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IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
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BY RONALD R. CARPENTER *by h*

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

Plaintiffs/Petitioners,

vs.

NOVA SERVICES, a Washington non-profit corporation, and LINDA  
BRENNAN,

Defendants/Respondents.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION  
FOUNDATION

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On Behalf of  
Washington State Trial Lawyers  
Association Foundation

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons, including an interest in protecting the substantive and procedural rights of such persons under the law.

## II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal arises out of tort claims by Ken Briggs and seven other former employees (collectively “Briggs” or “plaintiffs”) against employer Nova Services (“Nova”) and Linda Brennan (“Brennan”), its executive director.<sup>1</sup> For purposes of this amicus curiae brief, the relevant claims include unlawful retaliation for protected employee activities (or “concerted activities”) and wrongful discharge in violation of public policy (or “wrongful discharge”).<sup>2</sup> The superior court dismissed these and other claims on summary judgment, and determined Briggs’ motion to compel discovery, pending before the court at the time of the summary judgment proceeding, was moot. The Court of Appeals upheld the superior court on all grounds, and affirmed. See Briggs v. Nova Servs.

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<sup>1</sup> Ken Briggs is joined in this appeal by plaintiffs Judy Robertson, Mark Johnson, Beverly Nunn, Jami Smith, Shirley Bader, Margaret Clark, and Valerie Bruck.

<sup>2</sup> This amicus curiae brief does not discuss Briggs’ tort claims for negligent supervision. See Briggs Pet. for Rev. at 2-3, 18.

135 Wn.App. 955, 147 P.3d 616 (2006), *review granted*, 161 Wn.2d 1022 (2007).

The underlying facts are drawn from the published Court of Appeals opinion, and the briefing of the parties. See Briggs, 135 Wn.App. at 959-60, 964-67; Briggs Pet. for Rev. at 3-11; Nova Ans. to Pet. for Rev. at 1-2; Briggs Br. at 2-11; Nova Br. at 1-13; Briggs Reply Br. at 1-5. For purposes of this amicus curiae brief, the following facts are relevant:

In April 2004, a number of plaintiffs as employees of Nova wrote a letter to the Nova board of directors about certain work-related concerns involving executive director Brennan, her compensation, and the employees' perceived unduly burdensome workload. Briggs argued below that this letter was protected by law because it involved "concerted activities" regarding working conditions. See Briggs Br. at 24. Nova contended below that the letter related to the personality and management style of Brennan, and not protected activities involving working conditions, urging that sending the letter was insubordination. See Nova Br. at 24, 28; Briggs Br. at 25.

The April 2004 letter precipitated three additional events that also form the basis for the concerted activities and wrongful discharge claims. First, two plaintiffs (Ken Briggs and Judy Robertson), were fired for insubordination. See Briggs, 135 Wn.App. at 960. Second, plaintiff Shirley Bader ("Bader") gave her two week notice in response to the Briggs/Robertson firings. At that time Bader was asked to leave, with

pay, when she did not provide Brennan with sufficient assurances she would remain loyal to her during the two week period. Id. Bader considered this a firing. See Briggs Reply Br. at 4. Third, in July 2004, a number of plaintiffs, including Bader – after being warned by Nova to stop complaining and told not to consult their lawyer – sent another letter to the board of directors protesting the firing of Briggs and Robertson, and demanding Brennan’s removal, upon threat of a walkout. See Briggs at 960; Briggs Br. at 5. When the board of directors failed to respond to these demands, the remaining plaintiffs did not return to work the following week. See Briggs at 960. Nova deemed the “walkout” a mass resignation. See Nova Br. at 19. As with the April 2004 letter, plaintiffs urged that these subsequent events constituted protected concerted activities challenging working conditions, and unlawful employer interference. See Briggs Br. at 22-27. On the other hand, Nova cast these events as traceable to unprotected personal complaints against Brennan. See Nova Br. at 24, 28.

On Nova’s motion for summary judgment, the superior court determined that neither the April 2004 letter nor any of the subsequent events involved protected concerted activities, and that all plaintiffs but Briggs and Robertson had voluntarily resigned. The court dismissed both the concerted activities and wrongful discharge claims. See Briggs at 960; Nova Br. at 12.

At the time Nova's summary judgment motion was heard, Briggs timely moved to compel discovery of information and documents that Nova had not produced. See Briggs at 960; Briggs Br. at 7; Nova Br. at 9-10. Nova argued the information was irrelevant and privileged, See Briggs Br. at 10. The superior court, having granted summary judgment of dismissal on all claims, determined the motion to compel was moot. Briggs at 960.

The Court of Appeals affirmed. First, the court concluded the April 2004 letter involved only personal preferences and professional differences, and complaints about Brennan's management style and work ethic. It found these concerns did not constitute protected concerted activities involving working conditions under RCW 49.32.020. Briggs at 964-65. Second, regarding Bader's termination of employment, the court found it voluntary, and that Bader was not wrongfully discharged. Id. at 965. Third, while the court described the July 2004 letter as involving workplace conditions, it concluded the walkout by the remaining plaintiffs was not concerted activities because "the demands exceeded those recognized in prior cases and were not focused on any term or condition of employment." Id. at 965-66. Lastly, without citation, the court concluded that, in any event, those plaintiffs designated as managers in the April 2004 letter were not entitled to the protections of RCW 49.32.020. Id.

The Court of Appeals upheld summary judgment of dismissal for "improper retaliation for statutorily protected activity." Briggs at 966.

Although not identified as such, the above determinations also appear to dispose of Briggs' claims for wrongful discharge in violation of public policy. Id. at 964-66.

Regarding the motion to compel discovery, the court described the motion as relating to the claim for negligent supervision, indicating it was applying an abuse of discretion standard of review. See Briggs at 967. However, it did not address the mootness rationale, and determined the evidence sought was unrelated to the negligent supervision claim. Id.

Judge Sweeney dissented, concluding that those plaintiffs who sent the July 2004 letter to the board of directors and walked off the job were engaged in protected concerted activities under RCW 49.32.020, and were wrongfully terminated. Briggs at 967-68 (Sweeney, C.J., dissenting). Alternately, he found there was at least a genuine issue of material fact on whether these plaintiffs were wrongfully terminated. Id. The dissent also found an issue of fact existed on whether any of the plaintiffs were managerial employees, and thus excluded from the protections of RCW 49.32.020. Id. at 968-69. It does not appear the dissent expressly addressed the wrongful discharge claim, or the events surrounding the termination of Briggs, Robertson and Bader. Id. at 967-69.

Briggs' petition for review was granted in part, regarding "the issue whether material issues of fact precluded summary judgment on the wrongful termination claim." See ORDER (Oct. 30, 2007).<sup>3</sup>

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<sup>3</sup> For purposes of this amicus curiae brief, WSTLA Foundation assumes that this Court accepted review regarding summary judgment dismissal of both Briggs' implied cause of

### III. ISSUES PRESENTED

The following legal issues bear upon whether genuine issues of material fact exist as to either the concerted activities or wrongful discharge claims:

1. When the public policy at issue is based upon protection of employees' concerted activities under RCW 49.32.020, what differences exist between an implied cause of action for violation of the statute, and a claim for wrongful discharge in violation of public policy?
2. What constitutes "concerted activities" by employees under RCW 49.32.020, and what actions by employers constitute unlawful "interference, restraint, or coercion" under this statute?
3. Are constructive discharges covered under the tort of wrongful discharge in violation of public policy?

### IV. SUMMARY OF ARGUMENT

In Bravo v. Dolsen Companies, 125 Wn.2d 745, 888 P.2d 147 (1995), this Court recognized that impairment of employees' right to engage in concerted activities under RCW 49.32.020 may give rise to liability for two separate torts when termination results: 1) an implied cause of action for violation of RCW 49.32.020, and 2) wrongful discharge in violation of public policy. Both theories of recovery are presented in this case, and require separate analysis. While the parameters

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action under RCW 49.32.020 and claim for wrongful discharge in violation of public policy. See Briggs Pet. for Rev. at 1-2, 13-15, 17-18; Nova Ans. to Pet. for Rev. at 3-4; see also Washington Courts website, available at: [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues.display&fileID=2008Jan](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2008Jan). (Last visited: Jan. 11, 2008.)

This brief also assumes the Court will reach the merits on both theories, notwithstanding Nova's contentions that certain issues raised by Briggs were not preserved below. See e.g. Nova Br. at 26 (regarding failure to plead RCW 49.32.020); *id.* at 19 (regarding failure to plead constructive discharge); but see Briggs, 135 Wn.App. at 963 (finding concerted activities statute was raised in the superior court).

of the definition of concerted activities will impact the viability of each cause of action, a significant difference between the claims has been overlooked by the Court of Appeals.

The concerted activities cause of action is not limited to claims for actual wrongful discharge by an employer. RCW 49.32.020 prohibits *all* "interference, restraint, or coercion." This should allow recovery for all damages proximately caused by the employer's wrongful interference, restraint or coercion, including both actual and constructive discharge.

On the other hand, under current case law, in order to recover for the tort of wrongful discharge in violation of public policy, a violation of RCW 49.32.020 must result in an actual discharge. However, constructive discharge should also be sufficient under this claim, when the employer has created such an intolerable work environment as to force a reasonable employee to quit. Proof sufficient to create a question of fact regarding violation of the rights guaranteed employees under RCW 49.32.020 should establish a prima facie case of constructive discharge based upon intolerable work conditions.

Regarding the question of what constitutes concerted activities involving work conditions, employees' expressed concerns about management personnel, not based solely on personal animus or managerial discretion, involve protected concerted activities under the statute when they affect the working conditions of the employees. When employees

engage in such activities, unlawful employer interference includes coercive questioning of employees, threats of dismissal, or discharge.

Whether genuine issues of material fact exist as to either the concerted activities or wrongful discharge claims should be resolved with the above-stated legal principles in mind.

## V. ARGUMENT

### A. **The Analysis Of The Court Of Appeals Below Conflates The Concerted Activities And Wrongful Discharge Tort Claims, Failing To Recognize The Concerted Activities Claim Is Broader Than The Wrongful Discharge Claim, Which Is Confined To Actual Discharge Under Current Case Law.**

#### *Background*

Washington has a “long and proud history of being a pioneer in the protection of employee rights.” See Drinkwitz v. Alliant Systems, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). This state’s “concerted activities” statute, enacted in 1933, is an example. See Laws of 1933, Ch. 7 §2 (now codified in RCW 49.32.020). In RCW 49.32.020, the Legislature sets forth in compelling terms the public policy of the state of Washington regarding the plight of the “individual unorganized worker,” who it considers is “commonly helpless to exercise actual liberty of contract and to protect his [or her] freedom of labor.” The Legislature declares it is the policy of the state that these employees:

shall be free from *interference, restraint, or coercion* of employers of labor, or their agents, in the designation of such representatives or in self-organization *or in other concerted activities* for the purpose of collective bargaining or other *mutual aid or protections* . . . .

Id. (emphasis added)<sup>4</sup>

In Krystad v. Lau, 65 Wn.2d 827, 828, 845-46, 400 P.2d 72 (1965), this Court recognized a “unique action” under the common law for employees subjected to interference, restraint or coercion in violation of this statute. Krystad involved discharge of employees solely because they joined a union and designated it their collective bargaining agent. Id., 65 Wn.2d at 828. The Court found the statute conferred a substantive right to recover for those damages proximately caused by the employer’s wrongful termination. Id. at 845-46.

More recently, in Bravo v. Dolsen Companies, 125 Wn.2d 745, 888 P.2d 147 (1995), the Court addressed the rights of nonunion employees under RCW 49.32.020. In this instance, the employees attempted to negotiate with their employer “for better wages, improved medical coverage, better treatment from supervisors, and lunch and rest breaks.” Id. at 748. When the employer refused to negotiate, the employees went on strike. The employer then allegedly engaged in coercive and threatening conduct, ultimately terminating the striking employees. Id. The employees sued their employer under Krystad for violation of RCW 49.32.020, *and* for wrongful discharge in violation of public policy, based upon Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984). Bravo addressed separately each of these tort-based causes of action, ultimately upholding the employees’ right to proceed to trial on *both* theories. 125 Wn.2d at 756, 758. Under Bravo

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<sup>4</sup> The full text of RCW 49.32.020 is reproduced in the Appendix to this brief.

each of these tort actions is recognized as a freestanding basis for recovery.

### *Concerted Activities*

Bravo expressly extends the implied cause of action recognized in Krystad to nonunion employees. See 125 Wn.2d at 754-57. Further, the Court refuses to limit this cause of action to situations involving only the discharge of employees engaged in concerted activities, concluding that any such limitation is at odds with the text of the statute, which proscribes “interference, restraint or coercion” by employers. It holds that the Legislature:

intended to prohibit a wide range of actions that could operate to deprive workers of protections under the statute. Had the Legislature intended to prohibit only discriminatory discharge, it could easily have chosen to use that term.

Id. The Court specifically recognizes that interference, restraint or coercion may include threatening workers with dismissal and coercive questioning of workers. Id. at 756. Ultimately, although Krystad and Bravo only address damages proximately caused by wrongful termination, these cases contemplate that other forms of interference, restraint and coercion are compensable under this implied cause of action. See Krystad at 846; Bravo at 756-57; accord Pulcino v. Federal Express, 141 Wn.2d 629, 649-50, 9 P.3d 787 (2000) (reaffirming claim under RCW 49.32.020 not limited to wrongful discharge theory), *overruled on other grounds*, McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006).

The foregoing analysis supports the implied cause of action under RCW 49.32.020 for an employer's wrongful conduct up to and including actual or constructive discharge.<sup>5</sup> Under current case law, the same is not true for the tort of wrongful discharge in violation of public policy.

### *Wrongful Discharge*

The tort of wrongful discharge in violation of public policy, first recognized in Thompson, 102 Wn.2d at 231-33, requires four elements of proof: 1) existence of a clear public policy (clarity element); 2) discouraging the protected conduct would jeopardize the public policy (jeopardy element); 3) the public-policy-linked conduct resulted in dismissal (causation element); and, if the first three elements are met, 4) the employer does not have an overriding justification for the dismissal. See Gardner v. Loomis Armored, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). In this case, the jeopardy element is met by proof that the employer interfered with, restrained or coerced employees in violation of RCW 49.32.020. See Bravo, 125 Wn.2d at 757-58.

As the name suggests, this tort has not been extended to permit recovery against an employer for actions short of discharge of the

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<sup>5</sup> In identifying the elements of a claim under RCW 49.32.020, the Court of Appeals borrowed from the retaliation cause of action under Ch. 49.60 RCW, relying on Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 862, 991 P.2d 1182, *review denied*, 141 Wn.2d 1017 (2000). See Briggs, 135 Wn.App. at 966. While the standards are similar, the elements of a retaliation claim are not an exact fit. Federal cases involving the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*, provide a more precise template, with the following elements: 1) the employees engaged in protected activities, 2) the employer's conduct tends to interfere with, restrain, or coerce the activities of employees, and 3) the employer's conduct is not justified by a legitimate and substantial business reason. See Fun Striders, Inc. v. NLRB, 686 F.2d 659, 661-62 (9th Cir. 1981).

employee. See White v. State, 131 Wn.2d 1, 18-20, 929 P.2d 396 (1997) (refusing to recognize *wrongful transfer* in violation of public policy). Thus, unlike the implied cause of action under RCW 49.32.020, interference, restraint or coercion not resulting in discharge is not actionable under this claim. There is an open question whether a wrongful discharge claim is limited to actual discharge, or whether it includes constructive discharge. See Korslund v. Dyncorp Tri-Cities Servs., 156 Wn.2d 168, 178-81, 125 P.3d 119 (2005) (identifying but not reaching constructive discharge issue).<sup>6</sup>

#### ***Court of Appeals Misstep Below***

The Court of Appeals opinion (both majority and dissent) appears to conflate the analysis regarding these two separate and distinct tort claims. Briggs, 135 Wn.App. at 962-69. While both claims require interference, restraint or coercion with concerted activities, the concerted activities claim under RCW 49.32.020 picks up (but is not limited to) actual and constructive discharge.<sup>7</sup>

Although it may be contended that the conflation of the two claims for relief by the Court of Appeals is without consequence, because it found the absence of concerted activities determinative, its analysis

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<sup>6</sup> This issue is addressed in §C., *infra*.

<sup>7</sup> For that matter, a claim based on RCW 49.32.020 arguably may include damages resulting from an employee leaving employment because of a violation of the statute, even when constructive discharge cannot be established, if otherwise proximately resulting from the unlawful conduct. Cf. Martini v. Boeing Co., 137 Wn.2d 357, 363-72, 971 P.2d 45 (1999) (upholding recovery for front and back pay under Ch. 49.60 RCW disability discrimination claim, notwithstanding absence of proof of constructive discharge). Although Martini involved a different statutory scheme and its analysis relies

nonetheless creates unnecessary confusion in Washington case law that may carry over to other cases. If this Court determines that the Court of Appeals concerted activities analysis was flawed, and finds genuine issues of material fact, then the distinction between these two tort theories is important.

**B. The Dispositive Issue As To Each Tort Claim Involving RCW 49.32.020 Is Whether Genuine Issues Of Material Fact Exist Regarding “Concerted Activities,” Which Covers A Broad Range Of Conduct By Employees Bearing On Working Conditions.**

There is surprisingly little case law regarding the nature of the implied cause of action under RCW 49.32.020, recognized in Krystad, Bravo and Pulcino. Consequently, a host of questions remain unanswered, such as whether this Court would read into “concerted activities” a management exemption like the one expressly provided for under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 et seq. There are also questions that may have relevance at any trial of this case under either the concerted activities or wrongful discharge theory, should remand occur, such as the outer limits of protected concerted activities under the statute. For example, should illegality or unreasonableness limitations be imposed, like those recognized by courts interpreting the NLRA counterpart, 29 U.S.C. § 157?

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upon the specific language in a particular statute, a similar result may follow here, given the broad language of RCW 49.32.020. This issue is not raised in this appeal.

As intriguing as these issues may be, they are not ripe for determination here.<sup>8</sup> The superior court and Court of Appeals dismissed Briggs' claims on the most elemental of grounds – no genuine issue of material fact regarding whether plaintiffs' various efforts involved protected concerted activities and, if so, whether such efforts resulted in Nova engaging in unlawful conduct under the statute. If the courts below misconstrued the fact record in this case, then the matter should be remanded. Whether employees engage in concerted activities is a question of fact under the totality of the circumstances. Cf. Atlantic-Pacific Constr. Co., Inc. v. NLRB, 52 F.3d 260, 263 (9th Cir. 1995). Thus, the question here is whether this summary judgment record, considered in the light most favorable to the plaintiffs, reflects genuine issues of material fact regarding employee “concerted activities” and employer “interference, restraint, or coercion,” as this relates to each of plaintiffs' tort claims. The general parameters of each of these concepts must be addressed to resolve this question.

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<sup>8</sup> The Court of Appeals found, without discussion or citation, that those employees who were “managers” were exempt from the protections of RCW 49.32.020, “consistent with federal law.” Briggs, 135 Wn.App. at 966. It concluded that the designation as managers in the April 2004 letter was determinative. Id. Briefing on this issue is minimal. See Nova Br. at 27; Briggs Reply Br. at 10; Briggs Pet. for Rev. at 15-16; Nova Ans. to Pet. for Rev. at 5. Further, there is no indication that this issue was fully vetted in the summary judgment proceeding, or a focus of argument below. See Briggs Pet. for Rev. at 15-16; Briggs Reply Br. at 10. This issue should not be addressed on this record and the briefing to date. Otherwise, the Court should call for supplemental briefing under RAP 12.1.

Similarly, it is not necessary for this Court to determine what limitations may be imposed for protected concerted activities under RCW 49.32.020, such as unreasonableness, unlawfulness, violence, indefensible acts, or breaches of contract. See generally NLRB v. Washington Aluminum Co., 370 U.S. 9, 16-17 (1962) (identifying considerations for determining whether concerted activities are protected under the

Under Krystad, “participation in labor union activities” constitutes protected concerted activities. See 65 Wn.2d at 846. Bravo extends the definition of concerted activities to the “collective action of nonunionized employees.” See 125 Wn.2d at 748. The focus in Bravo was upon whether the employees “had undertaken action in concert - together - for the purpose of improving their working conditions.” Id. at 752. The activities involved included attempting to negotiate about wages, medical coverage, better treatment from supervisors, and lunch and rest breaks. Id. at 748. When these efforts proved unsuccessful, the employees went on strike for better working conditions. Id. All of these activities were ultimately found to be concerted activities under RCW 49.32.020, giving rise to claims under the two tort theories for all damages proximately resulting from the wrongful termination of the employees. Id. at 756-59. The act of the employer in discharging the employees was considered “interference, restraint, or coercion” under the statute. Id. at 756.

Based on the foregoing Washington case law, and analogous NLRA jurisprudence noted below, the notion of concerted activities covers a broad range of employee conduct.<sup>9</sup> The focus of the employee actions must be on betterment of working conditions. It is not determinative that the concerted activities center upon the acts or

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NLRA). This issue has not been briefed by the parties and is not ripe for review on this record. This issue *may* become relevant on any remand.

<sup>9</sup> In interpreting RCW 49.32.020, this Court has looked to federal case law regarding the National Labor Relations Act (NLRA), 29 U.S.C. §151 *et seq.*, and interpretation of a similar federal provision found at 29 U.S.C. §157. See Bravo, 125 Wn.2d at 754-55.

omissions of a manager, so long as the activities are not solely motivated by personal animus or constitute only quibbles with management style or discretion, not otherwise impacting working conditions. See e.g. Trompler, Inc. v. NLRB, 338 F.3d 747, 748, 752 (7th Cir. 2003) (finding walkout to be protected concerted activities when employees protested supervisor's failure to prevent sexual harassment, address co-worker's drug problem, and operate machines properly); Atlantic-Pacific, 52 F.3d at 262-64 (noting personal animus not a viable basis for concerted activities, but finding writing letter to express concerns as to manager's scheduling and performance expectations was protected activity); NLRB v. Oakes Machine Corp., 897 F.2d 84, 86 (2nd Cir. 1990) (holding that writing letter criticizing company president for lost profits, immaturity, ineptitude, and poor attitude was protected activity); Smithfield Packing Co. v. NLRB, \_\_\_ F.3d \_\_\_ 2007 WL 4246892 (4th Cir. 2007) (concluding employees' concerted activities involving manager unreasonable under the circumstances).

When protected concerted activities are involved, the employer cannot undermine such activities through interference, restraint or coercion. See Bravo at 756 (recognizing that when employees are involved in concerted activities, an employer cannot engage in coercive questioning, threaten to dismiss, or actually dismiss the employees); Trompler, 338 F.3d at 748, 752 (enforcing reinstatement of workers, with backpay, who were improperly fired for striking); NLRB v. Swedish

Hosp. Med. Ctr., 619 F.2d 33, 34-35 (9th Cir. 1980) (determining granting vacation time to non-striking employees was coercive); Perdue Farms, Inc., Cookin' Good Div. v. NLRB, 144 F.3d 830, 832-33 (D.C. Cir. 1998) (finding questioning employees, confiscating union materials, and timing raises to influence employee union activities to be coercive).

It remains to inquire whether plaintiffs' various efforts, and Nova's responses, fall within these parameters. The briefing on appeal suggests that they do. It reveals the following:

***Re: Concerted Activities***

- Generally, plaintiffs expressed concerns about their responsibilities, finances and budget for client care, potential wage violations and treatment by their supervisor. See Briggs Br. at 24.
- The April 2004 letter to the Nova board of directors by some of the plaintiffs expressed concerns about the adverse effect of executive director Brennan's management skills and style on working conditions, and the employees' unduly burdensome workload. See Briggs Pet. for Rev. at 14; Nova Br. at 2, 24.
- The July 2004 letter sent by some plaintiffs objected to the Briggs/Robertson firing, and demanded Nova respond to the employees' concerns. See Briggs Pet. for Rev. at 6.
- A number of plaintiffs walked out after the July 2004 letter, refusing to return to work until their concerns were addressed by Nova. See Briggs Br. at 30.

***Re: Interference, Restraint and Coercion***

- Briggs and Robertson were fired for "working in a disruptive manner to forge alliances with other staff members against me [Brennan]." See Briggs Br. at 29 (quoting Clerk's Papers).
- After the Briggs/Robertson firing, Nova told a number of plaintiffs and other employees to stop complaining and not consult with their lawyer. See Briggs Br. at 5.

▪ Nova told plaintiff Bader her services were not needed for the remaining two weeks of employment following her notice, if Bader was unwilling to pledge her loyalty to Brennan; Bader considered this a firing. See Briggs Br. at 30; Briggs Reply Br. at 4.

If the Court determines these recitations are borne out in the factual record below, then plaintiffs, as the nonmoving parties, were not given the full benefit of all inferences on summary judgment. If so, the case must be reversed and remanded.<sup>10</sup>

**C. The Tort Of Wrongful Discharge In Violation Of Public Policy Should Encompass Constructive Discharge, When The Employer Creates Intolerable Work Conditions Forcing The Employee To Quit.**

Washington cases upholding the tort of wrongful discharge in violation of public policy have only involved an actual discharge. See e.g. Thompson, 102 Wn.2d at 221. In Korslund, 156 Wn.2d at 172-73, plaintiffs sought recovery for wrongful discharge in violation of public policy based upon constructive discharge. This Court observed “we have not previously considered and rejected the constructive discharge theory advanced by the plaintiffs.” Korslund, 156 Wn.2d at 179. However, the

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<sup>10</sup> The superior court’s determination to moot the motion to compel in light of its summary judgment ruling is troubling, and may have some bearing upon the existence of genuine issues of material fact regarding one or both of these tort claims. The Court of Appeals avoided this question by apparently conducting what amounts to de novo review regarding the requested information and materials. See Briggs, 135 Wn.App. at 960, 967. The briefing by Briggs at the Court of Appeals suggests they considered the motion to compel to bear upon facts relevant to *all* theories of recovery before the court on summary judgment. See Briggs Br. at 17-18.

A superior court should rule on a timely motion to compel before determining a summary judgment motion, when the moving party shows the motion to compel arguably involves evidence related to the summary judgment proceeding. See Versuslaw v. Stoel Rives, L.L.P., 127 Wn.App. 309, 331 n.26, 111 P.3d 866 (2005) (suggesting that if party argues a timely motion to compel is relevant to pending summary judgment motion, then the motion to compel should be decided first), *review denied*, 156 Wn.2d 1008 (2006). This principle should be applied to the extent applicable on this record.

Court did not reach the issue because it resolved the case on other grounds. Id. at 181.<sup>11</sup>

This case presents an opportunity for the Court to resolve this issue with regard to those plaintiffs who walked out and contend, in effect, that they were constructively discharged as a result of their walkout following Nova's failure to respond to the July 2004 letter. See supra at 3.

Wrongful discharge in violation of public policy should include either actual or constructive discharge. The test for establishing constructive discharge requires proof the employer deliberately imposed such intolerable work conditions as to force a reasonable employee to quit. See Bulaich v. AT&T Information Systems, 113 Wn.2d 254, 261-62, 778 P.2d 1031 (1989); see also Martini v. Boeing Co., 137 Wn.2d 357, 366 n.3, 971 P.2d 45 (1999).

Extension of this tort to include constructive discharge does not run counter to the notion that this claim for relief should be construed narrowly. See Korslund at 180. The onerous proof requirements for constructive discharge render it the substantial equivalent of actual discharge. There is no principled basis for distinguishing the two

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<sup>11</sup> Another case is currently pending before the Court involving Korslund and the tort of wrongful discharge in violation of public policy. See Brundridge v. Fluor Federal Services, Inc., (S.C. #80735-3). The issue in Brundridge is whether an alternative means for enforcing the public policy in question will defeat a claim for wrongful discharge in violation of public policy. See Korslund, 156 Wn.2d at 177-83. (WSTLA Foundation filed an amicus curiae brief in Brundridge.) This issue is not presented here, where both means for enforcing the public policy involved are common law tort claims.

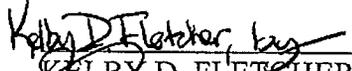
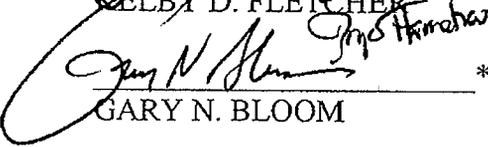
situations. Whether the employer openly terminates the employee, or insidiously achieves the same result, is a distinction without a difference.

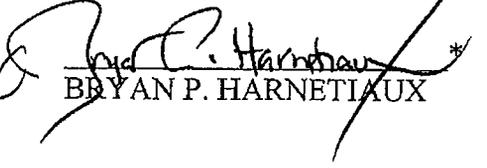
In the specific context of a wrongful discharge in violation of public policy grounded in RCW 49.32.020, a plaintiff who presents sufficient evidence of employer interference, restraint or coercion, which results in employees quitting, should be deemed to have established a prima facie case of constructive discharge. Under the compelling public policy of RCW 49.32.020 such interference, restraint or coercion should be deemed "intolerable" for constructive discharge purposes.

## VI. CONCLUSION

The Court should adopt the arguments advanced in this brief and resolve this appeal accordingly.

DATED this 14<sup>th</sup> day of January, 2008.

  
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\*Brief transmitted for filing by e-mail; signed original retained by counsel.

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# APPENDIX

**RCW 49.32.020**  
**Policy enunciated.**

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the state of Washington, as such jurisdiction and authority are herein defined and limited, the public policy of the state of Washington is hereby declared as follows:

WHEREAS, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the state of Washington are hereby enacted.

[1933 ex.s. c 7 § 2; RRS § 7612-2.]