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NUNN, JAMI SMITH, SHIRLEY BADER, PAM ZELLER,
MARGARET ("PEGGY") ZELLER, ODALYS P. CASTILLO, and
VALERIE BRUCK,
Plaintiffs/Appellants,

v.

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

FILED
SUPREME COURT
STATE OF WASHINGTON
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(CORRECTED) BRIEF OF AMICUS CURIAE
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

WELA has an interest¹ in these causes of action which preserve the declared public policy of the State of Washington, including the public policy at issue here.

II. STATEMENT OF FACTS²

Nova Services is a not-for-profit corporation. Briggs, Robertson, Johnson, Nunn, Smith, and Bader worked for Nova in jobs titled manager. Zeller, Clark, Castillo and Bruck worked for Nova in positions that were not titled as managerial or supervisory.³ Although Nova's policy prohibited them from communicating with its Board of Directors (Board), Briggs, Robertson, Johnson, Nunn, Smith, and Bader complained in a letter to the Board that Nova's Director Linda Brennan's actions had negatively affected them. They complained that Brennan refused their suggestion to add staff to reduce their work load, that sick leave was accorded arbitrarily, that she unfairly tracked working hours, and that she

¹ WELA's motion to file Amicus Brief sets out a complete description of its interest.

² This statement of facts is taken from the Court of Appeals decision, and the parties' briefs, except those facts taken independently from the record, in which case, the Clerk's Papers citation is given.

³ Because the record is apparently disputed, or not developed, concerning whether certain employees were truly supervisory or managerial, WELA will reference all the employees simply as "workers".

had misclassified some workers in order to not pay them overtime compensation. The letter expressed concern that Brennan's failure to plan for an anticipated loss of Nova's major funding source jeopardized Nova's existence and the workers' jobs, and complained that Brennan prevented communication with the Board, and that she utilized a staff member to surveil the workers. All this interfered with their job performance and caused them to be demoralized. The workers stated that they had not sought guidance from governmental agencies, and instead were seeking help from the Board. CP 73-77

Although several workers finally met with the Board to present their concerns, the Board ultimately supported Brennan, who fired Briggs and Robertson for what she termed "insubordination" in that they had "forged alliances with staff" against her. CP 67, 68 Bader then gave Brennan two weeks notice stating that she had promised to stay or go with the others. Brennan asked Bader if she would "refrain from collaborative efforts against her" during that time and, when Bader stated she would not, Brennan terminated her employment that day.

Bader and the remaining workers responded with another letter stating that workplace conditions were "worse than ever" after what they termed the "retaliatory" terminations, especially since Brennan had told

them it was time to “move forward.” The workers stated that unless Nova responded the next day with a plan of action for reinstatement of the terminated employees and removal of Brennan, they would “walk out” and would return to work only when those “requisites were met.” CP 79 The Board did not respond, the workers walked out, and Nova treated the walk-out as a group resignation.

III. ARGUMENT

I. RECORD EVIDENCE DISCLOSES MATERIAL ISSUES OF FACT CONCERNING CONCERTED ACTIVITY TAKEN FOR MUTUAL AID AND PROTECTIONS PRECLUDING SUMMARY JUDGMENT.

A. The Lower Courts Erred In Interpreting RCW 49.32.020, And Therefore Did Not Correctly Identify Which Issues Of Fact Were Material.

Although the Court of Appeals acknowledged that RCW 49.32.020 protects “concerted” activity by employees that are undertaken for the purpose of improving their terms and conditions of employment and for other “mutual aid and protections,” *Briggs v. Nova Services*, 135 Wn.App. at 963-43, as demonstrated below, the lower courts erred in applying those terms and therefore failed to correctly assess which factual issues were

material to both wrongful discharge claims, the implied claim under RCW 49.32.020 and the tort or wrongful discharge in violation of public policy.⁴

B. RCW 49.32.020 Provides A Cause Of Action To Remedy The Violation Of The Substantive Right To Engage In Concerted Activities For Mutual Aid And Protection That Extends To The Activities At Issue Here.

1. The substantive and actionable right to engage in concerted activities for mutual aid or protections.

Washington workers have “full freedom of association, self-organization,” and “substantive” and actionable rights to be “free from interference, restraint, or coercion of employers of labor, or their agents” in “the designation of ... representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections.” *Krystad v. Lau*, 65 Wash.2d 827, 845, 400 P.2d 72 (1965) (implied cause of action under RCW 49.32.020 to remedy unlawful interference with their right to join and designate a labor union as their collective bargaining agent).⁵ In *Bravo v. Dolsen Cos.*, 125 Wn.2d

⁴ A material fact is one on which the outcome of the cause of action depends. *Clements v. Travelers Indemnity Company*, 121 Wn.2d 243, 850 P.2d 1298 (1993). Hence, material facts are those that would entitle either party to judgment given the substantive law pertaining to the cause of action. *Sedwick v. Gwinn*, 73 Wn.App. 879, 873 P.2d 528 (1994).

⁵ In *Operating Eng's Local 286 v. Sand Point Country Club*, 83 Wash.2d 498, 502 519 P.2d 985 (1974), the Supreme Court reiterated that a private right of action existed under RCW 49.32.020, stating that “if employers were free to discharge employees for union

745, 756, 888 P.2d 147 (1995), this Court held that the freedom enunciated in RCW 49.32.020 from “interference, restraint, or coercion” by employers was to be interpreted liberally and extended to non-union employees who acted concertedly to withhold their labor, and prohibited a “wide range” of other adverse acts of retaliation, not just retaliatory discharge. *See also, Pulcino v. Federal Exp. Corp.*, 141 Wash.2d 629, 649-52, 9 P.3d 787 (2000) (same).

Two elements are necessary to come within the protection of RCW 49.32.020: (1) the activity must be concerted, and (2) must be for the purposes of designation of collective bargaining representatives, self-organization, or other mutual aid and protections. In *Bravo*, 125 Wn.2d 752, the Court held that “concerted” activities were those that were planned or taken together whether or not taken in a union context. Here, there is no factual dispute that the workers acted concertedly. Rather, the issue is whether those actions were for mutual aid and protection.

2. The purpose of RCW 49.32.020 is to provide protection for a broad range of concerted activities that relate to working conditions.

activities, the right to engage in such activities would be rendered meaningless." *See also, Culinary Workers v. Gateway Cafe*, 91 Wn.2d 353, 588 P.2d 1334 (1979) (invalidating employer's requirement that workers join employer selected union and stating that those workers had a private right of action under RCW 49.32.020)

Current Ch. 49.32 RCW, including RCW 49.32.020 was enacted as part of Washington Laws of 1933, Ex. Sess., chapter 7. It was patterned after the federal Norris-LaGuardia Act of 1932,⁶ which enunciated a similar federal public policy of providing legal protection for concerted activity taken by working people to improve their working conditions as a means of counterbalancing the protections the law gave to owners of capital, including government chartered corporations:⁷

The “**purpose and effect of the act, as a whole, was to give expression to, and make effective, the policy ...that labor disputes, as such, with the assembling, the picketing, the persuasion, the stopping of work, the enlisting of sympathy**”

⁶ 47 Stat. 70 (1932), now codified at 29 UCS § 101-115. Washington’s statute was one of many state enactments of “Little Norris-LaGuardia” Acts. See Eileen Silverstein, *Collective Action, Property Rights And Law Reform: The Story Of The Labor Injunction*, 11 Hofstra Lab. L. J. 97, (1993).

⁷ The prefatory language of RCW 49.32.020, concerning balancing legal recognition of property ownership entities with legal recognition of voluntary associations of workers, is also identical to that of the federal Norris-LaGuardia Act’s 29 USC §102. It provides, as does RCW 40.32.020, that “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 protection ...**” (The state statute uses “protections” rather than the federal statutes “protection.”) (emphasis added)

and support, and all the other acts expressly enumerated ... were expressly recognized to be, legitimate means for advancing the interests of the working man, and, therefore, of the people as a whole...[and T]hat policy ... can be made fully effective only when there is a recognition on the part of employer and employee alike that labor disputes as such are not at all reprobated but encouraged, and only violence in connection with them is forbidden.

Carter v. Herrin Motor Freight Lines, Inc., 131 F.2d 557, 560 (5th Cir.1942) (emphasis added).⁸

Significantly for this case, the Norris-La Guardia Act extended protection beyond union organizing and union activities, which had been protected under previous statutes, to the non-union setting and to all “concerted activities [whether] for the purpose of collective bargaining

⁸ While workers’ rights to act concertedly to obtain better terms and conditions of employment was understood to be legal under the common law, and had been protected by statute, see *Krystad* 65 Wash.2d 827, 836 (citing *Commonwealth v. Hunt*, 45 Mass. (4 Metcalf) 111, 38 Am. Dec. 346 (1842) and RCW 49.36), courts had with such increasing frequency issued broad injunctions against concerted activities of all kinds that it became a political issue. Frankfurter and Green, *The Labor Injunction* 1, 17-19, 23 (1930). Therefore, both the federal and state acts reiterated and expanded those rights and imposed procedural and substantive limits on courts’ power to issue injunctions in cases arising out of labor disputes. However, in *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 419, 63 P.2d 397 (1936), this Court held that the restrictions imposed by Washington’s Act on the courts’ process and power to issue injunctions were unconstitutional (RCW 49.32.072, .073, .074), and that the court would evaluate injunctive relief under the common law in light of the substantive rights enunciated in the statute. In “making [that] pronouncement, [it did] not declare generally, or even intimate, that workingmen have not the right to cease work, or to strike, or in a lawful way to call a strike and persuade others to join them. Such rights have, by all courts, been so often and so uniformly held to exist that citation of authority is almost unnecessary.” *Id.* 188 Wash. at 412. Thus, the *Blanchard* court upheld Section 2 of the Act, RCW 46.32.020, which declares public policy and creates substantive rights to association and protection for concerted activity. See *Krystad*, 65 Wn.2d at 845.

or other mutual aid or protections” RCW 49.32.020; 29 U.S.C. § 12 (emphasis added).⁹ State courts, including Washington’s, also understood their little Norris-LaGuardia acts to provide broad protection for concerted activities, regardless of the difficulties that posed for employers who faced a more even playing field when workers acted concertedly under the protections of the statutes, because the purpose was to protect workers’ rights to join together to negotiate and otherwise seek better working conditions.¹⁰ In *State ex rel. Lumber v. Superior Court*, 24 Wn.2d 314, 328, 164 P.2d 662 (1945), this Court held that injunctive relief was not appropriate based on claims of damage to the volume of business, reputation or goodwill because of picketing because “danger of injury to an industrial concern [does not] justify the sweeping proscription of freedom of discussion” carried on from the picket line. *See also, Yakima*

⁹ *See e.g., New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561, 559 (1938) (Norris-LaGuardia Act extends beyond controversies “between employers and employees; between labor unions seeking to represent employees and employers; and between persons seeking employment and employers” to protect picketing and boycotting of a store that refused to adopt “a policy of employing [African American] clerks in certain of its stores in the course of personnel changes”).

¹⁰ Similarly, the Oregon Supreme Court stated that, the “enactment of the Norris-La Guardia Act and laws patterned after it undoubtedly marks **the dawn of a new era . . .**” *George B. Wallace Co. v. International Ass’n of Mechanics, Mt. Hood Lodge, Local No. 1005, Auto Mechanics*, 155 Or. 652, 661-2, 63 P.2d 1090 (1936) (rejecting argument that picketing was inherently unlawful and refusing to enjoin picketing because some picketers were not employees of the picketed employer) (emphasis added)

v. *Gorham*, 200 Wash. 564, 566, 94 P.2d 180 (1939) (holding Yakima's anti-picketing ordinance was invalid as it conflicted with RCW 49.32.020).

In *Bravo*, 125 Wn.2d at 752, this Court enforced the substantive right to engage in "concerted activities" and again recognized that the legislature intended to protect not only union activity but all "action [taken] in concert-- together--for the purpose of improving ... working conditions...." See also, *Krystad, supra*. In the instant case, this Court similarly should give full effect to the term "for mutual aid and protection" in delineating the law on which materiality of the facts depends.

3. Activity related to wages, hours, or other terms and conditions of employment, and of concern to more than one employee, is activity for mutual aid or protection.

Section 7 of the National Labor Relations Act (NLRA) was patterned after Section 2 of the Norris-LaGuardia Act, as was RCW 49.32.020. In *Bravo*, this court looked to case law interpreting Section 7 of the NLRA to interpret the phrase "concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹¹ Here, this Court should look to the NLRA to interpret "mutual aid and protection."

¹¹ Section 7 of the NLRA, 29 U.S.C. § 157, originally enacted in 1935, provides in part that "Employees shall have the right to ... engage in other concerted activities for the

- a. **The term “mutual aid and protection” is interpreted broadly to include all activity that is of concern to more than one employee. The record here reflects evidence that the activity at issue was for mutual aid and protection.**

Activity that is reasonably related to wages, hours, or other terms and conditions of employment, and of concern to more than one employee, broadly construed, is activity for “mutual aid or protection.” *Intern., Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002). The issue is one of fact and must be determined from the totality of the circumstances. *Atlantic-Pacific Const. Co., Inc. v. N.L.R.B.*, 52 F.3d 260, 263 (9th Cir. 1995) Here, the record discloses that the issues raised by the workers related to working conditions of concern to them all. The workers:

- complained that Brennan accorded sick leave in an arbitrary manner CP 74¹²

purpose of collective bargaining or other mutual aid or protection.” This language is “derived from the Norris-LaGuardia Act. Paul E. Bateman, *Concerted Activity-The Intersection Between Political Activity And Section 7 Rights*, 23 Labor Lawyer 31, 43 (ABA, 2007). Bill Sponsor Senator Wagner testified that the relevant language “follows practically verbatim the familiar principles already embedded in our law” by section 2 of the federal Norris-LaGuardia Act *National Labor Relations Board: Hearings Before the Senate Comm. on Education and Labor on S. 1958*, 74th Cong., 1st Sess., 38 (1935), reprinted in, NLRB, *Legislative History of the National Labor Relations Act of 1935* (hereinafter “Leg. Hist. of NLRA”), at 1414 (1949); 79 Cong. Rec. 7569 (May 15, 1935), reprinted in, Leg. Hist. of NLRA, at 2332.

¹² See *Phillips Petroleum Co.*, 339 NLRB 916, 917 (2003) (employee engages in protected activity when he speaks with his co-workers about the employer’s sick leave policy and objects to employer’s denial of sick leave).

- complained about overtime and timekeeping issues. CP 74¹³
- asked for an additional position to lighten work load. CP 73-74¹⁴
- reported to the Board that they believed Brennan had mishandled financial matters necessary for non-profits, thus jeopardizing Nova's viability. CP 74¹⁵
- aired the concern that Brennan's failure to plan for an anticipated loss of Nova's major funding source jeopardized Nova's existence and the workers' jobs. CP 74¹⁶
- circulated and presented the first letter to the Board criticizing Brennan's actions that had affected their work conditions, although did not go so far as to ask for her discharge. CP 73-77¹⁷

¹³ See *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 539-40 (6th Cir. 2000), enforcing 327 NLRB 522 (1999) (dietician complained about errors in her own and other employees' paychecks, including failure to pay overtime pay, erroneous wage rates, about not getting raises).

¹⁴ See *NLRB v. Phoenix Mutual Life Insurance Co.* 167 F.2d 983 (7th Cir.), cert. denied, 335 U.S. 845 (1948) (two non union insurance salesmen it had discharged because of their participation in informal meetings, their discussions about the filling cashier position, and their activity in drafting a letter to management on behalf of salesmen).

¹⁵ See *Georgia Farm Bureau Mutual Insurance Co.*, 333 NLRB 850 (2001) (conduct of insurance agents who reported to the state insurance commissioner that their supervisor had knowingly mishandled claims and were then constructively discharged did bear on their working conditions because they feared that if they did not report the conduct, they could be terminated, suffer other losses in wages and terms and conditions of employment, and lose clients and, thus, their activity was for mutual aid and protection).

¹⁶ See *Georgia Farm Bureau*, *supra*, note 15; *Cubit Systems Corp.*, 194 NLRB 622(1971) (workers who reported staff's concern over the appointment of a new manager were engaged in protected activity because the selection of the new manager might adversely affect the working conditions and even the retention of jobs and therefore the workers had a legitimate concern in the appointment of a new manager).

¹⁷ See *Hoytuck Corp.*, 285 NLRB 904, 904 and n.3 (1987) (employees who circulated petition seeking the firing of a supervisor for cursing employees in front of customers were engaged in action for mutual aid and protection because the supervisor's "conduct had an impact on employee working conditions, distinguishing cases "in which employee

- sent the second letter asking for Brennan's discharge and reinstatement of Briggs and Robertson. CP 79¹⁸
- asked other workers to voice concerns to management to maintain jobs. CP 79¹⁹
- perhaps being understood to imply that they would resort to discussions with third parties. CP 76²⁰

Since the evidence is that their first letter to the Board concerned working conditions and that the workers' criticism of Brennan was focused on the effect she had on those working conditions, writing and sending the letter was for mutual aid and protection. See *NLRB v Guernsey-Muskingum Electric Co-operative, Inc.*, 285 F.2d 8, (6th Cir.

concerted activity is designed solely to effect or influence changes in the management hierarchy").

¹⁸ See *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 784 (6th Cir. 2002), enforcing 332 NLRB 943 (2000) (employee who circulated a petition among other employees calling for the removal of certain supervisors because they terminated needed employees and used company funds to thwart union organizing activity was acting for mutual aid and protection).

¹⁹ See *Robert F. Kennedy Medical Center*, 332 NLRB No. 153 (2000) (in response to the medical center's decision to out-source their department, three transcriptionists wrote a letter to staff doctors on hospital stationery asking them to voice their opinions in favor of preserving the department to the medical center's administration were held to be speaking out and appealing to others to prevent job loss for mutual aid and protection).

²⁰ See *Comptware Corp. v. NLRB*, 134 F.3d 1285, 1290 (6th Cir. 1998), (1998), cert. denied, 523 U.S. 1123 (1998) (employee of subcontractor to contractor hired to upgrade a state's computer systems, who was fired because he threatened to bring up concerns he had previously discussed with other employees about his employer's working conditions in meeting with representatives of the contractor and the state, was engaged in concerted activity for mutual aid and protection, and his discharge violated Section 8(a)(1)).

1960) (three employees who complained about a new foreman in an effort to remove him because he created hardships for them in their work were engaged in protected activity for mutual aid and protection).²¹

After Brennan discharged two of their number, the workers' letter to protest what they viewed as retaliation for their protected activity was also protected activity for mutual aid and protection, as was their walk-out, which was effectively a strike. Collective refusal to work accomplished by a "walk out" is a traditional protected activity. *See e.g., NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (six un-ionized workers who walked off job to protest cold work area even though they did not first present a demand for heat to the employer and even though the employer had started to attend to the problem). And specifically, walkouts to protest termination of workers are protected activity for mutual aid and protection. *See e.g., NLRB v Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941 (1st Cir. 1961) (strike action seeking reinstatement of workers is protected concerted activity).

²¹ Communicating with management for mutual aid and protection through letters and petitions is a time honored protected activity. *See e.g., Wood Parts, Inc.*, 101 NLRB 445 (1955) (employer interfered with employee's protected concerted activity by discharging him because he participated in the origination and circulation of a petition requesting that a particular crew leader be transferred to another shift, and that the crew leader of the latter shift be brought in to replace the crew leader in question); *NLRB v. Phoenix Mutual Life Insurance Co.* 167 F.2d 983 (7th Cir.), cert. denied, 335 U.S. 845 (1948).

Moreover, concerted activity, including walk-outs, related to workers' concerns about the identity of supervisors are protected where the identity of the supervisor has an impact on working conditions. *See e.g., Cubit Systems Corp.*, 194 NLRB 622(1971) (punch operators who reported staff's concern over the appointment of a new manager were engaged in protected activity because the selection of the new manager might adversely affect the working conditions and even the retention of jobs; therefore, the workers had a legitimate concern in the appointment of a new key punch manager); *F.C.F. Papers, Inc.*, 211 NLRB 657, 658 (1974) (strike to reinstate manager would be protected since manager had an identifiable direct impact on the employees' own job interests). Finally, strikers retain their employment status while engaging in a protected strike. *NLRB v. MacKay Radio*, 304 U.S. 333, 345 (1938).²²

Here, the letter protesting the firing of Briggs and Robertson and the demand that Nova remove Brennan must be considered in light of the concerns raised in the earlier letter about working conditions affected by

²² Even if one of the worker's purposes was simply effect managerial change unrelated to working conditions, the presence of mixed motives does not convert protected activities into unprotected ones. *Magna Visual v NLRB*, 516 F.2d 876 (8th Cir.) (employees engaging in concerted activities for mutual aid and protection, but also protesting possibility that unpopular co-employee would be selected to fill newly vacant supervisory position, are protected). *Accord: Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 304-04, 898 P.2d 284 (1995)

Brennan, and in light of the negative effect the firings had on those conditions. *Atlantic-Pacific Const. Co.* 52 F.3d at 263. Significantly, the workers stated they would return if conditions were met; thus, the walk-out was a strike, not a resignation, as the trial court held. RP 39:5-13²³

b. Evidence supports a question of fact that the manner in which the workers exercised their rights was within the ambit of protected conduct.

Unprotected concerted activities are those that are unlawful, violent, in breach of contract, or show such disloyalty to the employer that they are not defensible as necessary to concerted activity. *Washington Aluminum Co.*, 370 U.S. at 17. Here, the workers' activity was not unlawful, violent, or in breach of contract. Nor did it show such disloyalty that it loses protection. Nova's contention that "forging alliances" with other workers was such disloyalty that it justified termination of two employees does not square with the law. Nor does Nova's further demands of "loyalty" from the remaining employees or its expectation that they forego further association and activity. The workers were not obliged to forego association, or to not attempt to communicate their

²³ The trial court's misapplication of the law to the facts is reminiscent of the error of the trial court in *Bravo*, who stated that RCW 49.32.020 did not "create an actionable right under the circumstances presented To say it did I would have to say that the right to strike is an actual right ..." 125 Wn.2d 752, n.1.

dissatisfaction to the Board. Nova's rules prohibiting such conduct would not deprive those activities of their protected status. *See Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (employer rules unlawfully interfered with employee rights: (1) chain-of-command rule; (2) rule prohibiting solicitation and distribution of literature at all times while on duty or in uniform; and (3) rule prohibiting employees from fraternizing with other employees) Moreover, the workers presented evidence that they were not seriously disloyal by (1) repeatedly seeking to discuss the issues with the Board, (2) cooperating in the Board's investigation, (3) giving notice of their walk-out when those efforts failed, and (4) by bringing their concerns to the Board, despite risk to themselves, instead of simply going directly to governmental regulatory agencies. *Cf., Compuware Corp.* 134 F.3d at 1288.²⁴

Viewed with the correct understanding of "concerted activity ... for mutual aid and protection" there appears to be evidence in the record sufficient to create a genuine issue of fact precluding summary judgment on the claims arising under RCW 49.32.020.

²⁴ Although the lower courts may have viewed the actions taken as "unnecessary and unwise, ... it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." *Washington Aluminum Co.*, 370 U.S. at 14 & n. 12, citing *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344 (1938)

4. The Court of Appeals erred in holding that the workers who had managerial titles were not within the protections of RCW 49.32.020.

As additional grounds for its decision as to the alleged managers, the Court of Appeals held, as a matter of first impression, that managers are unprotected by RCW 49.32.020. 135 Wn. App. at 966. It apparently relied on the NLRA for this holding, without real analysis of why the NLRA should be persuasive on this issue.²⁵

Washington's Little Norris-La Guardia Act contains no analog to the NLRA's express exemption for supervisors.²⁶ Rather, the language of the Act, and RCW 49.32.020 in particular, protects the "individual unorganized worker" without exception. Hence, the Court of Appeal's importation from the NLRA of an exemption from protection for supervisors is not born out by the statute itself. "If the language of the statute is plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from

²⁵ Apparently the court was referring to the fact that supervisors are exempt from the protections that Section 7 of the NLRA extends to "employees" as there defined, because of the express exemption of supervisors from the definition of "employee." 29 U.S.C. § 152(11).

²⁶ Even if there were a similar exemption, there is a question of fact in every case as to whether the individual is merely a lead who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management.

the language of the statute." *Bravo*, 125 Wn.2d at 752. Nor is there any similarity in the structure of the two statutes that would support a judicially implied exemption.²⁷ Thus, even if this Court could exercise the legislative prerogative to imply an exception, it could not be justified by analogy to the exclusion of supervisors from protections under the NLRA.

C. Issues Of Material Fact Preclude Summary Judgment On The Claims That Plaintiffs Were Wrongfully Discharged in Violation Of Public Policy.

The tort of wrongful discharge in violation of public policy is available to workers who are discharged for exercising their rights under Washington's public policy declared in the Little Norris-LaGuardia Act.²⁸ The clear public policy declared in RCW 49.32.020 is the protection of the right of individual workers to act in concert to increase their ability to improve their working conditions. The material factual inquiry is not, as

²⁷ The NLRA was enacted after our statute for a different purpose and has a very different structure. The only similarity between the NLRA and RCW 49.32 is that explored above concerning what sort of conduct is protected. As explained in *Krystad* and *Sand Point*, Washington has no comprehensive collective bargaining statute and does not seek to regulate the negotiations between employers and employees.

²⁸ The Court of Appeals failed to address the implied cause of action under RCW 49.32.020 as a matter separate from the tort claims of wrongful discharge in violation of public policy. See e.g., *Pulcino v Federal Express Corp*, 141 Wn.2d 629, 9 P.3d 787 (2000) (implied cause of action is separate claim from the tort of wrongful discharge); *Bravo v Dolsen Cos.*, 125 Wn.2d 745, 756, 888 P.2d 147 (1995) (both implied cause of action and public policy tort are available when employers interfere with concerted activity).

the Court of Appeals stated, whether the content of the workers' dissatisfaction were "personal preferences" and "professional differences," which it stated are not protected by RCW 49.32.020. *Briggs v. Nova Services*, 135 Wn. App. at 964. In supporting this position, the Court of Appeals, as well as the trial court, relied on *Dicomes v. State*, 113 Wash.2d 612, 618, 782 P.2d 1002 (1989). *Dicomes* did not involve a public policy tort claim premised on concerted activity. Therefore, it necessarily did not hold that the content of employees' complaints or actions when made in a concerted manner must implicate some additional clear public policy in order to support a claim for wrongful termination in violation of public policy. This misapplication of *Dicomes* eviscerates the very purpose of the implied cause of action under RCW 49.32.020.

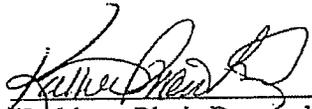
Although the opinions of workers concerning their working conditions will often simply be personal and professional preferences, RCW 49.32.020 protects the right of workers to gather those personal preferences and seek to obtain them through collective action. While one employee's preferences and difference of opinion are not a matter of public policy, the ability of the employees to engage in concerted action to advance those interests with their employer is. The trial court and Court of Appeals citation to *Dicomes*, demonstrates that the lower courts did not

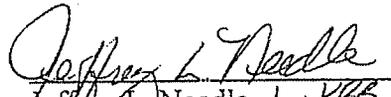
consider this public policy or correctly identify what factual issues were material in analyzing the factual record to determine whether the material facts were disputed. And, as demonstrated above, material factual issues exist precluding summary judgment.

IV. CONCLUSION

For these reasons, this Court should reverse and remand for trial.

Respectfully submitted this 16th day of January, 2008.


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THE SUPREME COURT OF THE STATE OF WASHINGTON

KEN BRIGGS, JUDY
ROBINSON, MARK JOHNSON,
BEVERLY NUNN, JAMI SMITH,
SHIRLEY BADER, PAM
ZELLER, MARGARET
("PEGGY") ZELLER, ODALYS P.
CASTILLO, and VALERIE
BRUCK,
Plaintiffs/Appellants

v.

NOVA SERVICES, a Washington
non-profit corporation, and LINDA
BRENNAN,
Defendants/Respondents,
Respondent.

No. 79615-7

WELA'S MOTION FOR
LEAVE TO SUBSTITUTE
A CORRECTED BRIEF

1. IDENTITY OF MOVING PARTY AND RELIEF SOUGHT

Pursuant to RAP 10.7, The Washington Employment Lawyers Association (WELA) brings this motion for leave to substitute a Corrected Amicus Curiae Brief in the above referenced case.

2. FACTS RELEVANT TO MOTION

On January 14, 2008, WELA filed with this Court a Motion for Leave to File an Amicus Brief in the above captioned case. WELA attached its Amicus Brief to its motion. The brief filed on January 14, 2008, had several typographical and editing errors. The Corrected Brief of Amicus Curiae, attached hereto, corrects these errors. No

substantive changes were made to any sentence or to the argument in the brief. WELA apologizes for any inconvenience this may cause the Court or the parties.

3. GROUNDS FOR RELIEF AND ARGUMENT

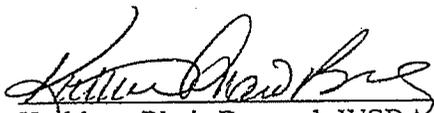
Under RAP 10.7, this Court may accept a corrected brief.

WELA respectfully asks the Court to accept this Corrected Brief, as a substitute for the brief attached to its previous Motion to file an Amicus Brief, because this version, while substantively identical to the brief originally filed, will better assist the Court in considering the issues raised therein.

4. CONCLUSION

WELA's Motion for Leave to Substitute its Corrected Brief should be granted.

DATED this 16th day of January, 2008.



Kathleen Phair Barnard, WSBA #17896
On Behalf of WELA

FILED AS ATTACHMENT
TO E-MAIL

PROOF OF SERVICE

I hereby certify that on this 16th day of January, 2008, I caused the foregoing Motion to Substitute Corrected brief and (Corrected) Amicus Brief of WELA, to be e-mailed for filing to the Washington State Supreme Court and a copy served by email, per agreement of the parties, to:

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SUPREME COURT
STATE OF WASHINGTON


/s/ Kathleen Phair Barnard
Kathleen Phair Barnard
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