. This was clearly error. As a threshold matter the court improperly placed the burden on the plaintiff on this issue. Once sufficient evidence has been produced on the clarity, jeopardy and causation elements of the public policy claim, the burden shifts to the employer to show an overriding justification for the dismissal. See, *Hubbard v. Spokane County*, 146 Wn.2d, at 178. (“However, because Hubbard has met the clarity element and a question of fact remains as to the jeopardy and causation elements, the burden does shift to the county to show an overriding justification for Hubbard’s dismissal.”)(citing, *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941 (1996).

This incorrect allocation of the burden goes to the heart of the trial court’s error in its analysis of the absence of overriding justification element. Once again the trial court observed in its letter ruling: “Nevertheless there is an abundance of evidence in the record to support a rebutting inference that the discharge was legitimately done for performance issues and was not pretextual, *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 60 P.3d 106 (2002).” (CP 480) As demonstrated above, Providence simply did not fire Ms. Worley for performance deficiencies. Defendant’s

lengthy discussion of those alleged performance deficiencies in its summary judgment briefing is directly contrary to Providence's own internal documentation of the discharge. The termination notice dated June 12, 2009 says absolutely nothing about any alleged performance deficiencies on Ms. Worley's part. That termination notice states very clearly that she was fired because she allegedly took documents containing confidential patient information from the Providence premises without permission. Because Ms. Worley's alleged performance deficiencies simply were not the reason for her termination, they cannot support a finding of an overriding justification for her termination. Alternatively, defendant's reliance on the alleged performance deficiencies to support the discharge represents a shift in rationale which itself raises a factual question concerning whether the discharge was retaliatory. *Renz*, 114 Wn. App., at 624.

As demonstrated above there are factual questions concerning whether the materials Ms. Worley removed from the Providence workplace contained confidential patient information. Further, Ms. Worley testified that she took the materials at the direction of Providence's compliance officer. Therefore, there is a factual question concerning whether defendant's proffered reason for discharge was justified or pretextual. It is clear that plaintiff's

removal of the patient face sheets and x-rays was done at the direction of Providence's compliance officer. The evidence is undisputed that Providence knew that Ms. Worley had reported scope of practice and medical charting issues to the compliance officer the day before she was fired. The evidence is sufficient to demonstrate a factual question on the absence of overriding justification issue. The evidence demonstrates a factual question concerning whether Ms. Worley's public policy linked conduct was a substantial factor in the discharge decision. Plaintiff respectfully requests the court to reverse the trial court's ruling dismissing her public policy wrongful discharge claim, and remand this claim for trial on the merits.

E. The court erred in dismissing plaintiff's breach of promise claim.

In her second cause of action Ms. Worley alleged that Providence breached its promise set forth in the code of conduct that employees would not be retaliated against for reporting ethical and unsafe practice concerns to the company's internal compliance officer. See, *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). In dismissing this claim the trial court noted that "plaintiff did not remove confidential patient information from the workplace until after being informed of a final written warning of unsatisfactory work performance." (CP 480). The court then

concluded that based on the “uncontroverted sequence of events, there is no genuine issue of material fact on the question of whether plaintiff contacted the compliance officer, Ms. Lidbeck, in reliance on the identified promise described above.” Id. This was clearly error.

As an initial matter, the trial court expressly adopted “the reasoning set forth in defendant’s memorandum at page 15-16 of defendant’s opening memorandum.” (CP 481) A careful analysis of page 15-16 of defendant’s opening summary judgment memorandum demonstrates that the court erred in concluding there was no factual question on the reliance issue. First, defendant correctly stated the elements of a *Thompson* breach of promise claim:

In order to prevail on this claim Ms. Worley must prove the following:

- 1) That the statement in the Providence code of conduct amounted to promises of specific treatment in specific situations, and
- 2) That she justifiably relied upon any such promise, and
- 3) That the specific promise was breached.

(CP 29-30; Defendant’s Memorandum in Support of Summary Judgment, p.15-16) citing *Bulman v. Safeway Inc.*, 144 Wn.2d 335, 344 (2001).

Defendant then stated: “In this case, even assuming that there is a question of fact on elements one and two for purposes of summary judgment only, Ms. Worley cannot present sufficient evidence setting forth specific facts which would rise to the level of creating a genuine issue of material fact precluding summary judgment.” (CP 30) Element two of the cause of action is reliance on the specific enforceable promise. Defendant expressly assumed or concluded that the record demonstrates a factual question on this issue in its summary judgment memorandum. Therefore, the trial court’s conclusion that there was no genuine issue of material fact on the reliance issue was clearly error.

Even independent of defendant’s concession, the record demonstrates a genuine issue of material fact on the reliance issue. The trial court expressed concern that Ms. Worley reported her concerns to the compliance officer only “after being informed of a final written warning of unsatisfactory work performance.” (CP 481) This is an inaccurate statement of the evidence in the record. Ms. Worley testified:

On June 9, 2009 I was called to Heidi Brown’s office for a meeting. I had no advance notice of this meeting. It was not scheduled. When I arrived Jennifer Rawlings from the HR department was present with Ms. Brown. I was given a written Corrective Action Notice that was characterized as a “final warning.” The document detailed much of the history of Ms.

Brown's criticism of my work performance. I refused to sign the document because it was obviously inaccurate, and without any medical justification.

I previously asked for and scheduled a confidential meeting with Providence CEO Kris Fay. I requested a human resource representative other than Jennifer Rawlings. I asked that Providence's chief medical officer, Dr. Moe Nunez, be present. I also asked that Dr. Jim Shaw, the ethicist, also be present. This meeting was scheduled to take place on June 10, 2009. I received the final warning Corrective Action Notice on June 9, 2009.

On June 10, 2009 I met with Kris Fay and Jennifer Rawlings. They said nobody else was available from HR. They said medical and ethical representation at that point was not appropriate. This meeting took place in an administrative office in the HR department and lasted approximately 15 minutes. I told Ms. Fay and Ms. Rawlings, that I was concerned about potential medical malpractice issues, Medicare fraud, scope of practice issues, and the inappropriateness of billing. I told them I had asked Ms. Brown about these issues, and each time I raised these concerns she had retaliated against me. Ms. Fay responded by characterizing me as an inadequate nurse practitioner. It was clear they were not taking my concerns seriously.

Within 30 minutes of leaving the meeting with Jennifer Rawlings and Kris Fay on June 10, 2009 I contacted Ms. Kari Lidbeck, Providence's Compliance Officer. I told her about my scope of practice, and medical charting concerns. Ms. Lidbeck asked if I had documentation regarding these concerns. I told her I had informal patient face sheets that I use for note taking. I told her I also had photo copies of x-rays. She instructed me to fax

everything I had to her. I inquired about confidentiality. She assured me that both her fax and her e-mail were protected.

(CP 255-256)

Contrary to the trial court's observation, Ms. Worley did not report concerns to the compliance officer only after receiving the final written warning for performance deficiencies. Ms. Worley had been complaining to her supervisor, Heidi Brown, about scope of practice and medical charting issues for several months. The evidence supports a finding that Brown retaliated against her for expressing those concerns by criticizing her work performance. Prior to receiving the "final written warning" on June 9, 2009, Ms. Worley requested a confidential meeting with Providence CEO Kris Fay to discuss her scope of practice and medical charting concerns and the retaliatory conduct of Ms. Brown. Worley requested medical representation at that meeting precisely because her supervisor, Heidi Brown, who was criticizing her work performance, had no medical training or experience. The confidential meeting with Ms. Fay occurred on June 10, 2009. No medical representation was provided to Ms. Worley. Her concerns about scope of practice and medical charting issues fell on deaf ears. Ms. Fay responded by characterizing Ms. Worley as an

inadequate nurse practitioner. In Ms. Worley's words: "It was clear they were not taking my concerns seriously."

Ms. Worley had requested the confidential meeting with CEO Kris Fay, with medical representation, before receiving the June 9, 2009 "final warning." It was only after the June 10, 2009 meeting with Ms. Fay, where her concerns were not taken seriously, that Worley made the decision to report those concerns to the compliance officer. That is the evidence in the record.

It is axiomatic that in a summary judgment proceeding the court must consider all facts and any reasonable inferences in the light most favorable to the non moving party, in this case, plaintiff Worley. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707. The trial court violated this most fundamental principal of summary judgment law in concluding, based on the sequence of events: "There is no genuine issue of material fact on the question of whether plaintiff contacted the compliance office...in reliance on the identified promise described above." (CP 481) Defendant conceded there was a fact question on the reliance issue in its summary judgment memorandum. Moreover, the court's reference to the "sequence of events" ignored Ms. Worley's testimony that (1) she requested the confidential meeting with Ms. Fay before receiving the "final warning" on June 9, and (2) she reported her

concerns about scope of practice and medical charting issues to the compliance officer only after her expression of those concerns in the June 10, 2009 meeting with CEO Fay fell on deaf ears.

Ms. Worley's testimony about the sequence of events leading up to her report to the Providence compliance officer demonstrates a genuine issue of material fact concerning whether she engaged in that protected conduct in reliance on Providence's specific promise that she would be free from retaliation. The record also demonstrates factual questions concerning whether Ms. Worley removed confidential patient information from the Providence workplace. This, combined with the fact that Providence fired Ms. Worley immediately after learning that she reported her concerns to the compliance officer, demonstrates a triable issue of fact concerning whether Worley's complaint to the compliance officer was a substantial factor in the employer's discharge decision.

The record demonstrates genuine issues of fact concerning whether Providence breached its code of conduct promise of non-retaliation when it discharged Ms. Worley immediately after she complained of unsafe health care practices to Providence's compliance officer. The trial court's order dismissing plaintiff's

breach of promise wrongful discharge claim on summary judgment should be reversed.

CONCLUSION

The trial court erred in granting summary judgment on plaintiff's public policy and breach of promise wrongful discharge claims. Plaintiff respectfully requests this court to reverse that decision, remand the case to the Superior Court, and allow this case to proceed to trial on the merits.

RESPECTFULLY SUBMITTED this 11 day of October,
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 12 day of October, 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
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