

No. 79615-7

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

KEN BRIGGS, JUDY ROBERTSON,  
MARK JOHNSON, BEVERLY NUNN, JAMI SMITH,  
SHIRLEY BADER, PAM ZELLER, MARGARET (PEGGY) CLARK,  
ODALYS P. CASTILLO, and VALERIE BRUCK,

Petitioners,

v.

NOVA SERVICES, a Washington  
nonprofit corporation, and LINDA BRENNAN,

Respondents.

**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENTS**

DEBORAH J. LA FETRA <sup>64591</sup>  
(CSBA No. 148875)  
TIMOTHY SANDEFUR <sup>80377</sup>  
(CSBA No. 224436)  
*Of Counsel*  
Pacific Legal Foundation  
3900 Lennane Drive, Suite 200  
Sacramento, California 95834  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747

DIANA M. KIRCHHEIM  
(WSBA No. 29791)  
Pacific Legal Foundation  
10940 NE 33rd Place, Suite 210  
Bellevue, Washington 98004  
Telephone: (425) 576-0484  
Facsimile: (425) 576-9565

Attorneys for Amicus Curiae Pacific Legal Foundation

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2008 JAN 22 P 12:54  
BY RONALD R. CASNER  
CLERK

**ORIGINAL**

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
I. AT-WILL EMPLOYMENT ADVANCES IMPORTANT PUBLIC POLICY OBJECTIVES THAT WOULD BE UNDERMINED IF COURTS CREATED BROAD EXCEPTIONS TO THE DOCTRINE .....	2
A. At-Will Employment Is a Just and Economically Efficient Doctrine .....	2
B. The Public Policy Exception to At-Will Employment Should Be Narrowly Construed to Promote Certainty and Stability .....	6
II. THE CONCERTED ACTION EXCEPTION SHOULD APPLY ONLY TO EMPLOYEES' ACTIONS IN SERVICE OF A PUBLIC DUTY OR TO ORGANIZE A LABOR UNION .....	10
A. Restrictions on Employment-At-Will Are Intended to Protect Only an Employee's Ability to Discharge Public Duties .....	10
B. The "Concerted Action" Limitation Should Only Protect Non-Union Workers Who Are Acting in Concert to Form a Union .....	12
C. The Federal Concerted Action Doctrine Does Not Apply When Employees Protest Supervisory Personnel .....	17
CONCLUSION .....	20
CERTIFICATE OF SERVICE .....	21

TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>1000 Friends of Washington v. McFarland</i> , 159 Wn.2d 165, 149 P.3d 616 (2006) .....	16
<i>Abilities &amp; Goodwill, Inc. v. NLRB</i> , 612 F.2d 6 (1st Cir. 1979) .....	8, 17-18
<i>Amunrud v. Bd. of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006) .....	2
<i>Blackie v. Maine</i> , 75 F.3d 716 (1st Cir. 1996) .....	8
<i>Bob Evans Farms, Inc. v. NLRB</i> , 163 F.3d 1012 (7th Cir. 1998) .....	18
<i>Bravo v. Dolsen Companies</i> , 125 Wn.2d 745, 888 P.2d 147 (1995) .....	13-14, 16-17, 19
<i>Culinary Workers &amp; Bartenders Union No. 596 Health &amp; Welfare Trust v. Gateway Café, Inc.</i> , 91 Wn.2d 353, 588 P.2d 1334 (1979) .....	13, 15
<i>Dicomes v. State</i> , 113 Wn.2d 612, 782 P.2d 1002 (1989) .....	1
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000) .....	11
<i>Foley v. Interactive Data Corp.</i> , 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (Cal. 1988) .....	7
<i>Gardner v. Loomis Armored Inc.</i> , 128 Wn.2d 931, 913 P.2d 377 (1996) .....	11
<i>Int'l Ass'n of Machinists, Tool &amp; Die Makers Lodge No. 35 v. NLRB</i> , 311 U.S. 72, 61 S. Ct. 83, 85 L. Ed. 50 (1940) .....	16

	Page
<i>Int'l Union of Operating Eng'rs Local No. 286, AFL-CIO (Local 286) v. Sand Point Country Club, 83 Wn.2d 498, 519 P.2d 985 (1974)</i> .....	15
<i>Korslund v. Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 125 P.3d 119 (2005)</i> .....	10
<i>Krystad v. Lau, 65 Wn.2d 827, 400 P.2d 72 (1965)</i> .....	13-14, 16
<i>Lockheed Aircraft Corp. v. Superior Court, 28 Cal. 2d 481, 171 P.2d 21 (Cal. 1946)</i> .....	11
<i>Lowe v. SEC, 472 U.S. 181, 105 S. Ct. 2557, 86 L. Ed. 2d 130 (1985)</i> .....	2
<i>NLRB v. Oakes Mach. Corp., 897 F.2d 84 (2d Cir. 1990)</i> .....	18
<i>NLRB v. Wash. Aluminum Co., 370 U.S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962)</i> .....	14, 17
<i>Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983)</i> .....	11
<i>Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (Haw. 1982)</i> .....	9
<i>Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 9 P.3d 787 (2000), overruled on other grounds, McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006)</i> .....	12
<i>Richardson v. Mellish, 130 Eng. Rep. 294 (P.C. 1824)</i> .....	10
<i>Sedlacek v. Hillis, 145 Wn.2d 379, 36 P.3d 1014 (2001)</i> .....	10
<i>Smithfield Packing Co., Inc. v. NLRB, Nos. 06-1541 &amp; 06-1652, 2007 WL 4246892 (4th Cir. Dec. 5, 2007)</i> .....	19
<i>Sperry v. Maki, 48 Wn. App. 599, 740 P.2d 342 (1987)</i> .....	10

	<b>Page</b>
<i>State v. Larkin</i> , 70 Wn. App. 349, 853 P.2d 451 (1993) .....	16
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984) .....	7, 9-10
<i>Veno v. Meredith</i> , 357 Pa. Super. 85, 515 A.2d 571 (Pa. Super. Ct. 1986) .....	3
<i>Yesterday's Children, Inc. v. NLRB</i> , 115 F.3d 36 (1st Cir. 1997) .....	18

### Washington Statutes

RCW 49.32.020 .....	1, 12, 14-15, 17
RCW 49.32.030 .....	12
RCW 49.32.060 .....	12

### Miscellaneous

Epstein, Richard A., <i>In Defense of the Contract At Will</i> , 51 U. Chi. L. Rev. 947 (1984) .....	2-4, 6
Grodin, Joseph R., <i>Are Rules Really Better Than Standards?</i> , 45 Hastings L.J. 569 (1994) .....	6
Hahn, Jeffrey M. & Smith, Kevin M., <i>Wrongful Discharge: The Search for a Legislative Compromise</i> , 15 Employee Rel. L.J. 515 (1990) .....	7
Loving, Paul E., <i>The Justice of Certainty</i> , 73 Or. L. Rev. 743 (1994) .....	6
Millon, David, <i>Default Rules, Wealth Distribution, and Corporate Law Reform: Employment At Will Versus Job Security</i> , 146 U. Pa. L. Rev. 975 (1998) .....	5

	Page
Morriss, Andrew P., <i>Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will</i> , 59 Mo. L. Rev. 679 (1994) .....	9
Owens, Thomas P., III, <i>Employment At Will in Alaska: The Question of Public Policy Torts</i> , 6 Alaska L. Rev. 269 (1989) .....	7
Snell, Ann Clarke & Eskow, Lisa R., <i>What Motivates the Ultimate Decisionmaker? An Analysis of Legal Standards for Proving Causation and Malice in Employment Retaliation Suits</i> , 50 Baylor L. Rev. 381 (1998) .....	8
Winterbauer, Steven H., <i>Wrongful Discharge in Violation of Public Policy: A Brief Overview of an Evolving Claim</i> , 13 Indus. Rel. L.J. 386 (1991-1992) .....	6

## INTRODUCTION AND SUMMARY OF ARGUMENT

The public policy exception to the employment at-will doctrine was devised to protect employees from being unjustly burdened in the performance of their *public* duties—that is, duties relating to their citizenship; it was not intended to guarantee their freedom to act for their private interests or in the pursuit of what they believe to be a business firm’s interest, without risk of adverse consequences from their employers. *Dicomes v. State*, 113 Wn.2d 612, 617-18; 782 P.2d 1002, 1006-07 (1989). While such matters as a pleasant workplace atmosphere are certainly important, they remain essentially private concerns, and therefore not grounds for the state to interfere with a company’s private decision to terminate an at-will employment contract. In this case, the Petitioners signaled their dissatisfaction with the practices of their supervisor and indicated that they intended to leave their jobs as a result. The fact that they found their workplace atmosphere unpleasant does not transform their behavior into the essentially public behavior that is protected by RCW 49.32.020. Instead, that section is most reasonably construed to protect non-union workers’ right to act in concert only insofar as the actions discharge a public duty or are intended to organize a labor union.

## I

### AT-WILL EMPLOYMENT ADVANCES IMPORTANT PUBLIC POLICY OBJECTIVES THAT WOULD BE UNDERMINED IF COURTS CREATED BROAD EXCEPTIONS TO THE DOCTRINE

#### A. At-Will Employment Is a Just and Economically Efficient Doctrine

Washingtonians have a fundamental right to earn a living, subject to such regulations as are necessary to protect the public welfare. This right was considered among the most important rights protected by the common law. *Lowe v. SEC*, 472 U.S. 181, 228; 105 S. Ct. 2557, 86 L. Ed. 2d 130 (1985); *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 232-35; 143 P.3d 571, 582-85 (2006) (Sanders, J., dissenting). Citizens frequently exercise this right by entering into employment contracts, particularly at-will employment contracts.

At-will employment serves at least five important public policy goals. First, it allows employers to try out inexperienced, entry-level employees without incurring substantial risks. “‘You can start Tuesday and we’ll see how the job works out’ is a highly intelligent response to uncertainty.” Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. Chi. L. Rev. 947, 969 (1984). If employers were required to offer jobs only on a permanent or semi-permanent basis, bad hiring decisions would impose much

greater costs on employers, leading them to fear the possibility of being “stuck” with costly and poorly performing workers, or of being exposed to liability for a worker’s incapacity, negligence, harassment of fellow employees, or other shortcomings. If terminating an employee becomes expensive and time-consuming, employers will adopt a stingy attitude toward job offers. As one court noted:

[A]brogation of the at-will rule could have the socially deleterious effect of forcing employers to become overly cautious about who[m] they hire, perhaps fearing to hire marginally qualified persons who would be more likely candidates for discharge at some point. The employer would naturally not care to hire someone who might later subject him to a lawsuit.

*Veno v. Meredith*, 357 Pa. Super. 85, 99 n.3; 515 A.2d 571, 579 n.3 (Pa. Super. Ct. 1986).

Second, at-will employment requires little negotiation, thus keeping transaction costs low. Epstein, *supra*, at 970. Employers and workers avoid a more complicated, expensive, or time-consuming hiring process while gaining a wider range of choices. In a dynamic economy, it is desirable to ensure that a worker can move to another job as circumstances dictate and that an employer can fill vacancies quickly. Moreover, the time and money saved from a more complicated hiring procedure can be applied to improving job conditions or lowering prices instead.

Third, at-will employment provides employees with a check against employer abuses after the contract is formed, and vice-versa. Epstein, *supra*, at 965-67. Since workers can quit whenever they decide a job costs them more than it is worth, the ability to end the employment relationship benefits the employee. *Id.* at 966. “[T]he contract at will provides both employer and employee with a simple, informal ‘bond’ against the future misfeasance of the other side: fire or quit.” *Id.* at 979. Providing workers with job protection even where they are willing to agree to an employment contract without it, harms job performance and encourages wrongful behavior on both sides.

Fourth, the at-will employment contract remains flexible enough that parties can adjust their bargain as events warrant. The employee will not exercise his power to quit if he is offered and willing to accept a new duty or change of position. The employer, meanwhile, remains amenable to adjustments on his side as well, such as accommodating employees who ask for raises or more time off. Thus, the at-will contract “allows for small adjustments *in both directions* in ongoing contractual arrangements with a minimum of bother and confusion.” Epstein, *supra*, at 967. It is an important protection for both workers and employers who need maximum flexibility to respond to changes in both the economy and their personal

needs. Workers are not helped by rules that make it harder and more expensive for employers to hire them.

Finally, at-will employment not only improves the positions of workers and managers, but of consumers in general. The cost of providing more secure jobs—and thereby incurring the risk of poor employee performance—is borne by the employer who must make up the cost by charging more for the ultimate product or service. At-will employment allows companies to keep prices low and achieve greater economic efficiency. David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment At Will Versus Job Security*, 146 U. Pa. L. Rev. 975, 1003 (1998): “[M]isconduct will be harder to punish and, therefore, more likely to occur under a job-security contract term than under an at-will term. This . . . represents a cost peculiar to a job-security regime, and . . . employers will seek to pass [it] on to the work force.”

After reviewing these important policy considerations, Professor Epstein concludes that ultimately the question is not just a matter of economic efficiency but of individual rights:

Freedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners . . . . The desire to make one’s own choices about employment may be as strong as it is with respect to marriage or participation in religious activities, and

it is doubtless more pervasive than the desire to participate in political activity.

Epstein, *supra*, at 953. At-will employment contracts are sought by both employers and employees, and both benefit from it. With the above principles in mind, this Court should exercise restraint when interpreting exceptions to at-will employment.

**B. The Public Policy Exception to At-Will Employment Should Be Narrowly Construed to Promote Certainty and Stability**

The vagueness of a public policy exception to at-will employment “provides the flexibility needed to apply the exception to a variety of contexts,” but “its undefinable parameters imbue the exception with a disconcerting unpredictability.” Steven H. Winterbauer, *Wrongful Discharge in Violation of Public Policy: A Brief Overview of an Evolving Claim*, 13 Indus. Rel. L.J. 386, 393 (1991-1992). The law places a high value on stability, certainty, and predictability because they promote confidence in the legal system and reduce the number and cost of disputes. See Joseph R. Grodin, *Are Rules Really Better Than Standards?*, 45 Hastings L.J. 569, 570 (1994). By eliminating speculation as to what the law is and avoiding a need for interpretation, clarification, or explanation, certainty promotes efficiency and innovation for businesses and individuals. Paul E. Loving, *The Justice of Certainty*, 73 Or. L. Rev. 743, 764 (1994).

The notion of “public policy” is so ambiguous that decisions interpreting it often rely the particular facts and the courts’ level of outrage, making it difficult for employers to anticipate exactly what they may and may not do. See Thomas P. Owens III, *Employment At Will in Alaska: The Question of Public Policy Torts*, 6 Alaska L. Rev. 269, 307 (1989); Jeffrey M. Hahn & Kevin M. Smith, *Wrongful Discharge: The Search for a Legislative Compromise*, 15 Employee Rel. L.J. 515, 532 (1990). Uncertainty creates “headaches for employers, who do not know what specific standards they must meet in terminating an employee nor what the results of a mistake will be.” Recognizing this, the California Supreme Court stated in *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 696; 765 P.2d 373, 254 Cal. Rptr. 211 (Cal. 1988) that

predictability of the consequences of actions related to employment contracts is important to commercial stability. In order to achieve such stability, it is also important that employers not be unduly deprived of discretion to dismiss an employee by the fear that doing so will give rise to potential tort recovery in every case.

This Court recognized that a narrow reading of the public policy exception to at-will employment “protects against frivolous lawsuits and allows trial courts to weed out cases that do not involve any public policy principle.” *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232; 685 P.2d 1081, 1089 (1984). This Court should avoid deviating from this established

precedent and reject Petitioners' request to extend the public policy exception to purely private matters involving personality disputes and disagreements over management style.

Personality conflicts between managers and employees are not uncommon in the workforce. Workplaces "are rarely idyllic retreats." *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996). Instead, they are "complex environments in which decisions are made by a variety of people for a variety of reasons." Ann Clarke Snell & Lisa R. Eskow, *What Motivates the Ultimate Decisionmaker? An Analysis of Legal Standards for Proving Causation and Malice in Employment Retaliation Suits*, 50 Baylor L. Rev. 381, 382 (1998). Conflicts may arise when management makes decisions about business operations, over the objections of employees. While employees may have legitimate criticism to make about management, they have no legally enforceable right to be satisfied with the skills of their supervisors or the business judgment of a firm's directors. "Traditionally, the interest of the employer in selecting its own management team has been recognized and insulated from protected employee activity." *Abilities & Goodwill, Inc. v. NLRB*, 612 F.2d 6, 8 (1st Cir. 1979).

Instead, if at-will employees are dissatisfied with management, they may end the employment relationship at any time without fear of retribution.

This fact creates an incentive for managers to formulate their policies and practices with care, lest the firm lose valuable employees. Yet it also allows management the flexibility to choose policies that some workers may find unwise or too demanding, but which in management's judgment is best for the firm. The option of resigning in protest—as Petitioners did in this case—provides a sufficient counterbalance to the power of management without hampering management's ability to make decisions. Constraining the right of business owners to terminate at-will employees who are dissatisfied with the performance or personalities of their supervisors would imperil the free discretion of management and restrict the competitive ability of firms. See *Thompson*, 102 Wn.2d at 227, 685 P.2d at 1086 (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 377; 652 P.2d 625, 629 (Haw. 1982)) (“[T]o imply into each employment contract a duty to terminate in good faith would . . . subject each discharge to judicial incursions into the amorphous concept of bad faith.”).<sup>1</sup>

---

<sup>1</sup> In *Thompson*, this Court endorsed a common misconception that the at-will employment contract originated in writings of the nineteenth century legal scholar Horace Wood. See *Thompson*, 102 Wn.2d at 226, 685 P.2d at 1085 (“Wood’s formulation, the ‘American rule,’ became the rule governing termination of employees . . .”). In fact, the at-will rule predated Wood’s treatise by centuries. See Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 Mo. L. Rev. 679, 681 (1994).

## II

### THE CONCERTED ACTION EXCEPTION SHOULD APPLY ONLY TO EMPLOYEES' ACTIONS IN SERVICE OF A PUBLIC DUTY OR TO ORGANIZE A LABOR UNION

#### A. Restrictions on Employment-At-Will Are Intended to Protect Only an Employee's Ability to Discharge Public Duties

Given the importance of the at-will employment contract, and the economic inefficiencies and restrictions on individual freedom that would arise from its limitation, it is appropriate that such limits are exceptional and apply only to protect the general public from potential abuses. *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 178; 125 P.3d 119, 124-25 (2005). Washington courts recognize that the public policy limits on at-will employment must be construed narrowly. *See, e.g., Sedlacek v. Hillis*, 145 Wn.2d 379, 390; 36 P.3d 1014, 1019 (2001). Because the concept of “public policy” is notoriously vague—“a very unruly horse, and when once you get astride it you never know where it will carry you,” *Sperry v. Maki*, 48 Wn. App. 599, 603; 740 P.2d 342, 344 (1987) (quoting *Richardson v. Mellish*, 130 Eng. Rep. 294, 303 (P.C. 1824))—courts have held that the public policies included in the exception must be clearly articulated by the Legislature and not determined by the judiciary’s intuitive notions of fairness. *See, e.g., Thompson*, 102 Wn.2d at 232, 685 P.2d at 1089: “[C]ourts should

*proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.”*

The public policy exception to the at-will contract was devised to protect workers in their capacity as citizens, not in their capacity as private employees negotiating with an employer on the basis of economic self-interest. The exception protects the public by protecting the worker’s ability to act in public capacities, or to discharge his or her duty to act as a responsible citizen; an employer who fires an employee for exercising the right to vote, for example, would affect not only the private relationship between the employer and the employee, but society in general. *Cf. Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 486; 171 P.2d 21 (Cal. 1946) (employers may not make adverse employment decisions which infringe on employees’ right to vote). Likewise, employers may not terminate workers for refusing to endorse political views they do not support, *see Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896-99 (3d Cir. 1983), or for refusing to break the law, *cf. Ellis v. City of Seattle*, 142 Wn.2d 450, 461; 13 P.3d 1065, 1071 (2000), or for “blowing the whistle” on employers who break the law or endanger the public. *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 937-38; 913 P.2d 377, 380-81 (1996).<sup>2</sup> The public policy

---

<sup>2</sup> Although Petitioners claimed in their April 6, 2004, letter to the Board that  
(continued...)

exception does *not* seek to protect each individual employee *qua* employee, which would essentially eliminate the at-will employment relationship.

**B. The “Concerted Action” Limitation  
Should Only Protect Non-Union Workers  
Who Are Acting in Concert to Form a Union**

RCW 49.32.020 sets forth certain public policies to be considered when “determining the jurisdiction and authority of the courts of the state.” It does not purport to declare any specific limitation on the at-will employment contract. Moreover, this section appears in a statutory chapter devoted to the granting of injunctions in labor disputes—a chapter which prohibits contracts that block employees from organizing as a labor union. *See* RCW 49.32.030. Reading the statute in the context of the whole chapter, it would be most logical to construe it as protecting the concerted activity of workers in organizing a labor union. *Cf.* RCW 49.32.060 (prohibiting courts from enjoining attempts to organize a union); *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 650; 9 P.3d 787, 798-99 (2000), *overruled on other grounds*, *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006) (“[T]he act of joining, belonging to, or voting against decertification of a labor union

---

<sup>2</sup> (...continued)

their action was one of “whistleblowing,” the letter contains no evidence that the Petitioners sought to discharge any possible public duty by bringing their allegations to the proper public authorities.

constitutes an activity undertaken together for the purpose of improving working conditions, *i.e.*, a ‘concerted activity.’”).

Cases interpreting the section have found that the law was designed to prohibit employers from restricting the ability of workers to organize a union. *See, e.g., Krystad v. Lau*, 65 Wn.2d 827, 846; 400 P.2d 72, 83 (1965); *Culinary Workers & Bartenders Union No. 596 Health & Welfare Trust v. Gateway Café, Inc.*, 91 Wn.2d 353, 370; 588 P.2d 1334, 1345 (1979). As the Court noted in *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 754; 888 P.2d 147, 152 (1995), “if employees’ right to act in concert to improve their working conditions existed only after they formed a union, employees would enjoy no protection to enable unionization.” Since the protection of employees’ ability to bargain collectively is considered a matter of *public* concern and not simply a private matter between an employer and an employee, such an interpretation is consistent with the general theory of public policy limits on the at-will contract: protecting the right of an employee to organize a union would qualify as a protection of the employee’s actions as a member of the general public, rather than his actions in his capacity as an employee. It should *not* bar an employer from accepting the resignation of workers who act in protest of management policies or activities, even if the workers are resigning “in concert.”

In *Bravo*, this Court held that RCW 49.32.020 applied to non-union employees who organized a walk-out and a picket-line as part of an attempt to obtain better working conditions. *Bravo*, 125 Wn.2d at 754, 888 P.2d at 152. But the rationale of that decision does not warrant its extension to this case. The Court based this interpretation of the statute on three considerations: First, the statute does not explicitly limit its protections to workers who are already members of a union, *id.* at 753; second, the Washington Legislature did not amend the statute in the wake of *Krystad*, which found that it applied to non-union workers, *id.* at 753 n.2; and third, a similar federal law had been construed to protect non-union employees who organized a walkout to protest working conditions, *id.* at 755 (citing, *inter alia*, *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962)). But *Krystad* only held that non-union workers are protected by RCW 49.32.020 *insofar as they are seeking to organize a union*. See *Krystad*, 65 Wn.2d at 846, 400 P.2d at 83. Indeed, the Court in *Bravo* rightly noted that the Legislature enacted this section to protect the ability of workers “to enable unionization.” *Bravo*, 125 Wn.2d at 754, 888 P.2d at 152. Construing the section to bar employers from terminating non-union workers who walk out in protest over a conflict with a supervisor goes much further than enabling unionization. Indeed, such an interpretation would effectively

unionize all employees in the state, by giving every employee the primary benefit of unionization—the ability to retain employment regardless of good cause for termination—whether or not the employer has agreed to create such a right by entering into a collective bargaining agreement.

Employers cannot be forced to negotiate with a union. *Int'l Union of Operating Eng'rs Local No. 286, AFL-CIO (Local 286) v. Sand Point Country Club*, 83 Wn.2d 498, 506; 519 P.2d 985, 990 (1974) (“[N]either expressly nor impliedly has the legislature introduced into this statute a provision imposing upon employers a duty to bargain with labor representatives.”). Employees, too, may not be compelled to join in a collective bargaining arrangement. *Culinary Workers & Bartenders Union No. 596*, 91 Wn.2d at 370, 588 P.2d at 1345. But if RCW 49.32.020 allows non-union employees to organize walkouts and other activities akin to the powers accorded labor unions, and bars employers from terminating them for doing so, then the section effectively unionizes all workers regardless of whether employers wish to do business with an organized labor group. “[I]t was not the legislative purpose to provide for compulsory collective bargaining when it enacted RCW 49.32,” *Int'l Union of Operating Eng'rs Local No. 286*, 83 Wn.2d at 506, 519 P.2d at 990. Thus an employer must retain the right to terminate employees whose services or actions the

employer finds unacceptable, until or unless the employer agrees to waive that right through a collective bargaining agreement.<sup>3</sup> Cf. *Int'l Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. NLRB*, 311 U.S. 72, 79; 61 S. Ct. 83, 88; 85 L. Ed. 50 (1940) (“[F]reedom of choice which is the essence of collective bargaining.”).

Nor is the Legislature’s inaction in the wake of *Krystad* compelling here. Legislative inaction is a poor guide to legal interpretation because there can be any number of reasons for the Legislature’s failure to act. Even where consideration of legislative inaction is appropriate it “does not indicate the legislature has also acquiesced to the extension of [a case] beyond its specific facts.” *State v. Larkin*, 70 Wn. App. 349, 360 n.13; 853 P.2d 451, 457 n.13 (1993). *Krystad* found that the concerted action doctrine applied to workers who were acting to organize themselves. It did not find that they were protected when acting together for some other purpose, such as violating the explicit rules of employment as the employees did in this case. If the Legislature did acquiesce in *Krystad*’s interpretation of the statute that agreement does not support the extension of the *Krystad* rationale to encompass activities *other* than organizing.

---

<sup>3</sup> Insofar as *Bravo* was inconsistent with this fundamental principle, it is both “incorrect and harmful,” *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 176; 149 P.3d 616, 622 (2006), and ought to be overruled.

**C. The Federal Concerted Action Doctrine Does Not Apply When Employees Protest Supervisory Personnel**

In holding that the “concerted action” doctrine of RCW 49.32.020 prohibited an employer from terminating non-union workers who staged a walkout, the *Bravo* Court relied on an analogy to federal case law construing federal collective bargaining statutes. *See Bravo*, 125 Wn.2d at 755, 888 P.2d at 153 (citing, *inter alia*, *Wash. Aluminum Co.*, 370 U.S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298). But *Wash. Aluminum* does not apply here.<sup>4</sup> Indeed, federal courts have found that the federal concerted action doctrine does not protect workers who act in concert to protest management’s decisions regarding the hiring, firing, or maintaining of supervisory personnel.

In *Abilities & Goodwill*, 612 F.2d 6, for example, 21 workers at a non-profit organization threatened to organize a “sick-out” if their fired supervisor was not reinstated. The court found that this was *not* “concerted activity” under federal labor laws, and therefore that the workers were *not* protected from termination. It found that *Wash. Aluminum* did not apply because the

---

<sup>4</sup> *Wash. Aluminum* was an extreme and unusual case in which the United States Supreme Court found the working conditions at issue to be “too bad to have to be tolerated in a humane and civilized society like ours.” *Wash. Aluminum*, 370 U.S. at 17, 82 S. Ct. at 1104. This case does not involve “working conditions” as such—and no workplace condition regulation was violated here—but instead involves the personality and performance of the supervisory personnel.

“peculiar issue of changes in supervisory personnel” is not covered by the federal concerted action doctrine. *Abilities & Goodwill*, 612 F.2d at 10. Such matters “have only recently been regarded as matters of legitimate employee concern and even then subject to the legitimate claim of employers to a minimum of interference in this area.” *Id.* If the employees’ protest were considered a protected in-concert activity, the result “would in effect bootstrap a dispute between management personnel into one about the terms and conditions of employment.” *Id.*; accord, *Yesterday’s Children, Inc. v. NLRB*, 115 F.3d 36, 45 (1st Cir. 1997) (“[T]he policy is not clearly implicated when non-supervisory employee concerted activity concerns supervisory staffing matters.”); *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 89 (2d Cir. 1990) (“Employee action seeking to influence the identity of management hierarchy is normally unprotected activity because it lies outside the sphere of legitimate employee interest.”).

It is “generally accepted that the hiring and firing of supervisory personnel is a managerial action unrelated to the terms and conditions of the work of non-supervisory employees,” *Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012, 1021 (7th Cir. 1998), and therefore that workers protesting such decisions are not protected from termination under federal law even when acting in concert.

As the Fourth Circuit explained recently, “employee protest in response to personnel decisions regarding management” is protected by the federal concerted action doctrine only in rare circumstances. *Smithfield Packing Co., Inc. v. NLRB*, Nos. 06-1541 & 06-1652, 2007 WL 4246892, at \*9 (4th Cir. Dec. 5, 2007). To rule otherwise—to hold, in this case, that the employees who sent a letter of resignation and then refused to report for work, may not be terminated—would “blur the line between employers and employees and potentially create a CEO-by-committee approach whereby employees could control the hiring and firing of their managers by walking out over every managerial change.” *Id.*

Even if this Court were to rely on an analogy to federal law as the *Bravo* Court did, the concerted activity at issue here is not protected. Until they have agreed to waive that right in a collective bargaining agreement, employers retain the right to terminate employees—or to accept their resignation—when they act in protest against management’s decisions regarding the hiring, firing, or continued employment of supervisory personnel.

**CONCLUSION**

The decision below should be *affirmed*.

DATED: January 10, 2008.

Respectfully submitted,

DEBORAH J. LA FETRA  
TIMOTHY SANDEFUR  
DIANA M. KIRCHHEIM

By   
\_\_\_\_\_  
DIANA M. KIRCHHEIM  
(WSBA No. 29791)

Attorneys for Amicus Curiae  
Pacific Legal Foundation

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2008 JAN 11 A 10: 21

**CERTIFICATE OF SERVICE**

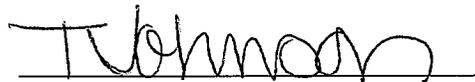
BY RONALD R. CARPENTER  
CLERK

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on January 10, 2008, true and correct copies of the foregoing document described as BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS were served on those listed below via Federal Express for delivery on January 11, 2008:

MARY R. GIANNINI  
Witherspoon, Kelley, Davenport & Toole, P.S.  
1100 U.S. Bank Building  
422 West Riverside Avenue  
Spokane, WA 99201  
Telephone: (509) 624-5265  
*Attorney for Petitioners*

LOUIS RUKAVINA  
421 West Riverside  
Suite 1015  
Spokane, WA 99201  
Telephone: (509) 459-3200  
*Attorney for Respondents*

  
TRISHA D. JOHNSON